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California's Wiretapping Laws Implicated by Chat-Bot Features of Websites

We have seen a recent uptick in litigation alleging violations of California's wiretapping laws because of an unpublished decision issued May 31, 2022, by the US Court of Appeals for the Ninth Circuit in *Javier v. Assurance IQ, LLC*. The *Javier* case interpreted the California Invasion of Privacy Act (CIPA) and ruled that the plaintiff had alleged a claim under Section 631(a) of the CIPA, reversing a district court holding that consent under Section 631(a) was valid even if given after the communication between a website and a website user had taken place.

Notably, and for purposes of CIPA and the wiretapping laws, California is a two-party consent state, meaning that to record a covered communication, all parties must consent prior to such recording. In this regard, the *Javier* court reasoned that the wiretapping laws under Section 631(a) apply to Internet communications and make liable anyone who "reads, or attempts to read, or to learn the contents" of a communication without the consent of all parties to the communication. Accordingly, the *Javier* case creates additional compliance obligations for financial institutions that collect information on their website from California users.

Financial institutions, especially those that implement chatbot functions or otherwise communicate and collect information from consumers via their website, must ensure that they are obtaining the requisite prior consent before recording such communications. Financial institutions must also ensure that their information collection practices comply with all other applicable laws and regulations, including privacy laws.

When Cryptocurrency Exchanges File Bankruptcy

As more and more cryptocurrency exchanges file for bankruptcy, an unsettled question of ownership has arisen. When an exchange files for bankruptcy, who owns the cryptocurrency? The exchange or the depositor? Despite possessing some similarities, exchanges are not banks, but are instead brokerage accounts. However, people who use exchanges to buy, hold, and trade cryptocurrency may not be aware that their cryptocurrency accounts on exchanges are not like traditional brokerage accounts (e.g., protected by the Securities Investor Protection Corporation and FDIC insured). Thus, customers may not be aware of the ramifications if the cryptocurrency exchange(s) they use collapses.

In the United States, at least, a debtor exchange holding cryptocurrency could potentially hold an interest in the currency that would make it an asset of the debtor's estate. Where that's the case, the automatic stay that springs into place upon the filing of the bankruptcy would prevent the depositors from withdrawing their cryptocurrency. Further, due to the nature of the asset and the exchange platform, if the currency is determined to be property of the bankruptcy estate, the depositors would likely be treated as unsecured creditors, which tend to fall last or almost last in the bankruptcy distribution scheme, frequently receiving only cents on the dollar for their claims, and only then after a lengthy (sometimes years long) wait. The key factor in whether or not the cryptocurrency is an asset of the depositor, being held by the exchange in a custodial capacity, or an asset of the exchange, is the terms of the relationship between the depositor and exchange. Where the exchange has extensive rights to use the cryptocurrency for its own benefit, a court is more likely to conclude that the relationship is not "custodial" and that the currency is property of the estate, with the depositor only having a contractual claim for the return of the funds, as opposed to a property right in the funds themselves.

Financial institutions are increasingly looking to cryptocurrency assets for security or to assess a borrower's overall financial wherewithal. In doing so, they should be aware of the impact that holding the currency with an exchange can have on the potential ability to realize on the value of the asset, and account for the impact accordingly. Financial institutions should also be aware that there is currently no consensus as to the character of cryptocurrency assets for purposes of lien attachment and perfection.

CFPB Interpretations Bring Nuance to Digital Marketing Practices and Compliance Risks

Recently, the CFPB issued an interpretive rule to clarify the limited applicability to digital marketing providers of the "time or space" exception under the Consumer Financial Protection Act of 2010 (CFPA). By way of background, the CFPA prohibits, among other things, unfair, deceptive, or abusive acts or practices and applies to "covered persons"—that is, "a person who offers or provides a financial product or service for use by consumers primarily for personal, family, or household purposes." The CFPA also extends to service providers that provide a "material service" but sets forth two exceptions, including the "time and space" exception. Under the "time and space" exception, a person is not a service provider "solely by virtue of such person offering or providing to a covered person time or space for an advertisement for a consumer financial product or service through print, newspaper, or electronic media."

The interpretative rule clarifies that when digital marketers commingle the provision of advertising with additional services such as targeting and delivery of advertisements to consumers, they do not qualify for the "time and space" exception. Hence, when a digital marketing provider identifies or selects prospective customers and/or selects or places content to affect consumer engagement, it is providing a material service, and thus falls outside of the exception.

Financial institutions that engage digital marketers to provide services that involve more than "time or space" for advertising (e.g., targeted advertising to individuals with certain characteristics) should be aware of the risks involved. The CFPB could potentially go after a financial institution because of the digital marketer's violation of the CFPA, even if the financial institution is not directly involved. That said, financial institutions should be sure to include legal compliance warranties and indemnification provisions in their contracts with such providers.

COVID-19 Update: Employment Issues Two Years Later

For more than two years, employers have navigated the ever-changing protocols for managing employees in response to the COVID-19 pandemic. Employers have taken their cues from various federal, state, and local agencies in determining when vaccinations can or cannot be mandatory, how to handle remote workers, and how often employees can be required to submit to onsite testing. Now that employers have begun recalling employees to work onsite, federal and state agencies are issuing updated guidance.

On July 12, 2022, the EEOC issued an update to its COVID-19 guidance in relation to the Americans with Disabilities Act ("ADA") and other anti-discrimination laws. This update largely focused on adding guidance for managing employees who are returning to the workplace. The ADA permits employers to make disability-related inquiries and to conduct medical exams to screen employees for COVID-19 when entering the workplace if such screening is "job-related and consistent with business necessity." Determining whether a practice is consistent with business necessity requires the employer to consider a number of factors including, but not limited to the level of community transmission; what types of contacts employees may have with others in the workplace; the vaccinations status of employees; the severity and transmissibility of the current variant(s); and the potential impact on operations if an employee enters the workplace with COVID-19.

One distinction the EEOC's newest guidance outlined was between the use of viral testing versus antibody testing. According to the EEOC, viral tests are considered a type of medical examination within the meaning of the ADA and are consistent with the business necessity of a workplace. Therefore, employers may administer viral tests as a mandatory screening measure when evaluating an employee's presence in the workplace. On the other hand, antibody testing is not permissible under the ADA. Antibody tests may not show whether an employee has a current infection, which means such testing provides no indication to the employer whether the employee poses an actual "direct threat" to the workplace. Therefore, antibody testing does not meet the ADA's business necessity standard.

Employers will need to stay up to date with CDC and local updates and adjust practices accordingly.

Employment Background Check Forms Strict Compliance Standards

Earlier this year, the California Court of Appeals reversed and remanded a trial court's grant of summary judgment by holding that was triable issues of fact related to whether the defendant, Barnes & Noble, had willfully violated the FCRA's standalone disclosure requirement by including extraneous language unrelated to consumer reports when conducting employment background checks.

Specifically, the Court of Appeals held that a reasonable jury could find that Barnes & Noble acted willfully because (i) at least one of its employees was aware of the extraneous information, (ii) it delegated its FCRA compliance responsibilities to an HR employee who, by their own admission, knew very little about the FCRA, (iii) it failed to adequately train its employees on FCRA compliance, (iv) it did not have a monitoring system in place to ensure compliance, and (v) it continuously used the noncompliant disclosure form for nearly two years.

In response, Barnes & Noble argued, in part, that the violation was not willful because it relied in good faith on the advice of counsel when adopting its disclosure form. However, the Court of Appeals noted that reliance on the advice of counsel "is not a complete defense, but only one factor for consideration" and must be considered with all of the evidence pertinent to the willfulness inquiry.

While this case is unpublished (i.e., non-binding), it emphasizes the need for financial institutions to review their background check disclosure forms for compliance and implement policies and procedures to maintain compliance given the increased class action risk in this area of the law.