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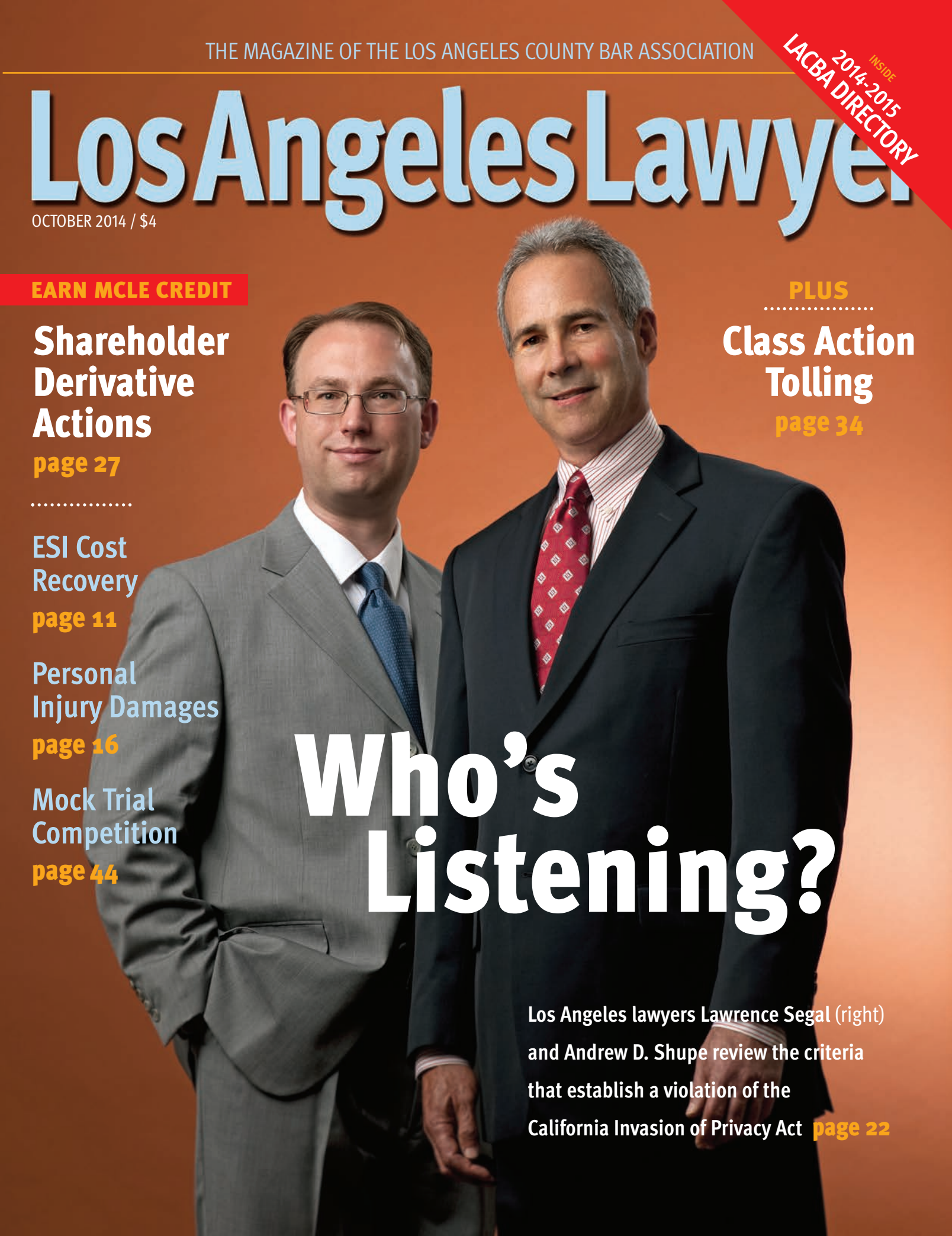

Who's Listening?

Los Angeles lawyers Lawrence Segal (right) and Andrew D. Shupe review the criteria that establish a violation of the California Invasion of Privacy Act page 22

by Lawrence Segal and Andrew D. Shupe

Who's LISTENING?

The broad protections of the California Invasion of Privacy Act against unauthorized recording of telephone communications are not without idiosyncrasies

VIRTUALLY EVERYONE has noticed that telephone conversations with customer service representatives often begin with a familiar warning that the call "may be monitored or recorded for quality assurance," or some similar statement. However, whether the monitoring or recording of telephone calls is illegal in the absence of such a warning and the nature and type of civil remedies that may be available, in addition to any criminal penalties that could be imposed, are subject to complex guidelines set out in the California statutes. Defendants who engage in the monitoring or recording of telephone conversations without all parties' consent may face significant exposure, but plaintiffs who ignore the idiosyncrasies of California's statutory scheme do so at their peril when preparing claims based upon the unannounced monitoring or recording of their telephone calls. Plaintiffs' claims may fail if they do not allege and prove that the monitored or recorded communications were confidential, a finding that may depend upon the content of the communications and the relationship and past interaction of the parties. California and federal district courts have variously interpreted this aspect of the law in recent years.

The California Invasion of Privacy Act (CIPA), enacted in 1967 and subsequently amended, bars various acts of eavesdropping upon, intercepting, or recording communications.[1] With regard to recording telephone conversations, CIPA replaced prior laws that permitted the recording of calls with the consent of one party to the conversation.[2] "The purpose of the act was to protect the right of privacy by, among other things, requiring that all parties consent to a recording [or monitoring] of their conversation."[3] For example, even if a company has assigned a supervisor only to listen while a customer service representative talks by telephone with a customer, the monitoring may violate CIPA; the two employees do not constitute a single corporate party because CIPA "protects the consumer's right to know *the audience* to whom he or she is speaking…."[4] The privacy rights affected are the same regardless of whether a conversation is secretly recorded by a machine or monitored by a human being.[5]

Section 637.2

In addition to criminal penalties for monitoring or recording communications without the consent of all parties to the conversation, CIPA explicitly provides for a private right

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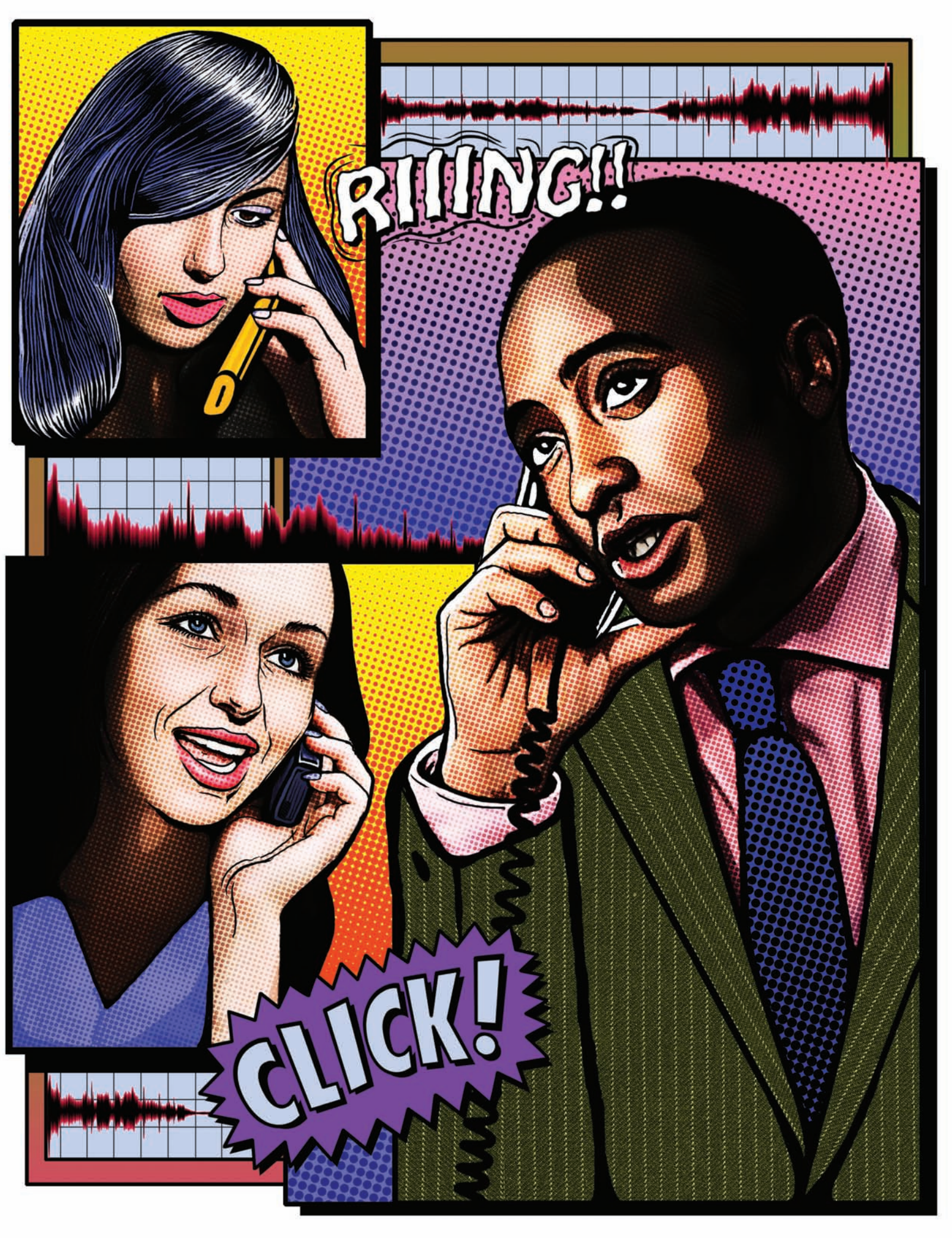
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of action in Penal Code Section 637.2, authorizing any person who has been injured by a violation of CIPA to bring a civil action to recover damages and to obtain injunctive relief.[6] The right to relief accrues at the moment of CIPA's violation and does not depend upon the monitored or recorded communication subsequently being disclosed to an additional party.[7] If a communication is protected by CIPA, its mere unconsented monitoring or recording violates CIPA.

While a plaintiff may attempt to prove actual damages—which may be tripled pursuant to Section 637.2(a)(2)—CIPA does not require a showing of actual harm. Section 637.2(a)(1) provides for alternative statutory damages (effectively a civil penalty) of $5,000 per violation. Each recorded telephone call constitutes a violation or incident triggering the award.[8]

At the pleading stage, a plaintiff may bring a claim for violation of CIPA and a claim for common law violation of privacy, seeking both statutory damages under CIPA as well as compensatory and punitive damages for the corresponding common law claim.[9] However, if the plaintiff prevails at trial, he or she must then elect whether to accept statutory damages pursuant to Section 637.2 or a punitive damages award, as both awards are considered punitive.[10]

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Confidential Communication

CIPA includes several statutes addressing the monitoring or recording of telephone communications. Section 632(a) forbids an individual from intentionally and "without the consent of all parties to a confidential communication," by means of any electronic amplifying or recording device, eavesdropping upon or recording a confidential communication, whether it "is carried on among the parties in the presence of one another or by means of a…telephone…." Section 632(c) defines "confidential communication" as including "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto" but excludes a communication made in any circumstance "in which the parties to the communication may reasonably expect that the communication may be overheard or recorded."

Section 632.7, added to CIPA in 1992, expands the protection of Section 632 to conversations communicated at least in part via cordless or cellular telephones, but with a subtle yet significant difference in language. While Section 632(a) refers to a "confidential communication," Section 632.7(a) refers only to a "communication," omitting the word "confidential." Therefore, Section 632.7 would seem to apply to all communications involving cellular or cordless telephones, while Section 632 would cover only confidential communications.

In *Flanagan v. Flanagan*, the California Supreme Court resolved a conflict among two lines of appellate decisions regarding the meaning of the term "confidential communication" in Section 632(a). Although the statute itself attempts to define the term in Section 632(c), two competing lines of interpretive authority had emerged. One line (established by *Frio v. Superior Court*[11]) held that "a conversation is confidential if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded."[12] The other, established by *O'Laskey v. Sortino*,[13] held that "a conversation is confidential only if the party has an objectively reasonable expectation that the content will not later be divulged to third parties."[14]

In *Flanagan*, the California Supreme Court adopted the *Frio* definition of "confidential communication" and read the phrase "confined to the parties" in the first clause of Section 632(c) to refer to "the actual conversation, not its content."[15] The court found support for its holding in its prior decision in *Ribas v. Clark*, which explains that "'a substantial distinction has been recognized between the secondhand repetition of the contents of a conversation and its simultaneous dissemination to an unannounced second auditor, whether that auditor be a person or a mechanical device.'"[16] The court also noted that when the legislature amended CIPA, adding Section 632.7 to cover communications made via cellular and cordless telephones, the legislature barred the recording of "any communication," not just the "confidential communications" referred to in Section 632, which confirmed that the legislature was concerned "with eavesdropping or recording of conversations, not later dissemination."[17]

The court then added that CIPA "protects against intentional, nonconsensual recording of telephone conversations regardless of the content of the conversation or the type of telephone involved."[18] This statement may have been overbroad, however. Whereas the language of Section 632.7, which concerns cellular and cordless telephones, protects all telephone communications, the language of Section 632—for landline telephones—still requires that the communications be confidential, meaning that the plaintiff had an objectively reasonable expectation that the conversation was not being overheard or recorded.

Several years later, in *Kearney v. Salomon Smith Barney, Inc.*, the California Supreme Court determined that CIPA's protections also extend to telephone conversations in which only one party is actually in California (meaning that California plaintiffs potentially can sue out-of-state defendants for the unannounced monitoring or recording of calls to or from California consumers).[19] *Kearney* also briefly touched on the issue of a party's reasonable expectations regarding the confidentiality of telephone conversations. In a footnote, the court cited *Flanagan* for the proposition that CIPA's "statutory scheme" protects against the unauthorized recording of conversations "'regardless of the content of the conversation….'"[20] In another footnote, the court wrote that "in light of the circumstance that California consumers are accustomed to being informed at the outset of a telephone call whenever a business entity intends to record the call, it appears equally plausible that, in the absence of such an advisement, a California consumer reasonably would anticipate that such a telephone call is not being recorded…."[21]

Taken together, these statements about the scope of CIPA and consumers' expectations were interpreted by some courts to mean that Section 632 applies to all landline telephone conversations regardless of content, leading to conflicting decisions and,

eventually, a decision by the Ninth Circuit—construing California law—as to whether, under Section 632, the reasonableness of a party's expectation depended in part on the content of the conversation.

Federal Interpretations

In recent years, as putative class actions brought pursuant to Section 632 have been removed from California courts to federal courts by defendants, the body of federal case law (published and unpublished) interpreting CIPA has steadily grown. Indeed, some federal decisions address scenarios not seen in published California decisions. For example, one federal district court granted a defendant's motion to dismiss a Section 632 class action complaint with prejudice because the plaintiff—the defendant's customer—had entered into an agreement with the defendant concerning the terms of service, including a contractual notice and consent provision informing the plaintiff that the defendant might monitor or record customers' telephone conversations with the defendant's representatives.[22] The court ruled that, in light of that provision, the plaintiff customer could not have had an objectively reasonable expectation that calls would not be recorded and that the plaintiff had consented to the recording, thus enabling the defendant company to "contract around" CIPA for purposes of monitoring or recording calls with its customers.

Similarly, the question of whether the content of a conversation is relevant in determining whether a plaintiff had an objectively reasonable expectation that his or her telephone call was not being recorded or monitored appears to have been debated more extensively in recent federal case law than in that of California. In May 2011, a judge in the U.S. District Court for the Northern District of California dismissed with prejudice the putative class action filed by a customer of a home security provider in *Faulkner v. ADT Security Services, Inc.*[23] The plaintiff, alleging a claim under Section 632, had alleged that he called the defendant to dispute a charge on his bill and that when he asked about beeping audible on the telephone line, he was told that his conversation was being recorded. The court ruled that the plaintiff had failed to allege that his telephone call to the defendant was a "confidential communication" under Section 632 because the plaintiff had not alleged that the call concerned "personal financial affairs" or "private family matters" or any other circumstance that would support an objectively reasonable expectation that his telephone call would not be recorded or monitored.

Over the next 18 months, a split developed among federal district courts in California as to whether the *Faulkner* trial court was correct to dismiss the plaintiff's CIPA claim. At least three courts followed the order in *Faulkner* and granted defense motions—either for summary judgment or dismissal—in class actions or putative class actions in which the plaintiffs failed to plead or show that the telephone conversations at issue involved any personal family information, private financial information, or other information sufficiently sensitive to justify an objectively reasonable expectation that the calls would not be recorded or monitored.[24] Although these courts did not refer to this finding as a "content-based" standard, this would seem to be a fair description of their emphasis on the lack of sensitive content in the plaintiffs' telephone conversations.

Meanwhile, other federal district courts in California rejected the idea of a content-based standard. At least twice in 2012, courts acknowledged the holding of the *Faulkner* trial court but rejected motions to dismiss putative class actions, based on two statements from *Kearney* and *Flanagan*: 1) *Kearny*'s footnote 10, which reasoned that California consumers may be so accustomed to hearing warnings regarding recording and monitoring that they now reasonably assume that the absence of such a warning means the absence of recording and monitoring; and 2) *Flanagan*'s rather broad statement that CIPA protects against nonconsensual recording "regardless of the content of the conversation…."[25]

This more liberal line of cases may have seemed promising to plaintiffs, but it came to an abrupt halt when the Ninth Circuit issued its decision affirming the *Faulkner* trial court's content-based standard.[26] The Ninth Circuit emphasized that *Kearney* and *Flanagan* had already determined that a "confidential communication" under Section 632 requires that a party have "an objectively reasonable expectation that the conversation is not being overheard or recorded."[27] The circuit court noted that California courts interpreting Section 632 in the context of business-related telephone calls had looked to the circumstances surrounding the call, such as the nature of the defendant's business and the character of the communications, including content such as market data, business strategy, and sensitive or personal information.[28]

The Ninth Circuit agreed with the district court that the plaintiff had only alleged that his telephone call was confidential because it was "carried on in circumstances that may reasonably indicate that any party to the communication desires it to be confined thereto," which was characterized as "no more than a 'threadbare recital' of the language of Section 632," clearly insufficient under the heightened federal pleading standard.[29] However, because the complaint had been filed in a California state court prior to its removal to federal court, the Ninth Circuit remanded the case to allow the plaintiff a chance to amend his pleading to satisfy the federal standard in "an abundance—perhaps an overabundance—of caution…."[30]

At least one federal district court has cited *Faulkner* when dismissing a Section 632 action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to allege facts showing an objectively reasonable expectation that a telephone conversation would be confidential.[31] *Faulkner* has also been cited by a federal district court denying a motion for class certification, which found that commonality could not be shown because determining whether each class member had an expectation of confidentiality in telephone

conversations with a weight-loss company would require a detailed factual inquiry into the circumstances of each call.[32]

However, two other plaintiffs managed to keep their Section 632 claims—and class allegations—alive under *Faulkner*. A trial court denied a motion to dismiss filed by the Cosmopolitan Hotel of Las Vegas, noting that the plaintiff had alleged "that he shared his credit card number, expiration date, billing address, and security code" in telephone calls recorded by the hotel.[33] The district court added that such information "[c]ertainly… qualifies as potential private information."[34] In another matter, a motion to dismiss failed because the plaintiff alleged that his telephone conversation with defendant concerned a "mutual client's account balance, past due amount, last payment, and settlement offer, as well as personal and private financial information" that was "protected by the attorney-client privilege."[35]

Factor Tests in California Appellate Decisions

In the 2011 decision *Kight v. CashCall*, the California Court of Appeal reversed a summary adjudication order for the defendant, concluding that the defendant had not met its burden of showing that, as a matter of law, the plaintiffs did not have an objectively reasonable expectation of privacy in their telephone calls with the defendant—a requirement for the calls to be "confidential communications" within the meaning of Section 632. In so holding, the court cautioned that it did not intend to opine as to whether plaintiffs would ultimately prevail on the issue at trial, and it offered the following comment: "The issue whether there exists a reasonable expectation that no one is secretly listening to a phone conversation is generally a question of fact that may depend on numerous specific factors, such as whether the call was initiated by the consumer or whether a corporate employee telephoned a customer, the length of the customer-business relationship, the customer's prior experiences with business communications, and the nature and timing of any recorded disclosures."[36]

A recent California Court of Appeal decision, *Hataishi v. First American Home Buyers Protection Corporation*, cited *CashCall*'s list of factors when it affirmed the denial of a plaintiff's motion for class certification for lack of the requisite community of interest.[37] In that action, the named plaintiff was a customer of the defendant for several years, participating in numerous telephone calls with the defendant. During in-bound calls to the defendant, the plaintiff was advised that the call might be monitored or recorded. During calls placed by the defendant, the plaintiff was not so advised, but the calls were recorded anyway.[38] The plaintiff brought a single cause of action for violation of Section 632.

The *Hataishi* plaintiff attempted to distinguish *CashCall*'s list of factors by arguing that *CashCall* was applicable only to cases involving eavesdropping rather than recording calls.[39] The court of appeal dismissed this idea as unsupported by the language of the statute and the case law, and it saw "no reason why the factors listed in *CashCall* would not apply equally where a business records telephone conversations with its customers."[40]

The court of appeal agreed with the trial court that common questions of fact did not predominate because whether a customer's call constituted a confidential communication—whether a customer had an objectively reasonable belief that a conversation with a business would not be recorded or monitored absent warning—would require individualized proof of, among other things, the length of the customer-business relationship and the plaintiff's prior experiences with business communications.[41]

For reasons left unexplained in the opinion, the plaintiff never moved for leave to amend to add a cause of action under Section 632.7, which applies to calls involving cordless and cellular telephones without requiring that the calls be confidential. However, the court of appeal noted that, even if the plaintiff had amended her complaint to add a claim under Section 632.7 to get around the confidential communication requirement, an individualized factual inquiry still would have been required to determine what type of telephone was used by a class member to receive the call—landline, cordless, or cellular.[42]

In light of the factors identified by the Ninth Circuit in *Faulkner* and the California Court of Appeal in *CashCall* and *Hataishi*, questions to be kept in mind when preparing or responding to a claim under Sections 632 and/or 632.7 may include: 1) Has the plaintiff alleged the type of telephone he or she used during the calls? 2) Did the plaintiff convey personal financial information, information that could lead to identity theft, information regarding private family or health matters, privileged information, or sensitive business data, plans, or strategy? 3) Was the call between the plaintiff and an organization with which the plaintiff already had a relationship, or was this a cold call? 4) How long did the call last? and 5) If there is a contract between the plaintiff and the defendant, does it contain a provision in which the plaintiff consented to having calls monitored or recorded? As has been shown repeatedly in published and unpublished decisions in recent years, ignoring these details and alleging only the monitoring or recording of a telephone call, without more, may leave a CIPA claim vulnerable to dismissal. ■

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[1] Penal Code §§630-638.
[2] Flanagan v. Flanagan, 27 Cal. 4th 766, 768 (2002).
[3] *Id.* at 769.
[4] Kight v. CashCall, Inc., 200 Cal. App. 4th 1377, 1392 (2011) (emphasis in original).
[5] *Id.* at 1393. In so holding, the Kight court rejected a contrary rule from the unpublished Ninth Circuit decision Thomasson v. GC Servs. Ltd. P'ship, 321 Fed. Appx. 557 (9th Cir. 2008).
[6] Kearney v. Salomon Smith Barney, Inc., 39 Cal. 4th 95, 115-16 (2006).
[7] Ribas v. Clark, 38 Cal. 3d 355, 365 (1985); Friddle v. Epstein, 16 Cal. App. 4th 1649, 1660 (1993).
[8] Lieberman v. KCOP Television, Inc., 110 Cal. App. 4th 156, 167 (2003).
[9] Clauson v. Superior Court, 67 Cal. App. 4th 1253, 1256 (1998).
[10] *Id.*, citing Turnbull & Turnbull v. ARA Transp., Inc., 219 Cal. App. 3d 811, 826-27 (1990).
[11] Frio v. Superior Court, 203 Cal. App. 3d 1480 (1988).
[12] Flanagan v. Flanagan, 27 Cal. 4th 766, 768 (2002).
[13] O'Laskey v. Sortino, 224 Cal. App. 3d 241 (1990).
[14] Flanagan, 27 Cal. 4th at 768.
[15] *Id.* at 774.
[16] *Id.* at 775 (citing Ribas v. Clark, 38 Cal. 3d 355, 360-61 (1985)).
[17] *Id.* at 776 (citing *inter alia* Penal Code §632.7).
[18] *Id.*
[19] Kearney v. Salomon Smith Barney, Inc., 39 Cal. 4th 95 (2006).
[20] *Id.* at 117 n.7 (citing Flanagan, 27 Cal. 4th at 776).
[21] *Id.* at 118 n.10.
[22] White v. FIA Card Servs., N.A., 2013 WL 756292 (S.D. Cal. Feb. 26, 2013).
[23] Faulkner v. ADT Sec. Servs., Inc., 2011 WL 1812744 (N.D. Cal. May 12, 2011).
[24] Sajfr v. BBG Comm'ns, Inc., 2012 WL 398991 (S.D. Cal. Jan. 10, 2012); Weiner v. ARS Nat'l Servs., Inc., 887 F. Supp. 2d 1029 (S.D. Cal. 2012); Shin v. Digi-Key Corp., 2012 WL 5503847 (C.D. Cal. Sept. 17, 2012).
[25] Brown v. Defender Sec. Co., 2012 WL 5308964 (C.D. Cal. Oct. 22, 2012); Roberts v. Wyndham Int'l, Inc., 2012 WL 6001459 (N.D. Cal., Nov. 30, 2012).
[26] Faulkner v. ADT Sec. Servs., Inc., 706 F. 3d 1017 (9th Cir. 2013).
[27] *Id.* at 1019.
[28] *Id.* at 1020.
[29] *Id.; see also* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937 (2009).
[30] Faulkner, 706 F. 3d at 1021.
[31] Hoffman v. Cenlar Agency, Inc., 2013 WL 1285126 (S.D. Cal. Mar. 27, 2013).
[32] Torres v. Nutrisystem, Inc., 289 F.R.D. 587, 592 (C.D. Cal. Apr. 8, 2013).
[33] Mirkarimi v. Nevada Prop. 1 LLC, 2013 WL 3761530, at *3 (S.D. Cal. July 15, 2013).
[34] *Id.*
[35] Bernstein v. United Collection Bureau, Inc., 2013 WL 5945056, at *4 (S.D. Cal. Nov. 5, 2013).
[36] Kight v. CashCall, Inc., 200 Cal. App. 4th 1377, 1396 (2011).
[37] Hataishi v. First Amer. Home Buyers Protection Corp., 223 Cal. App. 4th 1454, 1466 (2014).
[38] *Id.* at 1458.
[39] *Id.* at 1467.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 1469.