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# Pixel Tracking: Privacy, Litigation & Professional Liability Exposure

August 20, 2025



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# Questions

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# Meet Your Presenter

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# Agenda

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1. Introduction To Tracking Technologies
2. Recent Developments In Tracking Litigation
3. Settlement Types and Trends
4. Pending Legislation
5. Regulatory Enforcement
6. Risk Management Best Practices

# Sources of Website Privacy Litigation

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- **“Meta Pixel” Tracking Claims**
  - Including similar visitor metrics and advertising tools
    - Google Analytics
    - LinkedIn, Twitter/X, SnapChat, TikTok
  
- **“Chat Assistant” claims**
  - Consent and Third-Party Access Are Key Issues
  
- **“Session Replay” Tools**
  - Early Victories > Fell Out Of Favor (Standing) > Comeback? (9<sup>th</sup> Cir - Mikulsky)
  
- ❖ **Inaccurate or Unfollowed Privacy Policies**
- ❖ **Misconfigured Consent Management Tools**

# Meta Pixel Functionality (Exemplar)

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- Free software tool made available by Meta (f/k/a Facebook)
- Shares certain website visitor activity with Meta
  - Standard Configuration = URLs, Button Clicks, Form Submissions
    - Core Data Restrictions For Healthcare Entities, etc.
- Typically Used for Retargeting Visitors / Measuring Ad Efficacy
  - Custom Events / CAPI
    - Click IDs tied to Responders to Ads
  - Custom Audiences
    - e.g. Send Ads to Audience Comprised of Website Visitors in the Last 3 Months
  - Advanced Matching
    - Hashed Contact Information for Increased Accuracy

# Common Website Tracking Claims Asserted

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- California Invasion of Privacy Act (“CIPA”) § 631(a)
  - Other state wiretap statutes (**FL**, LA, MD, MO, NH, **OH**, **PA**, WA)
- Electronic Communication Privacy Act – Federal Wiretap Act
- CIPA § 638.51 – Trap and Trace/Pen Register Prohibition
- State Laws Protecting Health Info, e.g., CMIA (proxy for HIPAA violation)
- Video Privacy Protection Act (VPPA)
- State Consumer Protection Acts
- Contract Theories
- Tort Theories
  - Invasion of Privacy
  - Negligence / Negligence *per se* – violation of HIPAA, etc.



# CIPA 631(a) – Most Litigated Tracking Claim

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Any person who,

**\*1\* by means of any machine, instrument, or contrivance, or in any other manner, intentionally taps ... [INAPPLICABLE TO WEBSITES], or who**

**\*2\* willfully and without the consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit ... or is being sent from, or received at any place within [CA]; or**

**\*3\* who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained, or**

**\*4\* who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or things mentioned above**

# 631(a) Clause Two – “Contents of Communication”

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- “Contents of Communication” is becoming any detailed URL
  - Lineberry v AddShopper, 2025 WL 551864, at \*3 [ND Cal Feb. 19, 2025]
    - Finding URLs revealing browsing activity that includes “the specific products viewed ... should be considered the ‘contents’ of communications” because such activity is “akin to calling the store and asking for information about that product”
  - Doe v. Google, 2025 WL 1616720, at \*3 [ND Cal June 6, 2025]
    - Finding URL entitled <https://www.eehealth.org/services/behavioral-health/programs/eating-disorders/> and a button-click labeled “bill pay” were each the contents of communications.
  - Mikulsky v Bloomingdale's, LLC, 24-3564, 2025 WL 1718225, at \*1 [9th Cir June 20, 2025]
    - Reversing dismissal of CIPA 631(a) claim based on session replay technology capture of “the contents of Mikulsky's communications on Defendants’ website without her consent, not merely the real-time capture of information regarding the characteristics of the communications.”
    - District Court below had found that information regarding “a visitor's navigation of the website such as mouse movements, clicks, keystrokes, **[and] URLs of web pages visited**” were not the contents of communications.

# 631(a) Clause Two – “In Transit” Requirement

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## ➤ Favorable Case Law At Summary Judgment Stage

- *Gutierrez v. Converse Inc.*, 2024 WL 3511648, at \*7 (C.D. Cal., July 12, 2024) (summary judgment granted for defendant noting it is “virtually impossible” to learn the contents of an internet communication while in transit because internet communications are transmitted “in different network packets.”)
- *Torres v. Prudential Fin., Inc.*, 2025 WL 1135088, at \*6 (N.D. Cal., Apr. 17, 2025) (granting summary judgment for defendant despite the plaintiff’s argument that “a strict interpretation of the while-in-transit requirement would mean that CIPA could never apply in the context of the internet, where communications are near instantaneous and cannot be meaningfully read or understood until later”).

## ➤ Potentially Threatened? [Doe v. Eating Recovery Center, NDCA]

- Unprecedented tentative ruling by NDCA’s Judge Chhabria finds “Meta’s mere act of redirecting the communication to itself” is an “attempt ... to learn the contents ... of any ... communication while the same is in transit ... or is being sent from, or received at any place within this state.”
- Plaintiff argued Ninth Circuit credited allegations regarding mere “real-time capture of the contents of [the plaintiff’s] communications” to be sufficient to state 631(a) claim despite absence of allegations regarding real-time reading, learning or attempt to learn.
- Formal Ruling Pending

# CIPA Party Exception

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- A party to a communication is exempt from liability under CIPA
  - Can a third party who receives a communication be considered a party?
- Courts frame applicability of party exception on whether the third party operates as a “tape recorder” or an “unannounced second auditor [eavesdropper]”
- Emerging majority view looks to whether third party has the *capability* of using the communications for its own purposes.
  - Minority view looks to whether third party actually uses the communications for its own purposes.

# CIPA - Other Concerning Trends

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## ➤ CMIA Decisions Becoming More Problematic For Defendants

- “Medical Information”

- “individually identifiable information ... in possession of or derived from a provider of health care ... regarding a patient’s medical history, mental or physical condition, or treatment.” Cal. Civ. Code § 56.05(j).

- Topsy Turvy Trap and Trace Decisions

- Telephonic Applicability Only, Not Internet?
- Testers and Standing
- Are Section 631(a) and 638.51 claims mutually exclusive?

- New Entrants Making Small Demands

- Filing Volume and Settlement Amounts Likely To Increase

# Other Tracking Litigation Concerns And Hopes

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- Standing arguments have been weakening
- *Briskin v. Shopify* (9<sup>th</sup> Cir. April 21, 2025)
  - Torches Previously Successful Personal Jurisdiction Argument
- *Frasco v. Flo Health* (NDCA, May 19, 2025)
  - Found at class certification stage that data immediately anonymized upon receipt (prior to storage) does not cure a CIPA violation.
  - Meta lost first CIPA jury verdict earlier this month, expected to appeal
- Recent Defendant-Friendly ECPA Decisions
  - e.g., *Goulart v. Cape Cod Healthcare*, 2025 WL 1745732 (D. Mass. June 24, 2025)
  - ECPA's crime tort exception requires (1) an independent underlying crime or tort, and (2) a criminal or tortious intent.

# Tracking Litigation Settlement Amounts

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- Ascertainable Settlement Class?
- Wiretapping / ID Theft Statutes (\$1,000 - \$10,000 pp potential liability)
  - Common Fund Settlements = less than one percent potential liability to date
    - Atypical / Expected to Climb
  - Claims Made Settlements
    - Low Class Member Payouts (often +CyEx Protection)
    - Healthy Attorney Fee Awards
      - *e.g., Beauford v. Johns Hopkins Hospital*
        - 772,818 class members
          - No Aggregate Cap on Claims Payouts
        - e.g. 2% claims rate = \$250,000 in claims payouts (~ \$1 million with claims admin)
        - Attys Fees Awarded = \$5,000,000

# Non Class Action Claims

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- High Volume, Low Effort
- Seeking Individual Settlements
  - Nuisance Value / Less Than Defense Costs
- Differing Niches / Tactics
  - Arbitrations Based On Terms of Use > Claimants Added If Not Settled Quickly
    - Mass arbitration demands trending upward
  - Demand Letters (\$) > Individual Lawsuits (\$\$) > Class Allegations Threatened
  - Class Actions Lawsuit Filed Up Front, Larger Individual Settlement Sought
  - Class Action Demands Based On Misconfigured Consent
  - **Recent trend = “Shine the Light” Claims By Former CIPA Claimants**



## CIPA Reform? (SB690 - 2025)

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- Eliminates CIPA Liability For Commercial Purposes
  - Bipartisan Sponsorship
  - Unanimously Passed Senate
    - ✓ Eliminated Retroactivity
  - Increased Headwinds In Assembly From Lobbyists
    - ✓ Amended to Two Year Bill By Bill Sponsors

# FTC Investigations and Enforcement

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## February 1, 2023

GoodRx - \$1.5 million [egregious allegations]

## March 2, 2023

BetterHelp - \$7.8 Million Fine

- “Revealed consumers’ email addresses, IP addresses, and health questionnaire information to Facebook, Snapchat, Criteo, and Pinterest for advertising purposes”

## July 20, 2023

Joint letter with HHS OCR to 130 hospital systems

- AHA v. Becerra (2024) invalidated OCR guidance

## September 18, 2023

Warning Sent Tax Preparers (e.g. H&R Block, Intuit)

- “FTC considers it an unfair or deceptive practice to use tracking technologies such as pixels, cookies, APIs, or SDKs to amass, analyze, infer, or transfer personal information without first obtaining consumers’ express consent”

## April 11, 2024

Monument – \$2.5 Million fine (suspended)

- Custom events with descriptive titles
- e.g. “Sign Up” “Paid: Weekly Therapy” or “Paid: Med Management”
  - Conversions API
  - Advanced Matching
  - Custom Audiences, e.g., “Paid sign up past 180 days”

## September 19, 2024

Investigation Results and Recommendations

Based on data requests to Amazon (Twitch); Meta; YouTube; Twitter; Snapchat; TikTok; Discord; Reddit; WhatsApp

- “Congress should pass comprehensive federal privacy legislation to limit surveillance, address baseline protections, and grant consumers data rights”

# CCPA Investigations and Enforcement

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## May 06, 2025

Todd Snyder, Inc. – \$345,178 fine by California Privacy Protection Agency (CPPA)

- Misconfigured consent management tool prevented effectual opt outs
- “Businesses should scrutinize their privacy management solutions to ensure they work as intended because the buck stops with the businesses that use them”

## July 1, 2025

Healthline – \$1.55 Million Fine by CA AG (largest CCPA Fine to date)

- Again, Ineffectual Opt-Out Mechanism

## August 6, 2025

Tractor Supply Company – CPPA’s first action to enforce investigative subpoena

- Seeking data on use of tracking technologies on its website, relationships with third parties who receive consumer information and processing of consumer requests

# Best Practices for Risk Management

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- Website Scans / Analysis
- Opt-In Consent
  - Required in UK (ICO)
  - Arguably Required by CCPA
- ❖ Properly Configured
- ❖ Accurate Privacy Policy
  - Consider Arbitration Language
- Contractual Limitations On Third Party Access / Use
- Use of Transmission Intermediaries
  - Scrubs IP addresses, URLs, Cookies Values, Assigned IDs

# Remember This

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- More Summary Judgment / Appellate Decisions Will Dictate Market
  - CIPA, CIMA Settlement Amounts Likely To Increase, Absent CIPA Reform
  - ECPA May Become Inhospitable to Plaintiffs
  - Litigation In Other States May Increase, Especially If CIPA Reform Passes
  
- Opt-In Consent Is Current Best Way To Avoid Liability
  - Ensure Accurate Description Of Practices
  - Ensure Proper Configuration Of Consent Tool

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