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Chapter 317: Is Big Brother Along for the Ride?

Jody M. Hausman

Code Section Affected

Civil Code § 1936 (amended).

AB 2840 (Corbett); 2004 Stat. ch. 317.

[The] notion of privacy is not drawn from the blue. It emanates from the totality of the constitutional scheme under which we live.¹

I. INTRODUCTION

Did you know that when you rent a car, the rental company may track your speed, direction, and location by way of electronic surveillance technology (EST)? Shockingly, such clandestine practices do in fact occur, and are much more prevalent than one would imagine. “Estimates suggest that about a quarter of rental cars in the U.S. are equipped with tracking technology.”² Moreover, this practice is on the rise. “AirIQ Inc., a Toronto company that derives most of its business from equipping U.S. rental cars with tracking systems, reported revenue was up 30% in the third quarter of 2003 from the previous year.”³

Not only do many rental companies covertly trace your whereabouts, but they may use the information the EST gathers to impose exorbitant fines for activities such as speeding or driving out of state.⁴ In one unsettling instance, a Payless Car Rental in San Francisco “used GPS technology to track a renter’s travel route and determine that he had traveled outside of the permissible rental area.”⁵ The company gave the consumer a “\$3,405 bill for violating the contract which prohibited [him] from leaving California: \$1/mile for every mile driven out-of-state.”⁶ The language in the contract regarding geographical restrictions and the potential use of the EST was hidden “in fine print in an addendum to the contract and [was] never mentioned by the rental agent.”⁷ Other rental companies track renters’ speeds and tack on hefty fines when renters exceed the speed limit.

1. Poe v. Ullman, 367 U.S. 497, 521 (1961).

2. *Big Brother Rent-A-Car, Companies That Track You Should Tell You When They’re Doing It*, SAN JOSE MERCURY NEWS, Apr. 19, 2004, at 6B, available at <http://www.mercurynews.com/mld/mercurynews/archives> [hereinafter *Big Brother*] (on file with *McGeorge Law Review*).

3. Jane Engle, *When You Rent a Car, Does the Company Secretly Track You? Some Vehicles Are ‘Bugged’ Without the Driver’s Knowledge. A California Bill Would Require Notification*, L.A. TIMES, Apr. 4, 2004, at L3, available at <http://www.latimes.com/archives/04583035.html> (on file with *McGeorge Law Review*).

4. *Id.*; see also ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 2840, at 3 (Apr. 20, 2004) (detailing incidents of rental car companies using electronic surveillance to impose fines).

5. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2840, at 3 (June 22, 2004).

6. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 2840, at 3 (Apr. 20, 2004).

7. *Id.*

One rental company in Connecticut “imposed a \$150 fine on customers every time they drove [faster] than 79 mph for two or more minutes.”⁸ Such forays into consumers’ privacy appear fairly commonplace within the car rental industry.

Big name companies Avis and Budget Rent-a-Car have stated that they do not use EST unless one of their rental cars has been reported stolen.⁹ However, independent franchisees¹⁰ “who run about a quarter of Avis’ outlets and nearly half of Budget’s, can use the tracking devices ‘in any lawful manner.’”¹¹ Due to less-than-stringent regulation, “in any lawful manner” has remained a loose and ambiguous phrase, inviting the iniquitous conduct of the rental companies.

AirIQ, a company that installs EST systems in U.S. rental cars, touts the wallet-lining potential of these tracking systems.¹² Their online brochure advertises that “[w]henver a vehicle crosses geographical boundaries, an alert is sent.”¹³ AirIQ avers that with their automated alert system, clients can access route information, “enforce restricted areas,” and “monitor driving behavior,” using such information to collect additional revenue.¹⁴ Some of these car rental companies are willing to trample consumers’ privacy rights in order to turn a profit. The Legislature enacted Chapter 317 in order to protect consumers and curtail these Big Brother surveillance tactics.

II. LEGAL BACKGROUND

A. Privacy Under California Common Law

Under California law, the right of privacy is defined as “*the right to be left alone* It protects our homes, our families, our thoughts and emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose.”¹⁵ California common law protects against invasion of privacy, conferring a right of action on all of its citizens.¹⁶ There are “four distinct kinds of activities violating the privacy protection and giving rise to tort liability: (1) intrusion into private matters [and/or “intrusion upon the

8. *Id.*

9. Engle, *supra* note 3.

10. Independent franchisees are rental outlets not within the exclusive control of the parent companies.
Id.

11. *Id.*

12. *Big Brother*, *supra* note 2.

13. AIRIQ, RENTAL VEHICLES, SOLUTION OVERVIEW at <http://www.airiq.com/airiqnewweb2/content.cfm?chapterID=3&pageID=59&SegmentID=91> (last visited Sept. 4, 2004) (on file with the *McGeorge Law Review*).

14. AIRIQ, RENTAL VEHICLES, VALUE PROPOSITIONS at <http://www.airiq.com/airiqnewweb2/content.cfm?chapterID=3&pageID=59&SegmentID=90> (last visited Sept. 4, 2004) (on file with the *McGeorge Law Review*).

15. *Hill v. Nat’l Collegiate Athletic Ass’n*, 7 Cal. 4th 1, 24, 865 P.2d 633, 646-47 (1994) (quoting the Privacy Initiative Ballot Argument that labels privacy as an inalienable human right).

16. *Timperley v. Chase Collection Serv.*, 272 Cal. App. 2d 697, 699, 77 Cal. Rptr. 782, 783 (1969).

plaintiff's seclusion or solitude"¹⁷]; (2) public disclosure of private facts; (3) publicity placing a person in a false light; and (4) misappropriation of a person's name or likeness."¹⁸ The surveillance activities of rental car companies would almost certainly fall within the first category.

In order to prevail on an invasion of privacy action, the plaintiff must first show that she has a legally protected privacy interest.¹⁹

Legally recognized privacy interests are generally of two classes. The first is the interest in precluding the dissemination or misuse of sensitive and confidential information otherwise known as informational privacy. . . . The second type of privacy is the interest in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference. This interest is known as autonomy privacy.²⁰

Second, the plaintiff must establish that he or she had a reasonable expectation of privacy under the circumstances.²¹ Third, the plaintiff must show that the defendant's actions were "sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right."²²

B. Privacy Under the California Constitution

A plaintiff who does not fall within the purview of any of the four invasion of privacy categories above may still have a cause of action under the privacy provision of the California Constitution. The California Constitution counts the right to pursue and obtain privacy among its inalienable personal rights.²³ The "principal mischiefs" that the constitution's privacy provision seeks to eradicate are: "government snooping;" the casting of a wide net to collect and retain unnecessary, private information by the government and business interests; inappropriate use of information lawfully obtained for a specific purpose; and the loss of control over the accuracy of the record of information gathered.²⁴ Even with regard to causes of action under the California Constitution, a plaintiff must still establish that he or she (1) had a legally protected privacy interest, (2) had a reasonable expectation of privacy, and (3) that the defendant's conduct was a

17. 6A CAL. JUR. 3D *Assault and Other Wilful Torts* § 120 (2003).

18. *Hill*, 7 Cal. 4th at 24, 865 P.2d at 647.

19. *Id.* at 35, 865 P.2d at 654.

20. 6A CAL. JUR. 3D *Assault and Other Wilful Torts* § 123 (2004).

21. *Hill*, 7 Cal. 4th at 36, 865 P.2d at 655.

22. *Id.* at 37, 865 P.2d at 655.

23. CAL. CONST. art. I, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness, and *privacy*."). (emphasis added).

24. *White v. Davis*, 13 Cal. 3d 757, 774-775, 533 P.2d 222, 234 (1975).

serious invasion of privacy.²⁵ Whether a legally recognized privacy interest is present is a question of law for the court.²⁶

C. Existing Regulation of Electronic Recording Devices

Existing law does regulate the use and sharing of some electronically obtained information, specifically, information collected by recording devices installed by vehicle manufacturers called “event data recorders” (EDR) or “sensing and diagnostic modules” (SDM).²⁷ A vehicle’s owner manual must disclose the existence of EDRs or SDMs.²⁸ No one other than the owner of the vehicle may download or retrieve the recorded data, except under limited circumstances.²⁹ Such circumstances include the use of data retrieved following an accident pursuant to a court order, for the purpose of improving vehicle safety, or for diagnostic or maintenance purposes.³⁰ However, the use of EST to track rental car drivers is neither discussed nor prohibited under this code.

California law, however, is not completely silent as to rental car company policies and procedures. Civil Code section 1936 does regulate general practices of rental companies, touching on issues such as liability insurance requirements, damage waivers, and facility and overage charges.³¹ But before the enactment of Chapter 317, section 1936 was conspicuously silent in regard to rental companies’ use of EST. Perhaps this is because the Legislature was not keeping pace with rapidly advancing technology, or maybe it did not realize the potential for abuse of this technology. For whatever reason, California law had neither specific remedies nor regulations relating to the use of EST by rental car companies.

III. CHAPTER 317

Chapter 317³² restricts the use EST for the purpose of keeping tabs on rental car customers.³³ Chapter 317 defines “electronic surveillance technology” as “a

25. *Hill*, 7 Cal. 4th at 35-37, 865 P.2d at 654-55.

26. *Id.* at 40, 865 P.2d at 657.

27. CAL. VEH. CODE § 9951 (West 2000 & Supp. 2004).

28. *Id.* § 9951(a).

29. *Id.* § 9951(c).

30. *Id.* § 9951(c)(1)-(4).

31. *See generally* CAL. CIV. CODE § 1936 (West Supp. 2004) (noting that this section did not address the subject of electronic surveillance in rental vehicles).

32. In 2002, the Legislature amended section 1936 of the California Civil Code. CAL. CIV. CODE § 1936 (amended by AB 2457 (Frommer)); 2002 Stat. ch. 948. Those provisions will sunset on January 1, 2006. Section 1 of Chapter 317 amends the version of section 1936 that will be in effect until January 1, 2006. 2004 Stat. ch. 317, § 1. Section 2 of Chapter 317 amends the version of section 1936 that will come back into effect after the 2002 legislation sunsets (unless a later enacted statute deletes or extends the sunset date). 2004 Stat. ch. 317, § 2.

33. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2840, at 1 (June 29, 2004).

technological method or system used to observe, monitor, or collect information, including telematics, Global Positioning Systems (GPS), wireless technology, or location-based technologies.”³⁴ This definition “does not include event data recorders (EDR) [or] sensing and diagnostic modules (SDM).”³⁵

Specifically, Chapter 317 provides that “a rental [car] company may not use, access, or obtain any information relating to the renter’s use of the rental vehicle that was obtained using electronic surveillance technology,” except in limited circumstances.³⁶

A. Exceptions

There are six exceptions to Chapter 317’s ban on the use of EST. The first exception applies when the rental company uses electronic surveillance in order to locate a stolen, abandoned, or missing rental vehicle after (1) the rental company is informed (by the renter or law enforcement) that the vehicle has been stolen, abandoned, or missing; (2) the rental vehicle has not been returned to the company within one week of the contracted return date; or (3) the rental company ascertains that the rental vehicle has been stolen or abandoned, and has filed a stolen vehicle report with law enforcement.³⁷

The second exception is when a rental car company uses EST at the direction of law enforcement pursuant to a subpoena or search warrant.³⁸

The third exception allows for rental companies to equip their vehicles with GPS-like technology in order to provide navigational assistance at the customer’s request.³⁹ However, the rental company may not “use, access, or obtain any information relating to the renter’s use of the rental vehicle” from the use of that technology, unless, and only unless, it uses that information to “discover or repair” a technological defect.⁴⁰

Under the fourth exception, rental companies may use EST, at the renter’s request, to remotely lock or unlock a vehicle.⁴¹ Again, the rental company may not “use, access, or obtain any information . . . except as necessary to lock or unlock the vehicle.”⁴²

Under the fifth exception, rental companies may equip their vehicles with EST in order to provide their customers with other types of roadside assistance “such as towing, flat tire, or fuel services, at the request of the renter.”⁴³ This

34. CAL. CIV. CODE § 1936(a)(6) (amended by Chapter 317).

35. *Id.*

36. *Id.* § 1936(o).

37. *Id.* § 1936(o)(1)(A)(i)-(iii).

38. *Id.* § 1936(o)(2).

39. *Id.* § 1936(o)(3).

40. *Id.*

41. *Id.* § 1936(o)(4).

42. *Id.*

43. *Id.* § 1936(o)(5).

exception is subject to the same proscriptions on the use or access of any information obtained via EST.⁴⁴

The final exception allows rental companies to utilize information from EST “for the sole purpose of determining the date and time the vehicle is returned . . . the total mileage driven and the vehicle fuel level of the returned vehicle.”⁴⁵ However, companies may only access this information *after* the renter has returned the vehicle to the company.⁴⁶

B. Actual Prohibitions

Under Chapter 317, rental companies are prohibited from using EST “to track a renter in order to impose fines or surcharges relating to the renter’s use of the rental vehicle.”⁴⁷ Such unconscionable practices are common, as evidenced by the Payless Car Rental scandal mentioned above.⁴⁸

Chapter 317 requires that the rental car company keep records of any data obtained during the activation of EST pursuant to any of the exceptions listed above.⁴⁹ “The record shall be maintained for a period of at least 12 months from the time the record is created and shall be made available upon the renter’s request.”⁵⁰

Chapter 317 also states that victims of such practices may bring an action for damages and equitable relief against the rental car company.⁵¹ Further, “[a]ny waiver of any of the provisions of [Chapter 317] shall be void and unenforceable as contrary to public policy.”⁵²

IV. ANALYSIS OF CHAPTER 317

Chapter 317 responds to the alarming press accounts of rental companies using electronic surveillance in order to secretly track customers and garner extra income.⁵³ The author of Chapter 317 concludes that “[c]onsumers should know when a rental car company can track their every move and locate them and their vehicle at any time.”⁵⁴ Supporters stress that the actions of the rental companies

44. *Id.*

45. *Id.* § 1936(o)(6).

46. *Id.*

47. *Id.* § 1936(p).

48. *Big Brother*, *supra* note 2; Engle, *supra* note 3; *Rental Car Tracking May Get a Stop Sign, Bill Aims to End Using Surveillance Equipment to Help Impose Extra Fees*, THE DAILY REV. (Hayward, Cal.), June 29, 2004 (on file with McGeorge Law Review).

49. CAL. CIV. CODE § 1936(o)(1)(B) (amended by Chapter 317).

50. *Id.*

51. *Id.* § 1936(q).

52. *Id.* § 1936(s).

53. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2840, at 3 (July 13, 2004).

54. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 2840, at 2 (Apr. 20, 2004).

violate consumers' privacy rights.⁵⁵ Chapter 317 provides consumers with the knowledge necessary to protect themselves from such an infringement, and affords them legal recourse in the event that a violation does occur. Supporters include the Consumers Union, the Office of the Attorney General, the Consumer Federation of California, the ACLU, and the Privacy Rights Clearinghouse (PRC).⁵⁶ Following several requested amendments, Cendant Car Rental Group (Avis and Budget), Hertz Corporation, and Vanguard Car Rental USA (Alamo and National) hopped on board in support of Chapter 317.⁵⁷

Steve McCarney, one of the victims of the Payless Car Rental scheme, rails against the "unethical" and "deceptive" practices used by rental companies to secretly track customers and then levy exorbitant penalties against them.⁵⁸ McCarney claims that Chapter 317 will curtail these devious, wallet-lining tactics and "ensure a level playing field for both rental car companies and consumers."⁵⁹

The Office of the Attorney General writes that the privacy protection provided by Chapter 317 is "fair and reasonable" in light of the advanced surveillance technologies available and the extent of the information these devices are capable of retrieving.⁶⁰ The PRC supports Chapter 317 as well, viewing it as an apt restraint on rental companies' use of EST to track renters and impose fines and penalties.⁶¹ Without any constraints, PRC fears that rental companies could use these practices as a steady "revenue stream."⁶²

Chapter 317's author "worked closely with consumer groups and industry representatives to properly balance significant consumer protections with legitimate business needs."⁶³ When Chapter 317 was first introduced as AB 2840, several major rental car companies (Avis, Budget, Hertz, Alamo, and National) held an "oppose unless amended" position on the bill.⁶⁴ The Legislature tailored the bill so as to omit the contentious disclosure requirements, and incorporated specific instances where the use of EST is allowed.⁶⁵ Following these amendments, the rental car companies listed above registered their support for Chapter 317.⁶⁶

55. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2840, at 4 (July 13, 2004).

56. *Id.* at 3.

57. *Id.*

58. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 2840, at 4 (Apr. 20, 2004).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. ASSEMBLY FLOOR, CONCURRENCE IN SENATE AMENDMENTS TO AB 2840, at 2 (Aug. 6, 2004).

64. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 2840, at 4 (Apr. 20, 2004).

The rental car companies claimed the bill was overbroad in scope. They also worried that the bill's disclosure requirements were unreasonable: the oral disclosure was inefficiently lengthy, and the written disclosure was so detailed as to discourage renters from reading it. *Id.* at 4-5.

65. ASSEMBLY FLOOR, FLOOR ANALYSIS OF AB 2840, at 1 (May 25, 2004); CAL. CIV. CODE § 1936(o) (amended by Chapter 317).

66. ASSEMBLY FLOOR, CONCURRENCE IN SENATE AMENDMENTS TO AB 2840, at 2 (Aug. 6, 2004).

General Motors Corporation (GM) also opposed the original version of the bill. GM felt that the definition of EST should not encompass EDRs or OnStar.⁶⁷ Many GM vehicles come equipped with such technology.⁶⁸ GM argued that neither of these systems have the “kind of continuous electronic tracking capability that [Chapter 317] seeks to prohibit for rental cars.”⁶⁹ In response, the author of the bill deleted EDRs and SDMs from the definition of EST. Subsequently, GM retracted its opposition to Chapter 317.

V. CONCLUSION

There is something fundamentally wrong with the notion that a rental car company could covertly track your travels, and then stick you with fees for violations of fine-print rules upon your return. This underhanded use of EST is a serious concern that, prior to Chapter 317, California law did not address. Chapter 317 fills a void in California law that once left renters vulnerable and exposed. Renters have been tricked and taken advantage of by car rental companies in California, Arizona, and Connecticut.⁷⁰ There are certainly others. And until now, these victims had no clear avenue for redress. This evidences the need for Chapter 317, and indicates the important role it will play in protecting Californians from secret surveillance and manipulation by car rental companies. Support from the Consumers Union, the Consumer Federation of California, the ACLU, the Privacy Rights Clearinghouse, and the Office of the Attorney General provide a strong foundation for Chapter 317.⁷¹ Alamo, Avis, Budget, Hertz, and National car rental companies, as well as GM, all stand behind Chapter 317.⁷² Advocacy from these big-name rental companies suggests that Chapter 317 should be of no concern to organizations that do honest business and respect the rights of their customers. The lack of opposition and the strength and influence of the groups in support illustrate that Chapter 317 is a significant and useful piece of legislation that will serve an important purpose in protecting the privacy rights of California consumers.

67. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 2840, at 5 (Apr. 20, 2004).

68. *Id.*

69. *Id.*

70. *Id.* at 3.

71. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2840, at 3 (July 13, 2004).

72. ASSEMBLY FLOOR, CONCURRENCE IN SENATE AMENDMENTS TO AB 2840, at 2 (Aug. 6, 2004).

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