

## Class Certified In Omni Hotels Phone Recording Suit

By **Michael Lipkin**

*Law360, San Diego (September 15, 2014, 8:22 PM EDT)* -- A California federal judge has certified a class action accusing Omni Hotels Management Corp. of illegally recording conversations between customers and its employees, ruling the class is ascertainable despite Omni's failure to preserve call data.

U.S. District Judge Christina A. Snyder rejected Omni's argument that it could not be sure which calls in its database met the proposed class definition because an unknown number of calls were never recorded due to technical glitches. Omni also claimed the plaintiffs hadn't shown wireless carriers would give up private records identifying customers based on cellphone numbers.

Judge Snyder, however, found the plaintiffs has outlined enough detail in their class definition to let potential members identify themselves, allowing Omni to offer evidence removing them if appropriate.

"The possibility that Omni may be able to disqualify some putative class members if more evidence comes to light does not make the class unascertainable," said the Sept. 8 opinion, entered Monday.

The court approved a class definition including California residents who were secretly taped by Omni from March 2012 to March 2013 while using California cellphone numbers and physically located in California, on AT&T Inc., Verizon Wireless or Sprint Corp. networks.

Named plaintiff David Ades filed the suit in March 2013, claiming he called Omni's toll-free number to make a reservation, and during the ensuing conversation he revealed sensitive information, including credit card numbers, to the call-center representative in order to book accommodations. Ades alleges he was never told the call was being recorded.

Omni acknowledged it had a policy of recording all incoming calls and did not warn callers, according to the opinion, but said its list of incoming calls could not be used to properly find class members. Not all of the listed calls were recorded because of technical problems, and the callers often did not leave their name when making a reservation for someone else. Omni also said it accidentally deleted all database entries for calls made in the class period, which destroyed some metadata about the calls but not the recordings themselves.

The plaintiffs contend that while the deleted data would have made it easier to search the recorded calls, there was still enough information to make the class action manageable and any difficulties were due to Omni's mistake. It is possible to find calls made with California cellphones and either use reverse directories to ask carriers to identify the callers.

Judge Snyder ruled that the class definition had enough objective characteristics for potential members to show they fit the requirements. Omni's objections that identification of members will be difficult are better suited for after certification, the opinion said.

The court also rejected Omni's claim that individual issues would predominate because some putative class members assumed their calls would be recorded, preventing plaintiffs from proving injury without individual investigations. Judge Snyder held that the only harm required under the California Information Privacy Act is the unauthorized recording itself.

Omni similarly could not rely on possible implied consent from some members to defeat certification because the expectation of recording does not matter if Omni can't show it notified callers, the opinion said. Omni has not shown that a single caller consented to the recordings, it said.

"There is no indication that individual consent issues will overwhelm issues plaintiffs have shown to be resolvable through classwide proof," the opinion said.

An attorney for the plaintiffs declined to comment. An attorney for Omni did not immediately respond Monday to a request for comment.

The plaintiffs are represented by Zev B. Zysman of the Law Offices of Zev B. Zysman and by James F. Clapp, James T. Hannink and Zach P. Dostart of Dostart Clapp & Coveney LLP.

Omni is represented by Angela C. Agrusa and David B. Farkas of Liner LLP and Robert M. Hoffman of Gardere Wynne Sewell LLP.

The case is Steven Ades et al. v. Omni Hotels Management Corp. et al., case number 2:13-cv-02468, in the U.S. District Court for the Central District of California.

--Editing by Brian Baresch.