

Hilton Says Customer Call Recordings Don't Invade Privacy

By **Andrew Westney**

Law360, New York (May 20, 2014, 4:52 PM EDT) -- Hilton Worldwide Inc. asked a California federal judge on Monday to dismiss a proposed class action accusing the company of illegally recording incoming customer service cellphone calls, claiming such service-observing recordings by businesses are allowed under state law.

In a case remanded to district court by the Ninth Circuit, Hilton claimed that the California Invasion of Privacy Act contains exemptions for businesses to record and monitor calls for customer service purposes, and that such recordings are regulated by the California Public Utilities Commission.

Plaintiff Rick Young's "attempt to use the protections of CIPA to proscribe service-observing — a practice recognized by the legislature as one employed by companies to enhance the level of service provided to consumers — is nothing more than a creative effort to turn consumer protection on its head for considerable profit," according to Hilton's memorandum supporting its motion for judgment on the pleadings in the case.

Hilton also argued that California Penal Code Section 632.7, which prohibits eavesdropping on calls made from cellphones and cordless phones regardless of whether the communications were initiated with a reasonable expectation that they would remain private, only applies to recordings by third parties, not participants.

In the original complaint, Young alleged that his call to 1-800-HAMPTON to update his credit card information was recorded without his consent, compromising sensitive financial information he had shared.

After Young's case was dismissed by the district court in March 2012, the Ninth Circuit reversed the decision on March 20, knocking the district court for glossing over the added legal protection calls from cellphones are afforded over those from landlines.

Hilton argued that while the language of Section 632.7 could be considered ambiguous, the statutory scheme and legislative history show that it only applies to recordings by third parties. Applying the statute to the participants in a call in which at least one side is using a cellphone would be "absurd and unconstitutional," because recording a call placed to Hilton from a landline would be legal while recording a call from a cellphone would be illegal, according to the memorandum.

Also, applying California law to Hilton's recordings of conversations would violate the Commerce Clause of the U.S. Constitution because businesses in other states would have to conform to Young's interpretation of California statutes, according to the memorandum. Hilton does not operate a call center in California, the memorandum said.

Hilton also slammed Young's request for \$5,000 aggregated statutory penalties per claim, calling it "an astronomical figure bearing no relation to any actual harm." The penalties would constitute an excessive fine without due process, the complaint said.

"There is a long history of courts refusing to allow class plaintiffs to turn statutory damages provisions into veritable 'adding machines,' resulting in massive judgments far beyond what the enacting legislature ever intended," the complaint stated.

Young sustained no actual injury by Hilton's conduct and thus has no claim for statutory or actual damages, Hilton said.

Representatives for the parties were not immediately available for comment on Tuesday.

Young is represented by Ellyn Moscovitz of the Law Offices of Ellyn Moscovitz PC, Daniel F. Gaines of Gaines & Gaines PLC and Eric A. Grover of Keller Grover LLP.

Hilton is represented by Angela C. Agrusa and David B. Farkas of Liner LLP.

The case is Rick Young v. Hilton Worldwide Inc. et al., case number 2:12-cv-01788, in the U.S. District Court for the Central District of California.

--Additional reporting by Andrew Scurria. Editing by Philip Shea.