

## 9th Circ. Asked To Again Revive Hilton Call-Recording Suit

By **Emily Field**

*Law360, New York (September 24, 2015, 10:46 PM ET)* -- The lead plaintiff in a class action accusing Hilton Worldwide Inc. of violating California privacy law by recording incoming customer service phone calls asked the Ninth Circuit on Wednesday to revive its case for the second time, saying a lower court again erroneously dismissed his suit.

Appellant Rick Young told the Ninth Circuit that the district court failed to acknowledge the law of the case that was set forth when the circuit panel reinstated his claims under 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. Therefore, it erred when it converted Hilton's motion for judgment on the pleadings into a motion to dismiss, Young said.

Young said his complaint had no allegations that Hilton recorded the calls for any particular purpose, much less a so-called service observing purpose, which had been factored into the dismissal.

"Despite the absence of such allegations, the district court based dismissal on its conclusion that Hilton recorded calls for 'service observing' purposes and was exempt from Section 632.7 liability due to a purported service observing exception," Young said. "Thus, the dismissal was not based on the face of the pleadings."

In fact, Section 632.7 has no explicit service observing exception and the term never even appears in the statute, Young said.

Young alleged that a phone call he placed to 1-800-HAMPTON to update his credit card information on file with the hotel company was recorded without his consent, compromising sensitive financial information he had shared.

In March 2014, the majority of the panel knocked the district court for glossing over the added legal protection calls from cellphones are afforded over those from landlines in its reversal of the first dismissal.

In its first dismissal, the district court rubber-stamped a proposed dismissal order drafted by Hilton positing that the complaint failed to allege that the incoming calls were confidential.

Though the district court judge apparently understood the order as dismissing the suit entirely, it did so

on grounds that are applicable only to the plaintiffs' second cause of action under Penal Code Section 632, which covers calls made from landlines that are subject to a reasonable privacy expectation, according to the opinion.

"The California Supreme Court has unequivocally held that no such requirement applies to Section 632.7," the majority said. "The district court's failure to so recognize was reversible error."

Writing in dissent, Maryland District Judge J. Frederick Motz, sitting by designation, argued that the suit called for clarity from the California Supreme Court on whether Section 632.7 allows for damages only when calls are covertly recorded by unauthorized third parties as opposed to by the intended recipient.

The majority, in contrast, said the state high court's 2002 decision in *Flanagan v. Flanagan* was dispositive and that there was no need to involve it again.

Representatives for the parties didn't immediately respond to requests for comment Thursday.

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, Allen P. Lohse and Randall J. Sunshine of Liner LLP.

The case is *Young v. Hilton Worldwide Inc. et al.*, case number 14-56291, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Aaron Pelc.

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