

Class Says Omni Can't Cite Privacy To Block Sprint Records

By Jeff Zalesin

Law360, New York (July 14, 2015, 3:28 PM ET) -- A class alleging Omni Hotels Management Corp. illegally recorded phone conversations told a California federal judge Monday that they shouldn't be forced to return documents produced by Sprint Corp., arguing that Omni can't assert privacy rights on behalf of Sprint customers.

The plaintiffs said they should be allowed to keep Sprint documents produced before U.S. District Judge Christina Snyder's decision in May that cellular carriers are subject to California law restricting how phone companies share subscribers' information. They added that if Judge Snyder does make them return Sprint records, the order should be limited to information covered by the California law.

Omni argued earlier this month that in light of the May ruling, clawing back the Sprint documents is the only way to comply with California's privacy protections. But the plaintiffs said Monday that Omni lacks standing to make a demand based on the statutory rights of Sprint's subscribers.

"It is a sham for Omni to pretend to advocate on behalf of Sprint subscribers and potential class members, whose interests in this litigation are diametrically opposed to Omni's," the class said.

In order to take action against a phone company under the California privacy law, the plaintiffs said, a subscriber must be "aggrieved" by a disclosure of private information.

"It is doubtful that any Sprint subscriber could be 'aggrieved' by the production of basic name, address, and cell site information to class counsel — all subject to this court's protective order — for the sole purpose of evaluating his or her right to a monetary recovery in this action," they said.

If an individual Sprint customer complains about an unauthorized disclosure asks for his or her information to be deleted from the record in the lawsuit, the class attorneys will honor that request, they said. With that remedy available, there is no need for "wholesale destruction of relevant evidence" to protect privacy rights, they added.

In any event, the class said, Omni should be barred from seeking the return of Sprint documents because it "did not say a peep" about any privacy concerns about the disclosures until March, more than three months after Sprint produced the information. By that time, the plaintiffs' lawyers had spent more than \$40,000 and hundreds of hours organizing and analyzing the information, they said.

The plaintiffs told Judge Snyder that if she disagrees with them about the merits of Omni's motion to

make them return documents, she should enter an order “narrowly tailored” to make sure the class isn’t deprived of information that California law doesn’t shield, such as ZIP codes and information that could have been obtained through directory assistance services.

“Because the some of the documents contain both ‘protected’ and ‘unprotected’ information, no order should be entered absent assurance of a practical way that plaintiffs can retain and use all of the unprotected information,” they said.

If the judge does go down that path, the plaintiffs added, she should order Omni to reimburse the class counsel for funds they spent analyzing the Sprint documents.

Named plaintiff Steven Ades filed the class action 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.

The class was certified in September to include those in California who had conversations on their cellphones with Omni Hotels representatives between March 2012 and March 2013.

In November, the class subpoenaed nonparties Verizon Wireless, AT&T Inc. and Sprint seeking information on subscribers who had called Omni on their cellphones, including their names, addresses, details of the calls to Omni, and location of the cell towers that transmitted in the calls. Omni responded in March with a motion to compel the plaintiffs to disclose the notice Verizon would send customers telling them about the subpoena.

Judge Snyder then questioned whether a section of California Public Utilities Code prohibiting "telephone or telegraph" corporations from disclosing of subscriber call pattern and demographic information without their express consent also applied to the wireless carriers. She later ruled that the law does protect cell phone subscribers.

The judge directed AT&T and Verizon, which had not yet produced documents, to send the relevant subscribers notices asking them to consent to releasing their information to the plaintiffs. In June, she refused to certify the order for interlocutory appeal, reasoning that the discovery issue won't determine the case's outcome.

Attorneys for the class and Omni did not immediately respond to requests for comment Tuesday.

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 Andrews Kurth 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.

--Additional reporting by Jody Godoy. Editing by Patricia K. Cole.
