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Criminalizing Taped Cell Calls 'Makes No Sense,' Judge Says

By **Daniel Siegal**

Law360, Los Angeles (February 14, 2014, 7:48 PM ET) -- A Ninth Circuit judge expressed skepticism Friday, when the plaintiff in a class action alleging Hilton Worldwide Inc. illegally recorded customer calls asked that his suit be revived because the lower court had failed to distinguish landline calls from cellphone calls, which receive added legal protection.

During oral arguments in Pasadena, Calif., plaintiff Rick Young's attorney Elyn Moscowitz told a three-judge panel that a California federal court erred in dismissing the suit because calls to the reservation line for Hilton's 1,700 Hampton hotels weren't confidential, saying California law protects all cellphone calls — not just confidential ones — from being recorded without notification.

"That's what the [state] Legislature intended when they expanded the law in 1992. ... Apparently the Legislature felt it was easier to record those cellphone, cordless calls. That's the language the Legislature chose to use," she argued.

Young filed the lawsuit in state court in January 2012, saying that he called 1-800-HAMPTON in November 2011 to update his credit card information on file with the hotel.

According to Young, his phone call that day was recorded, even though he shared sensitive information — including his credit card information — and was never warned that the call was being taped.

Young argued that he and other consumers had an objectively reasonable expectation the calls would be private, making the communications confidential so that recording them violated two provisions of California's penal code.

He sought to represent all California consumers who called 1-800-HAMPTON and were recorded between January 2011 and January 2012, seeking \$5,000 in statutory damages for each alleged call and a permanent injunction prohibiting the practice.

Hilton said it would face hundreds of millions of dollars in potential damages if Young's suit were permitted to proceed.

Hilton removed the case to federal court in March and filed a motion to dismiss the case that month, arguing that the customer calls are not confidential by nature since they require conveying information that is meant to be shared.

In June 2012, U.S. District Judge Manuel Real **dismissed the case**, agreeing with Hilton's arguments that calls to the reservation line were not confidential because callers could not reasonably expect they wouldn't be overheard or recorded.

Young appealed the case to the Ninth Circuit, alleging that Judge Real had erred in not accounting for the additional legal protections afforded to cellphone calls.

On Friday, Judge J. Frederick Motz said those protections seemed aimed at third parties who intercept cellphone calls, not at punishing a party that receives a call.

"If it comes over a landline and I record it and it's not confidential, it's not criminal, but if your client ... chooses to use a cellphone, then my recording is criminal — that makes no sense to me," he said. "What interest does the state have in criminalizing that conduct, simply because they don't know what kind of phone is being used?"

Ninth Circuit Judges Richard A. Paez and Jacqueline H. Nguyen sat on the panel with Maryland District Judge J. Frederick Motz.

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 12-56189, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Zach Winnick. Editing by Edrienne Su.

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