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Hilton Escapes Calif. Call-Recording Class Action

By **Allison Grande**

Law360, New York (July 15, 2014, 3:28 PM ET) -- A California federal judge has nixed a putative class action accusing Hilton Worldwide Inc. of illegally recording incoming customer service cellphone calls, ruling that state eavesdropping law does not apply to service-observing monitoring activities or to recordings made by call participants.

In an opinion issued Friday, U.S. District Judge Manuel L. Real granted the hotel chain's motion for judgment on the pleadings with respect to plaintiff Rick Young's 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.

The judge concluded that the claims could not continue because the law was not intended to apply to recordings made by parties to a call or to companies that engage in service observing monitoring of calls.

"The context of the statutory scheme along with legislative history make it clear that Section 632.7 does not reach Hilton's alleged activity," the judge ruled in dismissing the proposed class action complaint with prejudice. "Hilton had permission to receive the phone calls and service observing recordings are exempted."

The parties' dispute dates back to 2012, when Young lodged his class action complaint claiming that Hilton violated the California Invasion of Privacy Act — which carries statutory damages of up to \$5,000 per violation — by recording without his consent his call to 1-800-HAMPTON to update his credit card information.

After Young's case was dismissed by the district court in March 2012, the Ninth Circuit in a 2-1 ruling **reversed the decision** March 20, knocking the district court for glossing over the added legal protection calls from cellphones are afforded over those from landlines.

Though Judge Real apparently understood the proposed dismissal order that he had rubberstamped as disposing of the suit entirely, the order 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 Ninth Circuit's opinion.

In reviving the suit, the panel charged the district court on remand to consider how the section of the statute that addresses cellphone calls — Section 632.7, which does not contain the caveat that there must be an expectation that calls will remain private in order to be covered — applies to the allegations brought against Hilton.

Once the case was returned to the district court, Hilton **moved in May** to can the remaining claim, arguing that plaintiff 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.”

The company also argued in its motion that Section 632.7 only applies to recordings by third parties, and that 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.

After considering the parties' pleadings and arguments during a June 23 hearing, Judge Real sided with both of Hilton's arguments in concluding that the statute only restricts third-party interception of cellphone calls and does not extend to recordings done for service observing monitoring purposes.

"The statutory scheme makes it clear that [Section 632.7] refers to the actual interception or reception of these radio signals by third parties and does not restrict the parties to a call from recording those calls," the ruling said. "The use of a landline telephone as Hilton allegedly did, was already expressly covered in Section 632, and to give independent meaning to Section 632.7 it would have to cover the radio signals it was meant to protect."

The plaintiff is represented by Eric A. Grover of Keller Grover LLP and Daniel F. Gaines of Gaines & Gaines PC.

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 Westney and Andrew Scurria. Editing by Chris Yates.

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