

Omni Callers Denied Quick Appeal Of Cell Discovery Order

By **Jeff Zalesin**

Law360, New York (June 23, 2015, 4:02 PM ET) -- A class alleging Omni Hotels Management Corp. illegally recorded phone conversations can't appeal a ruling that cellular carriers need subscribers' consent before producing their information, a California federal judge said Monday, reasoning that the discovery issue won't determine the case's outcome.

U.S. District Judge Christina Snyder refused to certify for interlocutory appeal her decision that California law restricting how phone companies share subscribers' information also applies to cellular carriers, pointing to the procedural rule that appeals must wait for final judgment if they don't present a "controlling" legal question.

"Although the disputed ruling is likely, as a practical matter, to affect the number of potential class members for whom the plaintiffs can obtain records, it will not affect any of the core liability issues to be proven through classwide proof," Judge Snyder wrote.

The judge also rejected the plaintiffs' contention that if the case were to proceed through final judgment, only to have the Ninth Circuit later reverse the ruling on discovery of cellphone user information, a new trial would be necessary. The court's trial findings could probably be applied to any class members newly discovered on remand, she said.

"Furthermore, the mere possibility that a reversal on appeal could lead to a new trial, without more, is not sufficient reason for granting the relief requested by plaintiffs," she wrote.

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 Corp. seeking information on subscribers that 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.

After considering briefs from the parties and AT&T and Verizon, as well as the "sparse" case law on the issue, the judge ruled the California law applies to "cellular telephone subscribers, and that the names, addresses and physical whereabouts of subscribers at the time of those calls constitute information protected by that statute."

The judge directed AT&T and Verizon to send the relevant subscribers notices asking them to consent to releasing their information to the plaintiffs. Sprint had already produced records in response to the subpoena.

The class sought permission in May appeal the discovery ruling to the Ninth Circuit, saying the circuit court has not ruled on the issue and the lower courts have issued contradictory rulings, to the extent they have considered the matter. Omni argued in response that the plaintiffs did not meet the requirements for requesting an interlocutory appeal, which is an "extraordinary" form of relief.

Attorneys for the parties 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 Katherine Rautenberg.
