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Wiretap Exemption Blocks Recorded-Call Suit, Omni Says

By **Matthew Heller**

Law360, Los Angeles (June 24, 2013, 5:04 PM ET) -- Omni Hotels Management Corp. urged a California federal judge Monday to toss a putative class action alleging it has illegally recorded telephone conversations between customers and its employees, saying California's wiretapping law did not apply to the "routine" business practice of "service-observing."

Omni's attorney David Farkas said the luxury hotel operator could not be sued for violating the California Information Privacy Act by taping calls without first telling the guests or getting their approval because the law included an exemption for recording equipment "furnished and used pursuant to the tariffs of a public utility."

The Legislature was "clearly saying" by adopting the exemption that service-observing "is the [California] Public Utilities Commission's jurisdiction. We are not involved in it, we are after criminal eavesdropping and wiretapping, not service-observing," Farkas said at a hearing on Omni's motion to dismiss the case.

He argued that Omni should, at most, be exposed to a regulatory enforcement action, not a civil class action with the potential for "astronomical" statutory damages of \$5,000 per violation.

But U.S. District Judge Christina A. Snyder appeared skeptical of Omni's arguments, saying, "It seems counterintuitive to me that your calls are somehow exempted when all other consumer calls that I've experienced seem to involve notification if the call is being monitored and you have an opportunity to hang up the phone or not."

She deferred making a final ruling on the motion until after she takes a "further look" at the case.

Named plaintiff David Ades filed the suit in March alleging Omni "has a policy and practice of intentionally and surreptitiously recording and/or monitoring telephone conversations." He claimed he had called Omni's toll-free number to make a reservation, and during the ensuing conversation, he revealed "sensitive personal identifying information and confidential financial information" to the call-center representative in order to book accommodations.

CIPA makes it unlawful to record any "confidential communication" without the consent of all parties. Ades is seeking class certification for all California residents who called Omni within the past year and were secretly taped in violation of the law.

Omni argued in its motion to dismiss that service-observing was "specifically excluded

from CIPA's purview" and that it should not be penalized for its "efforts to ensure that its guests receive the highest quality care and attention."

At Monday's hearing, Farkas cited a PUC regulation ordering all utilities to adopt tariffs governing the use of privately owned recording equipment. The order "explicitly says that businesses that own their own recording equipment must follow PUC regulations," he told Judge Snyder.

Since CIPA exempted the use of recording equipment "pursuant to the tariffs of a public utility," the public utility exemption applied to the case, he said.

Ades' attorney James Hannink said Omni had failed, however, to point to "any tariff anywhere that applies here" and had admitted it did not use recording equipment how the PUC said it should be used.

Ades and the proposed class 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 Randall J. Sunshine, Angela C. Agrusa and David B. Farkas of Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor 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.

--Editing by Melissa Tinklepaugh.

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