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Class Certification Properly Denied Where Individual Questions Predominated Under California's Telephone Recording Statutes

By Brian D. Martin, Roxane A. Polidora, Richard M. Segal, and Andrew D. Bluth

The California Court of Appeal unanimously affirmed a trial court ruling denying class certification in a lawsuit filed under California's Invasion of Privacy Act. The Court held that the determination of whether each potential class member had a reasonable expectation that his or her phone conversations would not be recorded would require too many individual fact inquiries to be treated on a class basis.

Companies targeted in the recent onslaught of class action lawsuits filed under California's telephone recording statutes received welcomed news when a California appellate court upheld the denial of class certification in a putative class action under California Penal Code sections 630, *et seq*. ("Invasion of Privacy Act"). In the first appellate decision of its kind, the Court held that the need for individualized inquiries regarding whether each potential class member expected his or her communication to be confidential renders such lawsuits unsuitable for determination on a class-wide basis.

In *Hataishi v. First American Home Buyers Protection Corporation*, 14 C.D.O.S. 1881 (February 21, 2014), the California Court of Appeal for the Second Appellate District affirmed a trial court order denying class certification in a case alleging that the defendant intentionally recorded telephone calls without warning or consent of all parties to the communication, in violation of the Invasion of Privacy Act. The Court held there was substantial evidence that assessing confidentiality would require individualized proof where (1) the putative class representative had prior telephone calls with the defendant in which she was told the calls may be monitored or recorded, (2) the putative class representative had previous experience with other businesses where she understood her call could be recorded or monitored for quality assurance, and (3) expert survey results demonstrated that customers have divergent privacy expectations based upon their unique background and experiences, including where customers had received prior call recording disclosures.

Background of the Underlying Dispute and Superior Court Proceedings

The defendant in *Hataishi* issued one-year home warranty plans to customers in California and elsewhere. To make warranty claims, customers called an "800" number printed on the contract. Defendant's sales groups also made outbound calls to customers as part of marketing campaigns. All inbound and outbound calls were recorded by equipment that could not be turned off. Customers making inbound calls were greeted with an automated disclosure, including the statement that "your call may be monitored or recorded." An automated disclosure was not played when customers received outbound calls.

The plaintiff and putative class representative had three one-year warranty contracts with the defendant and over the course of those contracts made approximately 12 inbound calls to the defendant where she received the recording and monitoring disclosure. Plaintiff also confirmed that she had participated in "dozens and dozens and dozens" of telephone calls with other companies where she understood her call could be recorded or monitored for quality assurance. Plaintiff also received two outbound calls from the defendant that were recorded but for which no disclosure was provided.

Plaintiff moved for certification of a class of all persons in California who received telephone calls from the defendant and whose conversations were recorded without warning. The defendant opposed on the grounds that whether each putative class member reasonably believed the call would not be recorded would depend on each putative class member's unique experience, including the length of the relationship with the defendant, the number of times they heard the disclosure for inbound calls, and the class member's experience with other businesses that monitor calls for quality assurance. The defendant also presented the declaration of a marketing expert who conducted an internet survey of California homeowners that showed that 61.6 percent of qualified participants would expect a call to be monitored or recorded if they had received an automated monitoring or recording disclosure during a prior call to the company.

The trial court agreed with the defendant and ruled that plaintiff failed to meet her burden to establish commonality, an element of the community of interest requirement under California law, as well as ascertainability and superiority.

A Communication is "Confidential" Under Section 632 if a Party Has an Objectively Reasonable Expectation That the Conversation is Not Being Overheard or Recorded.

The *Hataishi* case follows a string of California cases interpreting the "confidentiality" requirement for section 632 of the Invasion of Privacy Act, which covers calls made to or from a landline telephone. These cases stem from the California Supreme Court decision in *Flanagan v. Flanagan*, 27 Cal.4th 766, 776-777 (2002), which held that that "a conversation is confidential under section 632 if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded." *See also Kearney v. Salomon Smith Barney, Inc*., 39 Cal.4th 95 (2006); *Kight v. CashCall, Inc.*, 200 Cal.App.4th 1377 (2011) ("[t]he issue whether there exists a reasonable expectation that no one is secretly listening to a phone conversation is generally a question of fact that may depend on *numerous* specific factors, such as whether the call was initiated by the consumer or whether a corporate employee telephoned a customer, the length of the customer-business relationship, the customer's prior experiences with business communications, and the nature and timing of any recorded disclosures.") (Emphasis added.)

The *Hataishi* court also found that the trial court's denial was supported by substantial evidence and noted that plaintiff's unique experience – including the fact that she had received the call monitoring or recording disclosure a dozen times on inbound calls, and plaintiff's prior experience with other business and the

"dozens and dozens and dozens" of telephone calls where she understood her calls would be recorded or monitored – could support a jury finding that she lacked an objectively reasonable expectation that her calls with the defendant would not be recorded. The Court of Appeal also cited the expert survey testimony as further support of the trial court's ruling.[1]

Adding a Section 632.7 Claim Will Not Ameliorate the Need for Individualized Proof

In the trial court, the plaintiff had also contended that the need to engage in the individualized inquiry would be eliminated by permitting her to add a claim under section 637.2 of the Penal Code for calls to cellular or cordless phones, because that section does not have a "confidentiality" requirement. The Court of Appeal held that such an amendment would not have ameliorated the need to engage in an individualized factual inquiry because determining what type of telephone was used to receive the subject call for each class member would itself require an individualized inquiry.

Conclusion

The Invasion of Privacy Act has been a hot area for plaintiff's class action attorneys in California given the statute's private right of action and statutory penalties of $5,000 per violation. The *Hataishi* ruling is likely to cool that trend somewhat, at least as to landline lawsuits, and provide support for defendants currently defending these claims.

Until *Hataishi*, there had been very little case law discussing or analyzing class certification requirements in the context of putative class claims under California's Invasion of Privacy Act. The Court of Appeal affirmed the community of interest arguments that defendants have been making for years in these popular putative class actions. The *Hataishi* decision also identifies the potential effectiveness of expert testimony in opposition to a class certification motion. The case further demonstrates that the addition of claims under Section 637.2, dealing with wireless phones, will not necessarily ameliorate the class certification challenges on Section 632 landline claims, as Section 637.2 creates its own need for a potential individualized inquiry regarding what type of phone was used.

Finally, the *Hataishi* decision underscores the importance of using automated disclosures about call monitoring and recording. Repeated disclosures impact the ability of plaintiffs to successfully argue there was a reasonable expectation that calls will not be monitored or recorded on future calls. Of course, the safest approach for businesses that interface with customers over the telephone is to provide the disclosure for all calls, inbound and outbound. Moreover, in all written interactions with customers (sales contracts, terms of use agreements, etc.), businesses should include written provisions obtaining express consent to record or monitor all communications with the customer.

[1] In affirming on the ground that the proposed class lacked the requisite community of interest, the Court of Appeal did not reach the trial court's other bases for denying class certification.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the attorneys below.

Brian D. Martin (bio)
San Diego
+1.619.544.3204
brian.martin@pillsburylaw.com

Roxane A. Polidora (bio)
San Francisco
+1.415.983.1976
roxane.polidora@pillsburylaw.com

Richard M. Segal (bio)
San Diego
+1.619.544.3203
richard.segal@pillsburylaw.com

Glenn S. Richards (bio)
Washington, DC
+1.202.663.8215
glenn.richards@pillsburylaw.com

Andrew D. Bluth (bio)
Sacramento
+1.916.329.4740
abluth@pillsburylaw.com