CIPA Class Actions May Soon Hit A Roadblock

Law360, New York (August 06, 2014, 10:33 AM ET) -- Over the past few years, the California Invasion of Privacy Act has been used to threaten or initiate dozens of putative class actions against companies that record customer service calls. A recent decision, however, could pave the way for stopping CIPA actions in their tracks.

CIPA, codified in California's Penal Code (Section 630 et seq.), is an invasion-of-privacy statute historically used to prevent wire-tapping and the invasion of cordless or cellphone calls. Section 632 prohibits the intentional recording of "confidential communication" without the consent of all parties, and Section 632.7 prohibits persons from "intercept[ing] or receiv[ing] and intentionally record[ing]" any communication without the consent of all parties, if at least one party is using a cordless or cellphone in the communication.

Seizing upon these two provisions, the plaintiffs' bar has filed more than a dozen civil actions in recent years, with still more threatened, against companies that record incoming customer service calls, alleging that the recording occurred without customer consent. Companies, in turn, have spent millions to resolve these claims. The last six months alone saw two multimillion dollar CIPA settlements in Nader v. Capital One (C.D. CA Case No. 12-cv-1265) and Nguyen v. Shell Oil (N.D. CA Case No. 12-cv-4650).

Plaintiffs' claims based on the recording of customer service center calls never fit the primary purpose of the statute, which is to combat "new devices and techniques for the purpose of eavesdropping upon private communications." After years of case law development, plaintiffs' theory of liability in most cases may finally be fully dismantled, if the reasoning of a recent federal district court decision in California becomes widely adopted.

Section 632: Most Customer Service Center Calls Are Not Confidential

The first wave of CIPA cases were filed under Section 632, which is also known as California's "two-party consent rule." Section 632 prohibits any recording of a confidential communication unless all parties to the communication consent. Plaintiffs filing CIPA actions alleged they expected their customer service calls be private and/or alleged that they disclosed personal information during the calls.

In 2012, the Central District of California, in a decision by Judge Percy Anderson in Shin v. Digi-Key (C.D. CA Case No. 12-cv-5415), held that plaintiffs could not reasonably expect their customer service calls to be private and further reasoned that such calls do not typically require sensitive personal or financial information. The court relied in part on the legislative history of Section 632 which made clear that the law was not intended to prohibit businesses from monitoring their employees' handling of customer service since that practice is "in the public's best interest."

In focusing on the nature of Digi-Key's business and the purpose of the plaintiff's call, Shin v. Digi-Key is consistent with the California Supreme Court's prior ruling in Kearney v. Salomon Smith Barney Inc., 39 Cal. 4th 95 (2006), which held that Section 632 applies to customer service calls in the financial services industry that involve sensitive personal or financial

information.

Section 632.7: Most Customer Service Center Calls May Be Recorded

After the decision in Shin v. Digi-Key, more CIPA cases were filed premised on Section 632.7 of CIPA, which is not limited to confidential communications. Section 632.7 applies if at least one party to the communication is using a cordless or cellphone. At the same time, Section 632.7 imposes liability only on a person who "without the consent of all parties to a communication[] intercepts or receives and intentionally records" it.

Plaintiffs' lawsuits were premised on the untested assumptions that a party can "intercept or receive" its own communications for purposes of Section 632.7 and the legislative intent to preserve an employers' ability to monitor employees' customer service does not extend to Section 632.7. Two years after Digi-Key, the Central District of California, this time with Judge Manuel Real presiding, rejected those assumptions.

In Young v. Hilton (C.D. CA Case No. 12-cv-01788), the court held that only interlopers can "intercept or receive" a communication within the meaning of Section 632.7. The court based its ruling on the legislature's concern with the use of technology to access radio signals by people who were not intended to have access to the radio signals. As a result, the court ruled that under Section 632.7, parties are not prohibited from recording their own conversations.

Plaintiffs' argument to the contrary was based on the word "receives" in Section 632.7 and the allegation that the defendant company received plaintiff's call. However, carried through to its logical conclusion, plaintiffs' argument would allow the person initiating the call to record it but not the person receiving the call, a result at odds with plaintiffs' pending cases regarding the recording of "outbound" customer service calls by defendants.

Judge Real advanced two additional grounds for dismissing Young v. Hilton. First, he held that the term "consent" in Section 632.7 modifies the phrase "intercepts or receives" and, thus, to the extent the company "received" a call within the meaning of Section 632.7, the plaintiff who placed the call consented to it. The court also relied on the legislative history to confirm that, even under Section 632.7, companies can use recordings to monitor customer service activities of their employees.

Cases to Watch and the Potential Application of Young

Consistent with the case developments described above, the CIPA actions currently pending in California illustrate: (1) the shift in focus from Section 632 to Section 632.7 over time; and (2) the recognition that the strongest CIPA claims are those based on calls involving sensitive personal or financial matters.

- Montemayor v. GC Services (S.D. CA Case No. 13-cv-1959) and Ziehm v. GC Services (S.D. CA Case No. 14-cv-1599) are a pair of related putative class actions pending in the Southern District of California. Each alleges that the defendant debt collection call center recorded outbound collection calls without the consent of the debtors. Montemayor, filed

in August 2013, alleges claims under both Section 632 and Section 632.7 while Ziehm, filed in May 2014, alleges a single claim under Section 632.7. In December 2013, the defendant filed a motion to dismiss in Montemayor on the grounds that: (1) CIPA does not reach the type of service-monitoring calls at issue; and (2) various federal statutes preempt the CIPA claims. The motion has been under submission as of Feb. 6, 2014, and the parties have stipulated to a stay of the defendant's response in Ziehm pending the court's order on the Montemayor motion to dismiss.

- Fanning v. HSBC Card Services (C.D. CA Case No. 12-cv-885), Lindgren v. HSBC Card Services (C.D. CA Case No. 14-cv-5816) and Kempton v. Capital One (Cty. of San Diego Case No. 37-2014-23795) are a trio of related putative class actions pending in the Central District of California and the San Diego Superior Court. Each alleges that the defendant credit card servicers recorded outbound collection calls to card members without their consent. Fanning, filed in 2012, alleged a single CIPA claim based on violations of both Section 632 and Section 632.7, while Lindgren and Kempton, filed in July 2014, allege violations of each section as a separate claim. Lindgren, in particular, seeks to certify separate subclasses under each section. In Fanning, the court denied defendants' motion for summary judgment on the Section 632 CIPA claim.

- Byrd v. Caribbean Cruise Line (N.D. CA 13-cv-2503) is a putative class action pending in the Northern District of California. Filed in August 2013, it alleges the plaintiff's call to defendant's call center was recorded with her consent, and asserts a single CIPA claim for violation of Section 632.7. In June 2014, the court denied defendant's motion to dismiss, but, regarding the substance of the Section 632.7 claim, determined only that the plaintiff need not allege that she had an objectively reasonable expectation of privacy relating to these calls, leaving the door open for the defendant to raise other challenges to the validity of the claim.

Each of these pending cases leave open the possibility that the reasoning of Young v. Hilton may be adopted by the respective courts — in an upcoming motion to dismiss or a motion for summary judgment — to dismiss the entire or a substantial portion of the actions. As the reasoning in Young v. Hilton is adopted in other cases, CIPA class actions may be run off the road.

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