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PERSPECTIVE

Improving landscape for defendants monitoring calls

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Business entities' alleged failure to provide sufficient disclosures for call monitoring or recording has spurred many class actions in California for purported violations of the California Invasion of Privacy Act (CIPA), which imposes civil and criminal penalties on an individual or company that intentionally "eavesdrops upon or records [a] confidential communication" and engages in this conduct "without the consent of all parties." Many have criticized these class actions as failing to protect individual consumers' privacy interests and for creating costly class actions that do not promote consumer protection.

But recent California Court of Appeal rulings may have limited the instances in which plaintiffs can seek class certification under CIPA. Despite this development, however, companies should continue to adhere to CIPA given the possibility of continued civil and criminal liability.

Understanding Businesses' Civil Liability for Failing to Disclose Communication Monitoring or Recording

In 2011, a California appellate court in *Kight v. CashCall (CashCall II)*, 200 Cal. App. 4th 1377, held that CIPA prohibits a company from monitoring or recording its customer service calls unless consent is obtained from each person on the call. Before discussing the disclosure requirements, the appellate court noted that CIPA makes clear that "a corporation and an individual" are prevented from monitoring conversations in secret, whether or not an individual acted on behalf of the corporation. Accordingly, a business could be held liable for its employees' failure to disclose call-monitoring, whether intentionally or not.

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The court explained CashCall's disclosure in providing context for disclosure requirements. CashCall's recorded call-monitoring disclosure stated: "*This* call may be monitored or recorded for quality control purposes." The court found that such a disclosure would not necessarily inform a caller that "this call *and all future calls*" between the company and a caller would be monitored or recorded. The court held that even when an unannounced listener is employed by the same company, liability would apply so long as the communication was "confidential." For a communication to be "confidential," plaintiffs must show that they had an "objectively reasonable expectation" that their conversations would not be secretly monitored according to the *CashCall II* court.

In remanding the case, the court further noted that a party's reasonable expectation of privacy was a question of fact dependent on numerous specific factors. The court stated that such factors included, for example: (i) who initiated the call — that is, the consumer or the business, (ii) the length of the business-customer relationship, (iii) the customer's prior experience with business communications, and (iv) the nature and timing of any recorded disclosures.

Call-Monitoring Disclosures and the Class Action

Recently, the same California Court of Appeal affirmed the trial court's decertification of the putative class in the CashCall matter after remand of *CashCall II*. In *Kight v. CashCall (CashCall III)*, 231 Cal. App. 4th 112 (2014), the court ruled that although CIPA's "confidential communication" requirement was an objective test, the test required an evaluation of the totality of the circumstances regarding the reasonableness of an individual plaintiff's belief.

The *CashCall III* court, however, is not the first California appellate court to conclude that class certification in call-monitoring and disclosure cases is inappropriate. In *Hataishi v. First American Home Buyers Protection Corp.*, 223 Cal. App. 4th 1454 (2014), the trial court refused to certify a class of "outbound" callers who alleged that a business violated CIPA. The Court of Appeal applied the *CashCall II* reasoning that a party's reasonable expectation of privacy was a fact-question based on numerous specific factors to conclude that class certification was inappropriate.

Based, in part, on the *Hataishi* court's reasoning, the *CashCall III* court further clarified that the existing law applied to the facts of each individual's case. The *CashCall III* court, therefore, concluded that class treatment was inappropriate when every putative class member would be required to litigate numerous and substantial questions about his or her individual right to recover on an alleged failure to disclose call-monitoring.

What Businesses Should Consider Moving Forward

While *CashCall III* and *Hataishi* may constrain costly class actions against companies for alleged failures to disclose call monitoring, it does not mean that individuals won't still seek civil penalties or that the state won't seek to impose the $2,500 fine for a violation or a maximum fine of $10,000 for subsequent violations. Accordingly, companies should continue to consistently provide callers (whether in-bound or out-bound) with call-monitoring or recording disclosures. If an automated disclosure cannot be provided, companies should also continue to train call center operators to provide the disclosure live.

Although the CashCall line of cases dealt with call monitoring or recording, California law speaks to the broader issue of eavesdropping on a "confidential communication." As such, and because customer and consumer outreach is increasingly happening online, companies should provide — if they are not already — monitoring or recording disclosures during live chats and virtual agent or collaborative browsing sessions.

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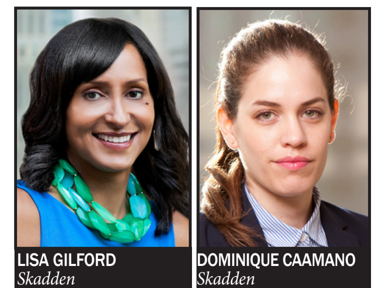
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