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client alert

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FAULKNER v. ADT AND THE LANDSCAPE FOR CIPA CLASS ACTIONS

Last week the Ninth Circuit ruled on the issue of whether a business can be held liable under the California Invasion of Privacy Act, Cal. Penal Code § 632 ("CIPA") for monitoring or recording its own customer service telephone calls in the ordinary course of business. *Faulkner v. ADT*, 2013 U.S. App. LEXIS 1108 (9th Cir. January 17, 2013). In February 2011, John Faulkner brought a putative class action suit against ADT in California state court and in March 2011 the case was removed to federal court on diversity grounds. Faulkner alleged that he called his security provider, ADT, to dispute a charge. After being transferred to ADT's technical line, he began hearing periodic "beeping" sounds during the conversation. When he inquired about the sounds he was told that the telephone conversation was being recorded by ADT. Faulkner told the ADT representative that he had not previously been told that the conversation was being recorded and that he did not wish to continue the conversation if the recording continued. The representative advised Faulkner to contact the customer service line to discuss the issue. Faulkner called the customer service line, where he asked to speak with a representative on a line that was not being recorded. That representative informed Faulkner that it was the company's policy to record telephone calls and advised Faulkner to end the call if he did not wish to be recorded, which he did. Faulkner subsequently filed a claim against ADT claiming that his call with ADT was a confidential communication under CIPA and that ADT violated his privacy rights under that statute by recording his call to the company without first obtaining his consent.[1]

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[1] CIPA applies only to a "confidential communication" defined under 632(c) to include "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication . . . in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." The California Supreme Court has concluded that a conversation is confidential within the meaning of CIPA's Section 632 "if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded." *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 117 n.7, 45 Cal. Rptr.

In May 2011, the federal district court granted ADT's motion to dismiss, ruling that plaintiff failed to plead an "objectively reasonable expectation" that his customer service call with ADT was not being recorded or overheard. Dismissing the complaint with prejudice, the trial court concluded that Faulker had not and could not allege plausible circumstances that "would support an expectation of privacy in such a call." An appeal to the Ninth Circuit followed.

On appeal, the Ninth Circuit expressed grave doubts about plaintiff's CIPA claims but remanded nonetheless – in what it called an "overabundance of caution" to allow plaintiff to amend his complaint in attempt to meet federal pleading standards. In so doing, the appellate panel intimated that it agreed with the district court's reasoning that a customer does not have a presumptively reasonable expectation of privacy for typical customer service calls with a business, especially where one does not reveal confidential information such as a social security number or an unlisted telephone number.

Whatever special circumstances the plaintiff ultimately pleads on remand, it is difficult to imagine how new details will bring plaintiff's CIPA case closer to class certification. To that end, *Faulkner* is another example of the growing judicial hostility to CIPA class actions challenging businesses that monitor or record their own customer service calls in the ordinary course. The leading case on this point is *Thomasson v. GC Services L.P.*, 321 Fex. Appx. 557 (9th Cir. 2008). Venable represented the defendant, GC Services, in that case, obtaining summary judgment that CIPA does not apply to businesses monitoring their own calls in the ordinary course. CIPA class actions exploded after a California state appellate court refused to follow *Thomasson* and held that CIPA could apply to business call monitoring and recording in certain circumstances. *See Kight v. CashCall, Inc.*, 2011 WL 5829678, No. 057440 (Cal. Ct. App. Nov. 21, 2011).

In the ensuing melee, numerous businesses have been sued by plaintiff lawyers misapplying CIPA to reach ordinary course of business call monitoring and recording. In our experience, many of these cases settle on an individual basis, while many others are dismissed on initial motions or summary judgment. *See e.g.*, *Sajfr v. BBG Communs.*, Inc., 2012 U.S. Dist. LEXIS 15198, 18-19 (S.D. Cal. Jan. 10, 2012) (granting summary judgment and noting that "the legislative history of section 632 reflects that it was not intended to prohibit 'service-observing' because the legislature deemed that practice to be in the public's best interest" and "consumer calls to a customer care center to discuss a billing issue do not support an expectation of privacy sufficient to qualify such calls as a 'confidential communication' under section 632."); *Turner v. Western Dental Services Inc.*, BC478188 (LA Super. Ct., filed June 20, 2012) (dismissing putative CIPA class action complaint because CIPA's "legislative history indicate that all service-observing calls

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3d 730, 137 P.3d 914 (Cal. 2006) (quoting *Flanagan v. Flanagan*, 27 Cal. 4th 766, 776-77, (Cal. 2002)). Although Kearney dealt with a brokerage recording its own service and transaction calls, the ordinary-course-of-business exemption was neither raised nor decided in that case.

are deemed not to be considered 'private,' and are not within the scope of the statutes sued upon here."). A minority of California courts refuse to recognize ordinary course of business exemptions under CIPA, at least on motions to dismiss. *See, e.g., Brown v. Defender Sec. Co.,* 2012 WL 5308964 (C.D. Cal. 2012).

When a business takes on the added expense of monitoring or recording its own call center activity, it is only looking after its customers by policing how its employees handle customer complaints, cancellation requests, transaction orders and a variety of other service and sales inquiries. This practice is expressly authorized by federal law, and no valid privacy rights are implicated by these cases – as the California legislature recognized when CIPA was enacted in 1968. *Faulkner* is part of a growing and welcome judicial recognition that CIPA class actions turn consumer protection law on its head by challenging ordinary-course-of-business customer call center monitoring or recording and, absent unique circumstances, these cases should not gain traction in California courts. However, until California state and federal courts uniformly adopt this approach, businesses should be cautious and, at the outset of all conversations with customers, advise them that the call is being monitored or recorded.

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