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AUTHOR

Thomas E. Gilbertsen
tegilbertsen@Venable.com
202.344.4598

Recent CIPA Ruling Sets Stage for Showdown Over Business Call Monitoring

Last week, a California court of appeals ruled that a state statute—the California Invasion of Privacy Act, Cal. Penal Code § 632 ("CIPA")—prohibits a business from monitoring its own customer service and other telephone calls conducted in the ordinary course of its own business unless consent is obtained from each person on the call. *Kight v. CashCall, Inc.*,—Cal. Rptr. 3d—, 2011 WL 5829678, No. D057440 (Cal. Ct. App. Nov. 21, 2011). The *CashCall* decision conflicts with a long-standing federal statute expressly authorizing one-party consent monitoring and recording for calls conducted in the ordinary course of business. The *CashCall* court also refused to follow an earlier Ninth Circuit decision holding that undisclosed business call monitoring does not constitute an invasion of privacy under CIPA. *See Thomasson v. GC Services L.P.*, 321 Fed. Appx. 557 (9th Cir. 2008). Venable partner Tom Gilbertsen represented GC Services in the Ninth Circuit matter, which upheld summary judgment for our client on grounds that a business entity is capable of acting only through its authorized employees, constitutes a "person" under CIPA, and is therefore incapable of eavesdropping upon its own business telephone calls because no third party is present when a supervisor monitors employee business calls.

Businesses continue to stare down California class actions for simply monitoring or recording their own business telephone calls, despite federal law expressly authorizing business telephone call monitoring and recording and despite the Ninth Circuit's unpublished *GC Services* decision. These cases turn consumer protection law on its head by attacking a practice that businesses undertake, at substantial cost, for the sole benefit of their customers: supervising and training call representatives and monitoring their performance to assure appropriate behavior that complies with the law. These class actions—which seem to thrive only in California courts despite a dozen other states with similar one-party consent privacy statutes—also turn class certification rules inside out. In most cases of this type, the defendant had procedures and disclosures in place to advise callers that their calls might be monitored or recorded. Yet, plaintiffs' lawyers are undeterred in bringing these cases because all that is needed is one plaintiff who claims that her call fell through the cracks and no advisement was given. Too often, trial courts have seemingly ignored the

individualized fact-finding that these cases require. In both the *CashCall* and *GC Services* cases, classes were certified despite judicial acknowledgements that individual cases will need to be examined on a case-by-case basis to determine whether a monitoring advisement was given, the timing of the advisement, whether the consumer consented to monitoring, and whether the circumstances of each call implicated any privacy issues.

CONCLUSION

Business telephone monitoring and recording class actions have been (rightly) criticized for protecting no articulable privacy interests and imposing significant costs on the economy without promoting consumer protection or social utility. These cases, which raise individualized disputes about what transpired in various telephone conversations, should be difficult to certify for class action treatment under a straightforward application of Rule 23. We are watching developments closely in the CashCall matter and anticipate that the defendant may file a petition for review to the California Supreme Court within the next several weeks. If that happens, we anticipate a great deal of interest in the CashCall matter from affected businesses and trade associations. There is an opportunity for interested parties to file *amicus* letters in support of the petition. Under Rule of Court 8.500(g), *amici curiae* may submit letters to the court supporting or opposing the grant of review. No permission from the court is necessary, and the letters are not listed on the docket but simply held for the court's review. Despite their informal status, letters from *amici curiae* often are pivotal in demonstrating why a case is worthy of the court's review. Venable attorneys can assist in the preparation of these letters.

More detailed information about the decisions in and current status of the *GC Services* and *CashCall* cases is below.

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The GC Services Case.

Andrew and Rebecca Thomasson filed this putative class action suit in San Diego federal court in May 2005, accusing GC Services of eavesdropping upon its own business telephone calls handled in its California call centers. The Thomassons brought claims under the Fair Debt Collection Practices Act and several state privacy statutes including CIPA. After discovery, GC Services moved for summary judgment asserting that CIPA does not apply to ordinary-course-of-business call monitoring and that the Thomassons set forth no evidence showing that GC Services monitored their calls or otherwise violated the FDCPA. Specifically, we established that pre-existing California Public Utility Commission ("CPUC") regulations leave no room for doubt that CIPA does not apply to business call monitoring. We also demonstrated that a company monitoring its own ordinary-course-of-business telephone calls is incapable of "eavesdropping" upon itself under CIPA. And we presented a compelling argument, which the Ninth Circuit never reached, that CIPA and other statute statutes like it are preempted by the federal Wiretap Act to the extent they are used to impose civil liability upon businesses who monitor or record their own telephone calls in the ordinary course of business.

On July 16, 2007, the district court granted summary judgment in favor of GC Services and denied plaintiffs' class certification motion as moot.

The Thomassons appealed to the Ninth Circuit and a panel of that court affirmed summary judgment dismissing the Thomassons' privacy claims but reviving and remanding their FDCPA count. *Thomasson v. GC Services*, 321 Fed. Appx. 557 (9th Cir. 2008). On May 14, 2010, the Thomassons filed another Rule 23(b)(3) class certification motion, which the district court granted even though it found that the class claim "clearly requires an individualized inquiry into the content of the telephone calls to determine whether the advisement was given and, if so, when it was given." Earlier this summer, the Ninth Circuit granted our petition for interlocutory review of this certification order, which is now pending appeal.

The CashCall Case.

CashCall is a finance company providing unsecured loans to consumers. Plaintiffs are borrowers alleging that during calls with the company about initiating loans and in subsequent collection attempts, CashCall supervisors "secretly" monitored their conversations with other CashCall employees. CashCall maintained that, like almost every consumer service business, it monitors its employees' calls with borrowers for quality control purposes and to ensure that CashCall employees are complying with applicable law and internal procedures. Supervisors monitor customer service representative calls through either a telephone software system or by sitting next to the employee and plugging into the call. Customer service calls are monitored only by supervisors and not recorded. Inbound calls are greeted by an interactive voice recognition ("IVR") system that typically provides an advisement that calls might be monitored but, in some limited circumstances, the advisement may not air depending on particular options selected by the inbound caller. According to the California appellate court decision, CashCall representatives never gave the advisement during outbound calls.

Plaintiffs brought several claims against CashCall, including: (1) invasion of privacy in violation of Sections 631 and 632, (2) intrusion into private affairs, and (3) violation of the right to privacy under the California constitution. Plaintiffs sought statutory damages and an injunction. Before CashCall moved for summary judgment, the trial court certified a class of "all persons that were physically in California at the time they had telephone conversations in which [CashCall], its employees, contractors, agents or other persons working on [CashCall]'s behalf, monitored . . . such conversations, within one year prior to May 16, 2006, the date of filing of the original Complaint . . . ." The court identified two subclasses, one of plaintiffs who were engaged in inbound calls and one of plaintiffs engaged in outbound calls. After certification, CashCall moved for summary adjudication, which the trial court granted. The trial court found no violation of Section 632, on the basis of the *GC Services* decision, because the "parties" to the monitored calls in question were the borrowers and the corporate defendant only, which was insufficient for liability.

That order was reversed in last week's Fourth Appellate Division decision, which holds that Section 632 liability reaches a business that monitors its own telephone calls. The *CashCall* court regarded Section 632 as prohibiting a "person" from eavesdropping on a confidential communication without the consent of "all parties." And while the statute defines "person" to "include" an "individual" and a "corporation," the *CashCall* court held that the word "'include' generally is a word of expansion, not limitation." That court also felt that the purpose behind Section 632, which is broadly to protect an individual's right to privacy by giving them

the right to protect dissemination of confidential information shared on the telephone, is consistent with preventing a business from monitoring its own telephone calls without the consent of all parties. The *CashCall* court also held that CIPA contains no exception for business call monitoring.

For more information, please contact the authors at tegilbertsen@Venable.com or at 202.344.4598.