

Reasonable Expectation of Privacy Can Defeat Class Certification

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In a hot-off-the-presses decision, the California Court of Appeal held that an issue common in privacy lawsuits – whether the plaintiffs had a “reasonable expectation of privacy” – does not constitute a common question proper for class treatment. The decision turns a major weapon for the privacy plaintiffs’ bar on itself: the stronger the fact issues to defeat summary judgment on reasonable expectation of privacy, the less appropriate the case is for class treatment. The case is *Hataishi v. First American Home Buyers Protection Corp.*, No. B244769 (Cal. Ct. App. filed Feb, 21, 2014).

Facts.

Defendant First American offers one-year home warranty plans for new home buyers in 46 states, including California. To make a warranty claim, customers dial an 800-number; these calls are recorded, but they include automated notification of recording. In marketing these products, First American makes calls to customers; these calls are also recorded, but do not include an automated notification of that recording.

Plaintiff Dina Hataishi, a First American customer, made several inbound calls with the notification, but also received numerous marketing calls without the notice. Alleging the recorded marketing calls invaded her privacy for lack of notification, she filed a putative class action in California court alleging violation of California’s Wiretap Act, Penal Code § 632, which prohibits “confidential” communications over phone lines. Hataishi filed a motion for class certification; the trial court denied class certification, finding individual issues predominated; and Hataishi appealed.

Reasoning.

The Court of Appeal affirmed, holding that individualized issues predominated and therefore precluded class treatment. Stated simply, the court reasoned that: (1) “confidentiality” under section 632 requires the plaintiff to prove she has an objectively reasonable expectation of privacy (i.e., that the conversation will not be overheard); (2) whether a plaintiff has a reasonable expectation of privacy depends on the facts and circumstances of each case; and (3) in the summary judgment context, the California Supreme Court has held that the fact intensive nature of determining a reasonable expectation of privacy precludes summary judgment on that issue (*Kight v. CashCall, Inc.* 200 Cal. App. 4th 1377 (2011)).

Here, in the context of class certification, the same fact-specific reasons that would defeat summary judgment on the question of reasonable expectations of privacy should defeat class certification. The customers’ length of their relationships with the defendant, prior notifications about recording (e.g., from warranty claim calls to First American), and experience with other businesses’ notification practices all may create fact issues on summary judgment, but they also mean individual, fact-intensive inquiries as to each putative class member. As such, class treatment is not appropriate.

Upshots for Clients Facing Class Actions.

Hataishi has several broad implications for clients currently facing class actions — and not just privacy class actions.

- Not Just Wiretap Act Claims. *Hataishi* will find use far beyond California’s Wiretap Act. Most privacy statutes – not just California’s Wiretap Act – require that the plaintiff has no reasonable expectation of privacy. The same is true for common law invasion of privacy causes of action.

- Not Just State Court. *Hataishi* will help in federal court as well — not just for California cases, but also for federal class actions (the most common vehicle for asserting privacy claims). Federal courts frequently include California privacy statutes, courts look to California cases to interpret federal statutes, and look to California law for guidance on similarly worded federal privacy statutes.
- Not Just Privacy. *Hataishi* will prove useful outside the privacy context. Strategic considerations apply for any case involving intensive fact inquiries. Consumer class actions ranging from food mislabeling to loan misrepresentation often involve individualized inquiries that could stymie summary judgment. As a recent California case that turns fact intensive problems precluding summary judgment into a double-edged sword at the class certification stage, *Hataishi* will have implications beyond privacy class actions.