August 2011

Does the Use of Foreign Call Centers Violate Privacy and Consumer Protection Laws?

Many companies rely on foreign call centers to help with customer service or other business needs. Now, Plaintiffs in a federal lawsuit allege that the use of such centers violates customers' privacy and puts personal and financial information at risk. On August 3, 2011, three residents of Washington D.C. sued Bank of America ("BoA") over the alleged confidentiality and privacy risks caused by the transfer of their data to foreign call centers. On behalf of the class, the three plaintiffs allege that their financial data receives greater protection inside the United States than outside it.

Plaintiffs assert that BoA has created a "seamless" customer service experience in which U.S. customers do not know that their calls are being transferred overseas. BoA customers (according to Plaintiffs) are not told to dial international numbers or otherwise informed that they have called an international exchange. Instead, when BoA customers call U.S. customer service numbers those customers and their data are transferred, without their consent, to a foreign call center where U.S. legal and constitutional protections may not apply.

Plaintiffs also assert that BoA's actions allow the U.S. government to circumvent confidentiality and privacy laws. In the U.S., the government's ability to obtain citizens' banking information is constrained by the Constitution's Fourth Amendment and other laws. However, Plaintiffs allege that neither the Constitution nor the laws protect their data once that data leaves the country. Plaintiffs claim that once their data is overseas, the U.S. government can purchase, intercept, or otherwise acquire as much of that data as it wants. They also complain that foreign governments can and do gather that data as well, and share it with the U.S. government.

Plaintiffs rely on two statutes, one federal and one a specific ordinance of the District of Columbia. The federal law, the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. §3401 *et seq.*, prohibits financial institutions from sharing customer records with a "Government authority," except as allowed by the RFPA. Plaintiffs argue that the transfer of customer data to overseas call centers violates the RFPA and they seek, in consequence, damages, attorneys' fees, an injunction, and other relief, both for themselves and for a national class of BoA customers.

CONTACT INFO:

Cleveland Office
Frances Floriano Goins
Partner
216.583.7202
fgoins@ulmer.com

Richik Sarkar
Partner
216.583.7352
rsarkar@ulmer.com

Isaac J. Eddington
Associate
216.583.7332
ieddington@ulmer.com

www.ulmer.com

1660 West 2nd Street, Suite 1100 Cleveland, Ohio 44113-1448 firm 216.583.7000 fax 216.583.7001

Plaintiffs also rely on the Consumer Protection Act of the District of Columbia (and the District's common law), which they claim BoA breached by, among other things, representing that its customer services have a characteristic — the privacy protections afforded by U.S. law — which those services do not in fact have. In making this claim, Plaintiffs do not point to any specific statement by BoA, but argue that BoA's integration of foreign call centers into its U.S. customer service organization "creates the illusion" that data transferred to those call centers is protected by U.S. law. Therefore, the Plaintiffs seek certification of an additional class that only comprises BoA's D.C. customers, as well as damages, an injunction, and other relief for members of that class, based also on claims of negligence, negligent bailment, and unjust enrichment.

This suit may break new legal ground, since the Right to Financial Privacy Act has not typically been applied to foreign call centers. Thus, the federal court in the District of Columbia will have to decide whether the RFPA's prohibition on giving customer records to a "Government authority" bars the transfer of that data to foreign locales where U.S. law (arguably) does not apply. The court will also have to decide whether an institution's compliance with accounting protocols governing data transfer—such as the newly promulgated Statement on Standards for Attestation Engagements ("SSAE 16") (formerly Statement on Auditing Standards 70)—is a defense to claims of improper data transfer. The resulting decision could be significant not only with regard to federal law, but also with respect to the laws of those states that have passed similar right-to-privacy laws.

The case will also involve issues of federal preemption, in that the court will have to decide whether District of Columbia law can affect international data transfers. Some commentators have argued that state and local law on this issue is preempted by the Constitution's Foreign Commerce Clause and by other federal laws. Various states have passed laws restricting the transfer of financial data, and in one case the U.S. Court of Appeals for the Ninth Circuit narrowed (but did not strike down) such a law on federal preemption grounds. *See American Bankers Association v. Lockyer,* 541 F.3d 1214 (9th Cir. 2008). However, since the *Lockyer* decision, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") has curtailed the scope of federal preemption of consumer finance laws, and the court hearing the suit against BoA may have to take Dodd-Frank into account.

This case against BoA should be closely watched by all companies with foreign call centers, especially in those jurisdictions that have protections similar to the D.C. Consumer Protection Act. Ohio's Consumer Sales Practices Act ("CSPA"),

1660 West 2nd Street, Suite 1100 Cleveland, Ohio 44113-1448 firm 216.583.7000 fax 216.583.7001

for instance, contains language similar to the language from the D.C. Consumer Protection Act on which the BoA Plaintiffs rely. Although the CSPA does not generally apply to certain financial institutions, the breadth of its coverage, combined with the BoA Plaintiffs' legal theory, could reach many businesses which use foreign call centers (for example, collection agencies and retail companies). The arguments and defenses raised, the court's rulings on those arguments, and the ultimate disposition by the Court of Appeals for the D.C. Circuit (if the case reaches that point) will form highly relevant precedent for all companies that rely on overseas call centers to service their U.S. customers.