

# One Minute Memo<sup>®</sup>



## Federal Court Denies Class Certification In California Call Monitoring Case

On April 8, 2013, the United States District Court for the Central District of California denied the plaintiff's motion for class certification in *Torres v. Nutrisystem, Inc.*, SACV 12-01854-CJC (JPRx), a lawsuit alleging Nutrisystem violated California Penal Code sections 632 and 632.7.

Penal Code section 632 prohibits the surreptitious recording of confidential communications made over a telephone. Section 632.7 prohibits the surreptitious recording of communications involving a cellular phone. Torres alleged that Nutrisystem secretly recorded a confidential cell-phone conversation she had with the company in August 2012. During the class period Nutrisystem did record calls when customers called its 1-800 number, but at the outset of the call it provided a welcome message that disclosed the call may be monitored or recorded for quality and training purposes. However, callers could bypass the disclosure by hitting any button during the welcome message.

In denying class certification, the court found that Torres did not meet the commonality requirement of Federal Rule of Civil Procedure 23(a) and did not satisfy the predominance requirement of Rule 23(b)(3). The thrust of the court's ruling was that the disclosure during the welcome message undermined the commonality of the class and raised individualized issues as to whether the putative class members had an objectively reasonable expectation of privacy or consented to the recording. Issues such as whether and when class members heard the disclosure and the impact the disclosure may have had on their expectations or consent created uncommon and individualized issues.

But the court also suggested that commonality and predominance may be lacking even absent the disclosure issue. For instance, the court hinted that common issues may be lacking given that it is now well-known that businesses may record customers' communications with their customer service representatives and that certain customers may therefore expect their calls to be recorded even absent a disclosure that the call may be recorded. The court also stated that even if customers had an expectation of confidentiality, individualized issues may arise as the trier of fact would still need to determine if such expectation was objectively reasonable, which in turn is informed by idiosyncratic facts, such as the length of the class member's relationship with the defendant and prior interactions with the defendant.

Finally, although the commonality prerequisite was not met in any event, the court also found that Torres did not satisfy Rule 23(b)(2), which allows for class treatment when injunctive or declaratory relief would apply to the class generally. The provision was not satisfied because the issue had become moot as Nutrisystem reconfigured its welcome message so that the pending disclosure could not be bypassed and Nutrisystem was not likely to allow the disclosure to be bypassed in the future.

By: *Robert Milligan*, *D. Joshua Salinas* and *Daniel Hargis*

*Robert B. Milligan* is a partner, *D. Joshua Salinas* is an attorney and *Daniel Hargis* is an associate in Seyfarth's Los Angeles - Century City office. If you would like further information, please contact Robert B. Milligan at [rmilligan@seyfarth.com](mailto:rmilligan@seyfarth.com), D. Joshua Salinas at [jsalinas@seyfarth.com](mailto:jsalinas@seyfarth.com), Daniel Hargis at [dhargis@seyfarth.com](mailto:dhargis@seyfarth.com) or your seyfarth attorney.