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Court Requires All-Party Consent To Record Interstate Calls with California Residents

A recent California Supreme Court decision requires entities that record or monitor the content of telephone calls with California residents to comply with a California statute mandating the consent of all parties to the call to do so. The Court ruled that all-party consent is required when a California resident is called by, or receives a call from, an out-of-state business – even if the other party's state imposes a lesser standard (such as the more common one-party consent rule that also applies under federal law). This decision establishes an important precedent for entities that record or monitor the content not only of telephone calls, but also of other forms of communication (such as e-mail) that implicate privacy interests.

Recording Communications: The Legal Landscape

Federal law and all 50 states (and the District of Columbia) regulate recording or monitoring the content of certain wire, oral, or electronic communications, including telephone calls (as well as using or disclosing any information that has been unlawfully recorded). The federal Electronic Communications Protection Act ("ECPA"), 18 U.S.C. § 2510, *et seq.*, and most state laws permit such communications to be recorded or monitored only in limited circumstances – for example, by the provider of a communication service in the course of an activity that is necessary for the provision of that service.

Federal and state statutes also allow recording or monitoring the content of communications where one or more of the parties to the communication has provided consent to the recording. But the standard for that consent varies among the laws:

- Federal law and 38 states (and the District of Columbia) generally require only *one* party to the call to provide consent.
- Twelve states generally require *all* parties to the call to provide consent.

California courts have held that ECPA does not preempt state law in this context, and that states may therefore impose more restrictive laws to protect the privacy of wire, oral, and electronic communications.

The *Kearney* Decision

In *Kearney v. Salomon Smith Barney*, 45 Cal. Rptr. 730 (Cal. 2006), defendant's Georgia-based brokers received calls from and made calls to plaintiffs, their California-based customers. Defendant's employees knowingly recorded the calls, but plaintiffs had not been notified of or consented to the recording.

Because one party to the calls was in Georgia, defendant argued that Georgia law – which requires the consent of only one party to record a call – should apply, and that recording the calls was therefore permissible because the Georgia-based brokers had provided consent. In contrast, plaintiffs argued

that California law – which requires the consent of all parties to record a call – should govern, and that recording the calls was therefore prohibited without their consent.

In a unanimous decision, the Court held that both California and Georgia law applied to the calls at issue. Under conflict of laws analysis, the Court then weighed the "comparative impairment" of the statutes "to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state." *Id.* at 753.

- Citing the significant privacy interests of California residents, the Court found that failure to apply the California statute and the all-party consent rule "would substantially undermine the protection afforded by the statute. . . . If businesses could maintain a regular practice of secretly recording all telephone conversations with their California clients or customers in which the business employee is located outside of California, that practice would represent a significant inroad into the privacy interest that the statute was intended to protect." *Id.* at 755.

- In contrast, the Court concluded that application of the California law (and not the Georgia law) "would have a relatively less severe effect on Georgia's interests." *Id.* at 756.

The Court therefore held that the California statute should govern the telephone calls at issue, and that the consent of all parties was required for recording.

Consequences of *Kearney*

Kearney may have significant implications for interstate wire, oral, or electronic communications – including telephone calls, text messages, and e-mail. If other courts follow the precedent in *Kearney*, all interstate communications may be subject to the more stringent applicable state statute.

Scope. Entities should consider obtaining all-party consent to record or monitor the content of communications made to or from any of the 12 states that impose such a requirement. Those states are California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington.

Form of Consent. Under *Kearney*, clear notice and implied consent may be sufficient (at least in some states): "[I]f a business informs a client or customer at the outset of a telephone call that the call is being recorded, the recording would not violate the applicable California statute." *Id.* at 749. Parties that do not consent after being adequately informed "simply may decline to continue the communication." *Id.* Because of the logistical complexities of a state-by-state policy, entities may want to consider a blanket policy of all-party consent. For those entities that do maintain a state-by-state approach:

- For calls *received from* another state, technical tools such as caller ID can help identify where the call originated and whether all-party consent is therefore required. Alternatively, employees answering calls may inquire as to the caller's state of residence.

- For calls *placed to* another state, entities should check the destination area codes before calling to determine whether the recipient is located in a state that requires all-party consent.

Employee Consent. In all-party consent states, employees (i.e., not just customers) must also consent to recording or monitoring the content of communications. For example, a customer service representative should receive clear notice of any recording policy – either on each call or in writing beforehand – and, ideally, provide express, written consent to the policy.

Open Questions. *Kearney* focused specifically on recording telephone calls – and largely on recording calls to or from consumers in a state where all-party consent is required. Because applicable federal and state law generally applies more broadly to all wire, oral, and electronic communications – and in light of developing technology – *Kearney* raised but did not answer several key questions, including:

- Whether other protected forms of communication (such as e-mail and text messaging) would be subject to the same standards, and if so, what constitutes sufficient consent to record or monitor content;
- How state laws would be applied to technology where it is difficult to determine the location of one party (such as e-mail and cell phones); and
- Whether a conflicts analysis would yield the same conclusion where the consumer resides in a state with a lower consent standard than the entity also on the call (e.g., for calls from a consumer in Georgia to a business in California).

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This information is not intended as legal advice, which may often turn on specific facts. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

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