

**Novel Class
Actions Seek
Application
of California
Eavesdropping
Law to
Ordinary
Course of
Business
Telephone
Monitoring
and Recording**

EXECUTIVE SUMMARY

Every day, hundreds of thousands of consumer product and service companies monitor or record their own telephone calls with customers. But several plaintiff class action lawyers have filed cases recently alleging that companies violate certain state privacy statutes by monitoring or recording their own telephone calls with consumers in the ordinary course of business. Almost all of these cases have been filed in California state and federal court, and rely on Section 632(a) of the California Invasion of Privacy Act (“CIPA”), which prohibits any person from eavesdropping upon or recording a telephone call without the consent of all parties to the call. Federal law, 18 U.S.C. §§ 2510 *et seq.*, expressly authorizes ordinary course of business telephone monitoring and recording, exempting this conduct from the federal wiretapping regime. In addition to California, eleven other states¹ and Puerto Rico have “two party consent” telephone recording and eavesdropping statutes, many of which contain an express exception for business call monitoring. CIPA provides for civil fines and a private cause of action, while a number of the other state “two-party consent” statutes do not.

CIPA has been on the books in California for forty years, but has never been used to challenge ordinary course of business call monitoring – by law

enforcement agencies or private parties – until quite recently. When the statute was passed in the late 1960s, its sponsors issued public statements that the law would not impact ordinary course of business call monitoring – a traditional business practice even then. The statute’s sponsors recognized that ordinary course of business call monitoring is pro-consumer. But plaintiff lawyers in the California cases have argued that CIPA requires a business to disclose its call monitoring protocols at the beginning of every telephone conversation, and that consumer privacy rights are harmed by undisclosed monitoring.

No California court – state or federal – has ever adjudicated the applicability of this statute in a contested and final judgment. Defendants have argued variously that federal law preempts CIPA, and that a corporation is incapable of “eavesdropping” on itself under CIPA.² But most of these novel cases have settled before reaching final judgment, and these settlements are stoking the fire for more cases in this area. In a recent California Supreme Court decision, the state’s highest court assumed, without deciding, that CIPA applied to business call monitoring. But a series of decisions from the California Public Utilities Commission (“CPUC”) seems to indicate that business call monitoring is outside the scope of CIPA and falls exclusively within that agency’s jurisdiction.³

¹ Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington.

² See, e.g., *Copperweld Corp. v. Independence Tube Corp.*, U.S. 752 (1984); *Tobman v. Cottage Woodcraft Shop*, 194 F. Supp. 83 (S.D. Cal. 1961).

³ See CPUC General Order 107-B, 11 CPUC2d 692 (CPUC 1983).

If a court rules that California's CIPA statute applies to ordinary course of business call monitoring and recording, the ruling could have broad implications for every business that monitors its telephone interface with consumers. Interstate companies that are relying on federal law – or laws of the states where they are located – will be at risk to class action litigation in California.

THE CALIFORNIA SUPREME COURT RECENTLY HELD THAT THE STATE'S EAVESDROPPING LAW APPLIES TO CALLS TO OR FROM CALIFORNIA RESIDENTS

In *Kearney v. Salomon Smith Barney*, the California Supreme Court was presented with a narrow choice-of-law question about whether CIPA applies to telephone calls received in California but originating outside the state. The case came up to the high court on a demurrer that had been sustained in the trial and appellate court, holding that CIPA did not apply to calls originating from outside California. In *dicta*, the California Supreme Court assumed – without analysis – that CIPA applies to ordinary course of business call monitoring and recording. But that issue was not before the court and was never raised by the parties.

In *Kearney*, two California consumers filed a class action against Salomon Smith Barney (“SSB”), alleging that the brokerage firm recorded telephone conversations between the consumers and employees at SSB’s Atlanta office without disclosing that the calls were being recorded. SSB demurred, asserting that the case should be dismissed because Georgia law – which requires the consent of only one party to the call – should apply instead of CIPA because the calls at

issue were made to or from SSB’s Atlanta office. SSB further contended that if the consent of only one party is necessary, then SSB did not have to disclose the recording practice because SSB’s consent, alone, satisfied the consent requirement. SSB’s demurrers were twice sustained at the trial and appellate courts before California’s highest court overturned those rulings. The California Supreme Court decided that California law applied, with some significant limitations, because:

- (1) California has a strong interest in prohibiting the recording of calls without the consent of all parties;
- (2) Allowing out-of-state recording of telephone conversations with California residents without obtaining the residents’ consent would significantly impair the privacy rights embodied by CIPA; and
- (3) Application of California law would not significantly undermine the policy behind the relevant Georgia statute.

Accordingly, the court determined that California’s requirement that all parties consent to the recording applies instead of Georgia’s “one-party” consent requirement. The court, however, applied CIPA in a very restrained manner, repeatedly stressing that CIPA only protects California *resident* consumers; CIPA does not compel any action or business conduct with regard to conversations with non-California consumers. Moreover, the court refused to impose damages for pre-July 2006 violations on grounds that, prior to the ruling, out-of-state businesses were justified in their past reliance on their own state law.

**SAFEGUARDS AGAINST
 LIABILITY UNDER CALIFORNIA'S
 EAVESDROPPING LAW**

No California court has yet ruled that the state's eavesdropping law applies to monitoring or recording of calls in the ordinary course of business. However, in light of the *Kearney* decision and the recent eavesdropping class actions, companies that do business in California may want to consider implementing procedures designed to ensure compliance with the state's "two-party" consent requirement. Such procedures should include disclosing to consumers that a call may be monitored or recorded *before* the monitoring or recording begins. A business may notify all consumers that calls may be monitored or recorded, or make the disclosure only to persons located in California.

FOR MORE INFORMATION

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