

California Court Rejects Latest Challenge to Business Telephone Monitoring

EXECUTIVE SUMMARY

A federal court in San Diego, California, has granted summary judgment to teleservices company GC Services L.P. in a case challenging the company's telephone monitoring practices. *Thomasson v. GC Services L.P.*, Case No. 05cv0940-LAB (S.D. Cal. July 16, 2007). GC Services provides call center and debt collection services to a variety of government and commercial clients. Plaintiffs argued that the company's practice of monitoring its own telephone calls for quality control purposes violated the federal Fair Debt Collection Practices Act ("FDCPA") and the privacy laws of California and a number of other states.

In a July 16, 2007 ruling, the U.S. District Court for the Southern District of California ruled that the monitoring practices at issue were undertaken in the ordinary course of business and that GC Services enforced policies to disclose its monitoring programs, so there was no FDCPA violation or invasion of privacy under California law. The complaint sought a nationwide class action on behalf of every person that had telephone conversations with GC Services that were monitored or recorded in twelve specified states.

REPEATED CHALLENGES

The *Thomasson* decision is the latest installment, and perhaps last, in a series of class action lawsuits that have challenged ordinary course of business telephone monitoring under state eavesdropping

and wiretapping statutes. Many of these cases have been filed in California state and federal court, and nearly all of them have settled for several million dollars. The cases have relied 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. In addition to California, eleven other states and Puerto Rico have adopted "two party consent" telephone recording and eavesdropping statutes. Federal law (18 U.S.C. §§ 2510 et seq., ("Title III")) expressly authorizes ordinary course of business telephone monitoring and recording, exempting this conduct from the federal wiretapping regime.

One issue presented in the *Thomasson* case is whether a company's supervisory employees can be considered eavesdropping "third persons" with respect to conversations between other company employees and customers – a contention that the court called "dubious." The court did not reach the issue of whether California Public Utility Commission regulations expressly preempt private suits challenging business call monitoring.

CALIFORNIA CASE LAW

The *Thomasson* decision follows last year's California Supreme Court decision in *Kearney v. Salomon Smith Barney*, which attempted to resolve a recurring question about whether CIPA applies to telephone calls in-bound to California

from other states. *Kearney* involved two California consumers who filed a class action against Salomon Smith Barney (“SSB”), alleging that the brokerage firm’s Atlanta office recorded telephone conversations between its employees and customers located in California, without disclosing the practice. SSB demurred, asserting that the case should be dismissed because Georgia law—which requires the consent of only one party to the call—governed the actions of its 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 them.

The California Supreme Court decided that California law applied to out-of-state telephone recording, 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 consent, significantly impairs the privacy rights embodied by CIPA; and

3. Application of California law would not significantly undermine the Georgia statute’s policies and goals.⁽ⁱ⁾

Accordingly, the court determined that California’s requirement that all parties consent to the recording applies instead of Georgia’s “one-party” consent requirement. In *dicta*, the California Supreme Court assumed – without analysis – that CIPA applies to business call recording. But whether CIPA applies at all to business call monitoring was never raised by the parties nor before the *Kearney* court.⁽ⁱⁱ⁾ The *Thomasson* decision issued earlier this week by the San Diego federal court suggests that it may not.

FOR MORE INFORMATION

GC Services was represented by Kelley Drye & Warren privacy litigation attorneys Thomas E. Gilbertsen, William M. Bailey, Daniel S. Blynn and Dawn E. Murphy-Johnson. For more information about the attorneys involved, please visit www.kelleydrye.com/attorneys. They can be contacted directly at:

- Thomas E. Gilbertsen.....tgilbertsen@kelleydrye.com
- William M. Bailey.....wbailey@kelleydrye.com
- Daniel S. Blynn.....dblynn@kelleydrye.com
- Dawn E. Murphy-Johnson.....dmurphy-johnson@kelleydrye.com

(i) See *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 934-937 (Cal. 2006).
(ii) The Massachusetts Supreme Court has held that, under similar factual circumstances, Massachusetts’ privacy statute (Mass. Gen. Laws ch. 272, § 99) was not implicated by ordinary course of business call monitoring and recording. See *O’Sullivan v. NYNEX Corp.*, 687 N.E.2d 1241 (Mass. 1997). *O’Sullivan* held that Massachusetts’ law was not violated where a telemarketing company recorded upwards of 90,000 business calls without disclosure. The court explained that the company had a legitimate business interest in managing the quality of telephone transactions made by its telemarketers to consumers, and that such ordinary course of business call monitoring is not actionable under that Commonwealth’s privacy statutes. *O’Sullivan*, 687 N.E.2d at 1245-46.