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The California Supreme Court holds that undisclosed recording of telephone calls with California residents violates California law, even if the recording is made outside of California and is lawful where made.

California's Supreme Court Requires Employers Nationally to Re-Examine Telephone Monitoring Policies and Practice

By Philip L. Gordon and John M. Julius III

In a unanimous decision with national implications, the California Supreme Court ruled July 13, 2006, in *Kearney v. Solomon Smith Barney, Inc.* ("SSB"), that out-of-state businesses are prohibited from secretly monitoring or recording their telephone calls with California residents, *even if that conduct takes place in any of the 38 states (and the District of Columbia) where only one party's consent is required to lawfully monitor or record a telephone call.* The ruling, at a minimum, will require all employers whose employees communicate by telephone with any of California's 36 million residents to re-examine their policies and practices for monitoring and recording telephone calls. The decision most likely will have an even broader impact as the highest courts of the 11 other states which, like California, prohibit monitoring or recording telephone calls without the consent of all parties to the communication, are likely to follow California's lead when interpreting their own states' privacy laws.

Consequently, a single employee who is not aware of this new ruling and its broader implications could expose an organization to significant potential liability under state privacy laws through undisclosed recording of telephone calls with customers, business partners, vendors or coworkers in California or the 11 states with similar wiretap laws. Though acting lawfully in his own state, the employee potentially would be violating the privacy rights of each person who is recorded during each call that is recorded. Because California's wiretap law, and some similar state statutes, provide for minimum statutory damages (even without proof of actual damages) and for an award of attorneys' fees to the prevailing party, a putative class action arising out of such conduct becomes a real possibility. Indeed, this is precisely the scenario that SSB confronted in the *Kearney* case.

SSB's "Secret" Recording Was Legal in Georgia But Unlawful in California

In *Kearney*, the two named plaintiffs were California residents employed in California. During the course of their employment, both were granted options in their employer's stock that could be exercised only through SSB. Instructed to contact SSB's Atlanta office for issues involving the options, both plaintiffs, while in California, had numerous telephone calls with brokers in SSB's Atlanta office.

Plaintiffs alleged that in unrelated litigation against SSB, they learned that the Atlanta brokers had routinely recorded their telephone conversations without plaintiffs' consent. Plaintiffs then sued SSB in a putative class action, alleging violations of California's 1967 Invasion of Privacy Act ("the Act"). The Act, among other things, prohibits any person from monitoring or recording

a telephone conversation without the consent of all parties to the communication (often referred to as a "two-consent" requirement). The Act permits recovery of treble damages or $5,000 per violation, whichever is greater.

SSB defended plaintiffs' claims on the theory that Georgia law regulated the company's conduct because that is where the recording occurred. Under Georgia law, any party to a telephone conversation may record the conversation or consent to monitoring by someone else (often referred to as a "one-consent" requirement). SSB asserted that its brokers' consent to the "secret" tape recording established the lawfulness of their conduct under Georgia, law, and because Georgia law regulated the brokers' conduct, plaintiffs' claims under California law should be dismissed.

The California Supreme Court Rules that California's Two-Consent Requirement Trumps Georgia's One-Consent Requirement

Though successful in obtaining dismissal of plaintiffs' claims in the trial court and unanimous affirmance in the California Courts of Appeal, SSB suffered total defeat before the California Supreme Court. The Supreme Court resolved the conflict between California and Georgia law in favor of California's two-consent requirement.

The court reasoned that California had a strong interest in regulating the recording at issue — even though the responsible SSB employees were located in Georgia. The court emphasized that plaintiffs were California residents, located in California, when the recording occurred. From the court's perspective, plaintiffs' location meant that the recording effectively occurred in both California and Georgia. Consequently, California had a strong interest in applying its laws to protect the privacy rights of state residents.

The court found no unfairness in subjecting SSB to California's wiretap laws for two reasons. First, SSB did business in California and should be aware of the California requirement. Second, the burden of requiring SSB's Atlanta employees to follow California's two-consent requirement was low, requiring only notice to participants that their calls were being monitored. Conversely, applying Georgia law would significantly impair the privacy rights of California residents.

The court did absolve SSB from liability for monetary damages under the Act because the court's decision was one of first impression. The court warned, however, that other out-of-state businesses were now on notice of the Act's extraterritorial reach.

The Implications of the Court's Decision

Kearney requires that out-of-state businesses determine when they are communicating with California residents and abide by California's two-consent requirement for recording of conversation. Given that California has the world's sixth largest economy, a substantial number of businesses will be required to re-examine, and potentially revise, their policies and practices for monitoring or recording telephone calls to comply with California law.

The *Kearney* decision is likely to have a far broader impact. To date, California's Supreme Court is the only highest state court to face this issue. Moreover, six of the seven lower court decisions that have addressed a similar conflict have reached the opposite conclusion. Thus, *Kearney* may mark a turning point in the resolution of an issue which is likely to arise in each of the other 11 two-consent states. These states include densely populated economic powerhouses, such as Florida, Illinois, Michigan, and Pennsylvania, as well as Connecticut, Maryland, Massachusetts, Montana, Nevada, New Hampshire and Washington.

The highest court in some, if not all, of these states is likely to follow *Kearney* as the decision is authoritative, unanimous, and authored by the Chief Justice of the supreme court of the nation's most populous state. Moreover, the principal underpinnings of the decision — the protection of residents of two-consent states, the minimum burden for businesses in a one-consent state to provide notice, and the fairness of requiring out-of-state businesses that operate in a two-consent state to comply with the laws of that state — apply with equal force in every two-consent jurisdiction.

In sum, any business in any of the 39 one-consent jurisdictions that secretly monitors or records telephone calls with a resident of any of the 11 two-consent states now is at risk of being on the losing end of a lawsuit alleging violations of the two-consent state's wiretap laws and other privacy-based claims.

Best Practices in Light of the *Kearney* Decision

Employers operating businesses that involve routine monitoring or recording of telephone calls will need to prohibit undisclosed monitoring or recording of calls with California residents. These employers also should evaluate whether to obtain the consent of all parties to all monitored conversations regardless of whether the parties to the call are located in California, in another two-consent state or in a one-consent state. While not required to obtain the consent of all parties for calls between the 39 one-consent jurisdictions, many multi-state businesses may confront an administrative nightmare trying to switch between unannounced recordings and announced recording depending upon the location of the non-employee parties to the call.

These employers should note that the

often-heard, pre-recorded reminder that a call "may be monitored for quality assurance purposes" often will not suffice to establish the consent of their own employees. Business telephone systems typically are configured so that service agents who answer the business' telephones do not hear the pre-recorded message. Consequently, these employers will need to implement a policy aimed at obtaining their own employees' consent. To do so, employers should provide separate notice to their employees of the following: (a) the reasons for monitoring, (b) how, when, and by whom the monitoring will be effectuated, (c) the categories of employees whose calls will be monitored, and (d) the non-monitored telephone lines available for personal calls. Employees should be required to acknowledge receipt of, and consent to, the policy, and the acknowledgement should be placed in the employee's personnel file.

A more challenging problem now arises when a business wants to record surreptitiously — for example, to create a record of negotiations at a critical juncture of a transaction without any offending the sensibilities of any of the participants. To begin with, employers should notify all employees that unannounced monitoring or recording of telephone calls with California residents is prohibited. In addition, any secret recording of telephone calls with a resident of any other two-consent state must be approved either by the corporate legal department or by senior management, and then only on the following bases:

- There is a legitimate reason for recording and for doing so surreptitiously.
- The benefits of recording surreptitiously outweigh the potential damages resulting from successful privacy-based claims, keeping in mind the significant likelihood that any such lawsuit would take the form of a class action.
- The employee who does the recording must determine the location of all participants to the call before the call commences and of any unanticipated participant when that person joins the call — either by technical means, such as Caller ID, or by asking. The employee must immediately stop recording if the unanticipated participant is located in California (or request that person's consent and the consent of all other parties to the call).
- The employee who does the recording should have a contingency plan in the event an unanticipated participant located in a two-consent state besides California joins the call.
- If the employee who does the recording will be relying upon Caller ID to identify the location of the caller, he or she should be provided a current list of area codes for all two-consent states.

Conclusion

The California Supreme Court's decision effectively bars all undisclosed monitoring or recording of telephone calls with California residents, even if done in a one-consent state. At the same time, the decision creates a risk that undisclosed recording of callers located in any of the other 11 two-consent states will violate state wiretap laws. Accordingly, employers in the 39 one-consent jurisdictions should revisit their policies and practices for monitoring and recording telephone calls to reduce the risk of liability for violating the wiretap laws of two-consent states.

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