

**CALIFORNIA PROTECTS PHONE CALL
PARTICIPANTS IN CALIFORNIA
FROM UNCONSENTED OUT-OF-STATE RECORDINGS**

California is the latest state to illustrate that no reliable judicial or statutory guidance exists on choice of law issues arising where an interstate communication implicates the laws of states with different domestic interception and recording rules. Practical considerations and the few decisions indicate that the most likely choice will be made by the forum court to serve its perception of the local state interest.

In *Kearney v. Salomon Smith Barney, Inc.*, No. S124739 (Cal. July 13, 2006), a case arising out of WorldCom litigation, the California Supreme Court has held on choice of law principles that Salomon Smith Barney's routine recording in Georgia of telephone conversations with customers in California gives rise to a claim under California's all-party-consent statute. The claim would not have survived, however, if SSB had given advance notice of the recording.

The plaintiffs were California residents who opened accounts with SSB in Georgia for the exercise of WorldCom options. When they learned in the ensuing litigation that their telephone conversations had been taped, they filed suit seeking an injunction and monetary damages under the California privacy and business regulation statutes. The trial court dismissed the complaint, concluding that the recordings were not an unfair business practice because they did not violate Georgia or federal law, and that less restrictive federal law preempted the claim for invasion of privacy under California law. The appellate court affirmed, holding on choice of law grounds that Georgia had the stronger interest because the recording was made there.

The Supreme Court reversed, easily rejecting the preemption ruling on the basis of congressional history and a strong line of cases confirming that the federal one-party-consent is a minimum that allows more restrictive rules by the states. In choosing the applicable law, it held that the place of recording was not as decisive as the respective state's interest in the privacy of its residents. Thus, where someone in another state secretly records her conversation with someone in California, the California resident has a claim in California court; and, where the recording is conducted in a business context, the privacy violation may also be a violation of the state's unfair competition law. As added weight, the court observed that a different rule would put California business competitors at a disadvantage. Recognizing that its choice of law decision could not have been predicted with certainty, the court denied the plaintiffs any opportunity for money damages. Now that its decision has brought certainty to the issue, however, monetary recovery will be available in the next case.

Other courts in both one-party and all-party consent states demonstrate that, if any prediction can be made of the choice of law, it will favor the forum state's policies. *See Koch v. Kimball*, 710 So. 2d 5 (Fla. Dist. Ct. App. 1998) (finding that an un-noticed recording in Georgia of conversations originating in Florida violated the rights of Florida residents); *Becker v. Computer Sciences Corp.*, 541 F. Supp. 694 (D. Tex. 1982) (determining that the Texas one-party-consent statute governs suit in Texas federal court where recordings were made in California, an all-party consent state); *Mustafa v. State*, 591 A.2d 481 (Md. 1991) (concluding Maryland's all-party consent provision precluded admission in evidence of a tape-recorded communication which was legally intercepted under the District of Columbia law); *MacNeill Eng'g Co. v. Trisport, Ltd.*, 59 F. Supp. 2d

199 (D. Mass. 1999) (concluding Massachusetts residents have no claim against un-noticed recordings made in other one-party consent states); *State of Hawaii v. Bridges*, 925 P.2d 357 (Haw. 1996) (finding that the Hawaii eavesdropping statute was not intended to have extra-territorial affect, and, therefore, would not operate to suppress evidence obtained by Hawaiian law enforcement agents in California in compliance with federal or California law, even if it would have violated Hawaii eavesdropping statute); *Wehringer v. Brannigan*, 1990 U.S. Dist. LEXIS 16447 (S.D.N.Y. November 30, 1990) (holding that New York residents in one-party consent state have no claim in New York federal court for recordings that violate all-party consent statute in another state).

Business reaction to the decision in *Kearney* predicted great difficulty for national businesses needing routinely to record conversations. To the contrary, *a simple pre-conversation advisory that the call may be monitored* – already standard in many contexts – can readily resolve any exposure in an all-party-consent state. The effect of the decision will have more impact, however, in situations where a recording is necessary to preserve an accurate record but the circumstances indicate that an unaware speaker would not talk if he knew the conversation was being recorded.

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July 2006