



California's Invasion of Privacy Act

Your right to know whether your call is being recorded

BY JASON IBEY

California consumers are familiar with automated or oral warnings by companies that their telephone conversation may be recorded. Whether it is a call from a debt collector or to one's own credit card company, consumers these days expect to hear the warning, "This call may be monitored or recorded for quality assurance purposes," or something similar.

But what happens when a company audio-records your telephone conversation without your knowledge or consent? Or, what if you are not informed until towards the end of a lengthy conversation that everything you have said has been recorded? You may be entitled to statutory damages in the thousands of dollars for each unlawfully recorded telephone call for an invasion of your right to privacy.

Under California's Invasion of Privacy Act, California Penal Code section 630, et seq. ("CIPA"), an individual has the right to certain protections in their telephonic communications, whether they are talking on a cell phone or a landline. The standards are different depending on the type of telephone being used by the consumer.

Landline vs. cell phone

For calls where the individual is using a landline, there must be a reasonable expectation of privacy in the communication before there can be a potential violation for recording the call without knowledge or consent. Courts often look to the content of the information disclosed and the surrounding circumstances to determine whether there was a required "confidential communication" (Cal. Pen. Code, § 632(a); *Brown v.*

Defender Sec. Co., No. 12-cv-7319-CAS (PJWx), 2012 U.S. Dist. LEXIS 153133, at *9 (C.D. Cal. Oct. 22, 2012).)

When the individual is using a cellular telephone, however, the Penal Code imposes strict liability, meaning the content of the communication does not have to be of a private nature. The mere act of audio-recording a cell phone conversation without knowledge or consent is a violation, even if the person recording does not know that the call involves a cell phone. (See Cal. Pen. Code, § 632.7(a); *Brown*, 2012 U.S. Dist. LEXIS 153133, at *10-14.) This section applies to parties to the communication as well as non-parties who intercept the communication. (*Montantes v. Inventure Foods*, No. 14-cv-1128-MWF (RZx), 2014 U.S. Dist. LEXIS 95266, 2014 WL 3305578, at *2-4 (C.D. Cal. July 2, 2014).)

Effective January 1, 2017, the California Legislature modified the language of California Penal Code section 637.2(a)(1), permitting recovery of "Five thousand dollars (\$5,000) per violation." At least one federal court has ruled that this modification was a clarification and not an amendment, meaning that a person harmed under this code may be entitled to statutory damages of \$5,000 for each and every unlawfully recorded call, even if the call predates 2017 when the code did not expressly include the "per violation" language. (*Ronquillo-Griffin v. Telus Commun., Inc.*, No. 17-cv-129-JM (BLM), 2017 U.S. Dist. LEXIS 99577, at *16 (S.D. Cal. June 27, 2017).)

Importantly, the CIPA provides a private right of action in a civil lawsuit, even though it is found in California's Penal Code. (Cal. Pen. Code, § 637.2(a).) It only applies to persons within the State of California at the time of the calls, but businesses (including individuals)

outside of California must still comply with its requirements when they call, or receive a call from, a person within California. (See *Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 116-26.

Courts have held that there is only a one-year statute of limitations for a violation under section 637.2. (*NEI Contr. & Eng'g, Inc. v. Hanson Aggregates Pac. Southwest, Inc.*, No. 3:12-cv-01685-BAS (JLB), 2015 U.S. Dist. LEXIS 37183, at *9 (S.D. Cal. Mar. 24, 2015).) However, there may be an argument for equitable tolling if the consumer was not aware that their call had been secretly audio-recorded without their permission. (*Ramos v. Capital One, N.A.*, No. 17-cv-00435-BLF, 2017 U.S. Dist. LEXIS 118162, at *23 (N.D. Cal. July 27, 2017).)

Is it being recorded?

A major challenge to protecting Californians is the difficulty of discovering whether a call is or has been recorded when the company or individual does not disclose that fact. One option is for consumers to ask at the beginning of the call whether the call is or will be recorded. Fortunately, some companies will turn off call recording on a given call if asked to do so, but others refuse. It is currently unclear whether refusal to turn off call recording is legally actionable. Some defendants will argue that continuing with the call even after an untimely disclosure amounts to implied consent to call recording.

People often do not learn that their calls have been secretly recorded until that information is obtained in discovery as part of a separate lawsuit by the consumer in an action such as unfair debt collection or unwanted automated calls. Despite the fixed statutory damages,



many companies continue to record telephone calls without a disclosure or do not timely provide a call-recording disclosure, thereby subjecting themselves to a potential class action.

Consumers should be aware that they have a right to know whether their calls are being recorded, and can recover statutory damages, and actual damages if any, for a violation of this California law. They can also help protect their privacy

by asking companies not to record their communications. Lastly, consumers should watch out for language in written contracts that purport to obtain consent for the company to record all future calls. If such language is hidden within a standard form contract, or terms and conditions, there may be an argument that such provision is unconscionable and therefore unenforceable.

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