

Limiting Your Right to Privacy in Collections

By Michael Doukas



phone to contact you about your Account or to offer you products or services that may be of value to you. If you prefer not to be contacted in one or more of these ways, you must either telephone us at **1-800-DISCOVER** (1-800-347-2683) or write to us at Discover, PO Box 30961, Salt Lake City, UT 30961-0961

California takes the strong position that recording a telephone conversation requires the consent of both parties to the conversation in order to protect the privacy of Californians. See California Penal Code §§630-637.9. In fact, California has taken the extraordinary step of including a private right of action in the Penal Code to give consumers recourse in civil court if their privacy has been compromised through the illegal recording of their telephone conversations. Many states, Georgia for example, do not provide such protections, requiring consent to recording from only one side of the conversation.

What is a creditor to do so its debt collectors can record California consumers with little resistance and with only the constructive knowledge and consent of consumers? Let's look at Discover Bank's Discover Card as a case study. If you examine the current, adhesive contract from Discover for its credit card, the right to record telephone calls is buried therein:

Our Communications with You. You agree that our personnel may listen to or record telephone calls between you and our representatives without additional notice to you, including but not limited to calls we make to collect debts. We may use any medium permitted by law, including but not limited to mail, live telephone calls, automated telephone equipment, prerecorded telephone calls, e-mail and calls to your cell

The desired consequence of this provision is to limit any reasonable expectation of privacy a Californian might have in dealing with Discover representatives on the telephone, and that includes with their collection agents or any outside debt collector they may hire. While the provision allows a customer to "opt out," doing so means losing the opportunity to address matters over the telephone with customer service as most consumers do.

Without the apparent need for further notice, Discover has gotten agreement to record all their dealings with you about your Account. For good measure, laws preventing the calling of cell phones without permission, or auto dialing for marketing purposes, have been circumvented as well.

In regard to California, the provision's intent is to circumvent substantial privacy protections afforded California consumers in California Penal Code §§630-637.9. Does it succeed?

Let's begin by looking at some implications of the Penal Code. For example, what happens when the caller is in another state, such as Georgia, calling a California consumer and seeking to record that telephone conversation? When the caller is outside of California, but the consumer is in California, the aforementioned statute still applies. *Kelly Kearney, et al v. Salomon Smith Barney, Inc.*, 39 Cal.4th 95, 137 P.3d 914 (Cal. July 2006). The California Supreme Court made it clear that California's right to protect its consumer's privacy is superior to the rights of other states to impose lesser restrictions.

What Discover Bank has sought to do in its adhesive contract is to secure *a priori* consent to record *any and all* conversations and eliminate any reasonable ex-

pectation of privacy Californians might have. If California law were the law of choice, the contract might well be found against public policy in the Golden State. However, another clever provision of the Discover contract is to specify federal and Delaware law as the laws of choice for contract interpretation, which is of little avail to Californians.

However, the *Kelly Kearney* court implies in dicta that consent must be given to *each* recording of a telephone conversation and offers an example of how that would be done – the familiar notice at the beginning of a conversation that, “this call is being recorded.” In *Yoon v. Discover*, CV08-04886 MMM (MANx), a trial court case from the U.S. District Court, Central District of California, the plaintiff argued just that position. If plaintiff’s argument were successful, it would make Discover’s *a priori* contract provision moot. However, the federal trial court in *Yoon* took the questionable position of interpreting the intent and meaning of the California Statute on its own,

rather than deferring to the California Supreme Court’s dicta. The *Yoon* court thought the dicta in *Kelly Kearney* were at odds with the meaning of the statute and was, therefore, unpersuaded, choosing to substitute its own interpretation, namely, that the Discover contract provision was consent for any and all conversations to be recorded.

It remains for the California Supreme Court to review this issue and inform litigants whether the Discover contract provision goes too far or hamstring unwary consumers. For the time being, it is important to review all credit card contracts of adhesion to see if California’s privacy protections have been minimized through onerous contract provisions.

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