California Corporate & Securities Law

Corporations Have The Right Of Free Speech But No Right To Eavesdrop

By Keith Paul Bishop on November 22, 2011

In 1967, the California legislature enacted Penal Code § 632 as part of the "California Invasion of Privacy Act". The statute imposes liability on "Every *person* who, intentionally and without the consent of all parties to a *confidential conversation*, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication . . . . ." (emphasis added).

Does § 632 apply when a corporation's supervisory employees secretly monitor conversations between a customer and other corporate employees? San Diego Superior Court Judge William R. Nevitt, Jr. thought not, reasoning that the statute does not apply because it requires a third party and in this case there are only two parties – the corporation and the customer.

In an opinion issued yesterday, however, the California Court of Appeal disagreed. Kight v. CashCall, Inc. involved phone conversations that were monitored, but not recorded, by a corporation's supervisors for quality control purposes. The Court of Appeal found that while the statute defines "person" to include a corporation, the corporation is not a single unit and all participants to the conversation must give their consent. In doing so, the court had to distinguish *Black v. Bank of America,* 30 Cal. App. 4th 1 (1994) which held that for purposes of tort law there can be no conspiracy between a corporation and its employees because a corporations cannot conspire with itself. The court did so based on what it perceived to be the legislative purpose underlying § 632.

Although the Court of Appeal ruled against the corporation, it is too early for the plaintiffs to break open the champagne. They still must prove that they had an objectively reasonable expectation that their conversations were not being overheard or recorded. In this regard, the corporation argued there could be no reasonable expectation when the plaintiffs knew that the information provided to one corporate employee would be disclosed to others. The Court of Appeal concluded, however, that this knowledge does not change the confidential character of a communication for purposes of the statute.

Kight has implications for all corporations who communicate with their customers, including broker-dealers, investment advisers, and lenders.

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Although *Kight* involved telephone calls, there is nothing new about eavesdropping. The term actually is derived from the Old English word, *yfesdrype,* referring to the place where rainwater drips from the eaves of a house. Old English was the language of England from shortly after the departure of the Romans in 410 CE until shortly after the invasion of the Normans in 1066 CE. The fact that an Old English term survives in a modern statute testifies to the fact that eavesdropping is not a creature of technology but of human nature.

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