

Defense Options After Calif. High Court Call-Recording Ruling

By **Neal Marder, Brett Manisco and Lauren Huennekens** (April 6, 2021)

On April 1, the California Supreme Court ruled in *Smith v. LoanMe Inc.* that California Penal Code Section 632.7 prohibits both parties to a communication and nonparties, such as an individual who covertly intercepts and eavesdrops on a phone call, from recording a communication without the consent of all participants.

In so holding, the court increased the privacy protections for covered communications and aligned the protections afforded to calls involving cellular or cordless phones with the safeguards applicable to calls involving only landlines.

Background

This case arose out of a brief phone conversation between the defendant, LoanMe Inc., and the plaintiff, Jeremiah Smith.

After LoanMe extended a loan to the plaintiff's wife, a LoanMe employee called a phone number provided by the plaintiff's wife. The plaintiff answered, advised the LoanMe representative that his wife was not home, and hung up the phone 18 seconds after the call began.

Unbeknownst to the plaintiff, LoanMe had recorded the call. The LoanMe representative did not orally advise the plaintiff that the call was being recorded. Rather, three seconds into the call, LoanMe simply caused a beep tone to sound.

In September 2016, the plaintiff then brought suit on behalf of a putative class consisting of:

[a]ll persons in California whose inbound and outbound telephone conversations involving their cellular or cordless telephones were recorded without their consent by [LoanMe] or its agent/s within the one year prior to the filing of this action.

The plaintiff alleged that the recording of these calls violated California Penal Code Section 632.7 which provides that, every person who, "without the consent of all parties to a communication, intercepts or receives and intentionally records, or assists in the interception or reception and intentional recordation of, a communication transmitted between" a cellular or cordless telephone and another telephone "shall be punished by a fine not exceeding" \$2,500.

In the first part of a bifurcated bench trial, the Superior Court of Riverside County was tasked with deciding whether the plaintiff consented to having the phone call recorded by continuing the conversation after LoanMe activated the beep tone. The trial court held that the tone gave the plaintiff adequate notice that the call was being recorded and entered judgment in LoanMe's favor.

On appeal, the California Court of Appeal's Fourth Appellate District did not reach the



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consent issue decided by the trial court, instead taking up the question of whether Section 632.7 prohibits a party from intentionally recording a communication transmitted to or from a cellular cordless phone or whether the section forbids only the intentional recording of such communications by persons other than parties — i.e., third-party eavesdroppers.

The appellate court concluded that Penal Code Section 632.7 applies only to nonparties and does not forbid a party to a phone call transmitted to or from a cellular or cordless telephone from recording the conversation without the consent of the other party or parties. The appellate court reasoned that the statute requires that the interception or receipt of the covered communication be without the parties' consent, but the parties to a phone call always consent to the receipt of their communications by each other.

Consequently, the parties to a phone call are incapable of violating Section 632.7 because they do not intercept or receive each other's communications without all parties' consent.

Opinion

Relying on the text of the statute, its legislative history and public policy, the California Supreme Court reversed the appellate court's decision.

The Supreme Court began its analysis by looking at the context of Section 632.7. The court reasoned that the purpose of the statute was to protect the right of privacy by requiring that all parties consent to a recording of their conversation. The Legislature then augmented the statutory scheme to take account of privacy issues raised by the increased use of cellular and cordless telephones.

The court also examined its 2002 decision, *Flanagan v. Flanagan*, in which it held that a conversation is confidential if a party to the conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded. The court emphasized that interpreting "confidential" this way was more consistent with the protections conferred by Sections 632.5, 632.6 and 632.7, which protect against interception or recording of any communication.

The court then looked to the language of Section 632.7 in this context, determining that it is most naturally read as prohibiting both parties and nonparties from intentionally recording a covered communication without the consent of all parties to the communication. Specifically, the court focused its analysis on the phrasing "[e]very person who, without the consent of all parties to a communication, intercepts or receives and intentionally records ... a communication."

The court read Section 632.7(a)'s consent language as directed at the recording component of the offense with the section's "intercepts or receives" phrasing specifying the circumstances in which a person may become privy to a covered communication. Under this interpretation, the court found that there is no doubt regarding its applicability to parties as well as nonparties to a communication.

The court held that although parties might normally be regarded as consenting to the receipt of their communications by other parties to a call, this acquiescence would not, by itself, necessarily convey their consent to having these communications recorded.

The court found that the legislative history of A.B. 2465 comports with the court's reading of Section 632.7 as announcing a general prohibition against the intentional recording of a covered communication without the consent of all parties, regardless of whether the

recording is performed by a party to the communication or someone else.

The court further reasoned that to hold that Section 632.7 applies only to nonparties would require concluding that the Legislature was content with retaining a substantial gap between the protections attached to landline communications and those afforded to calls involving a cellular or cordless telephone. The court found such a view of legislative intent difficult to square with the historical record and in tension with the court's prior analysis of the statutory scheme in Flanagan.

Finally, the court found its interpretation of Section 632.7 as applicable to recording by parties to be in line with public policy, as it better promotes the statutory scheme's goal of protecting privacy in communications.

Takeaways

Courts have previously been split on whether Section 632.7 applies to the intentional recording of a cellular communication by a party. With this decision, the California Supreme Court joins the majority of federal district courts that have considered the same issue, concluding that Section 632.7 applies to parties and nonparties alike.

Despite the court's decision, defendants still have a chance of successfully defeating Section 632.7 claims on the merits. While the trial court disposed of this case on the grounds that the beep tone at the start of the call put the plaintiff on notice of the recording, the California Supreme Court did not reach this issue or express an opinion on it.

Additionally, claims under Section 632.7 are vulnerable at the class certification stage even with this legal ruling. Plaintiffs seeking to certify a class will face an uphill battle in satisfying the commonalty, typicality and predominance requirements, as individual inquiries will often be required into the timing of the recording disclosure and whether class members actually consented to the recording.

Nonetheless, companies that do business and communicate with customers in California are well advised to implement policies and procedures ensuring that their representatives notify call recipients if a call is being recorded at the outset of any conversation.

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