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# California Supreme Court Clarifies Requirement of Two-Party Consent to Record Telephone Calls

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When it comes to recording telephone calls, it takes two to consent, at least in California. That is what the California Supreme Court recently confirmed in *Smith v. LoanMe, Inc.*, No. S26039 (Apr. 1, 2021). In *Smith*, the court construed California Penal Code section 632.7, which prohibits the interception, receipt, or intentional recording of cellular telephone communications without the consent of all parties. The court held that the statute prohibits recordings by any participant of a call, and not just recordings made by third-party “eavesdroppers,” unless all the participants to the call consent.

## Background

It has been long understood that California law, unlike federal and other state laws, prohibits the recording of communications without two-party consent. But, in *Smith*, the Fourth District Court of Appeal concluded that a LoanMe employee who recorded a telephone call without the other party’s consent had not violated section 632.7. Instead, the Court of Appeal held that section 632.7 applies only to recordings by *non-parties* to a communication, and did not prohibit a party to a telephone call from recording the communication without the other party’s consent.

## The California Supreme Court’s Decision

In reversing the Court of Appeal’s ruling, the California Supreme Court first explained that the text of section 632.7 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.” The court noted that section 632.7 is part of California’s Invasion of Privacy Act, Cal. Pen. Code § 630 *et seq.*, which was enacted to “protect the right of privacy by, among other things, requiring that all parties consent to a recording of their conversation.” Taking the legislative history and the statutory scheme’s goals into account, the court found that the Act’s aim was to “generally protect” communications from intentional recording without a party’s consent, and “[t]his intent would not be vindicated by an interpretation of section 632.7 as applicable only to recording by nonparties.”

Thus, the court concluded that section 632.7 prohibits any intentional recording of a communication without the consent of all parties, whether by a non-party to the communication or otherwise.

## Key Takeaways

Given the court’s reasoning and the similarity in the statutory language, *Smith* can be read to apply to other parts of the Invasion of Privacy Act, including those prohibiting non-consensual interception of landline telephone calls, in-person conversations, and other forms of confidential oral communications.

The consequences for violation of the statute are serious; they can include criminal sanctions (including fines of up to \$2,500 and imprisonment for up to one year), civil remedies (including injunctive relief and monetary damages), and exclusion from court proceedings any evidence gained from the unlawful interceptions.

To ensure that they are in compliance with the law, companies should establish policies and procedures that mandate that no telephone or other oral communications may be recorded without the consent of all parties to the call. That is particularly important for companies that offer telephonic customer service.

In addition, employers should be on guard against surreptitious recordings by employees, who sometimes record conversations with supervisors or co-workers in the hope of gathering evidence to be used in future litigation. Employers defending against employee lawsuits should conduct discovery to determine if the employee engaged in such activities and seek appropriate remedies.



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