

April 27, 2015

Assembly member Bill Quirk, Chair  
Assembly Committee on Public Safety  
Legislative Office Building, 1020 N Street, Room 111  
Sacramento, CA 95814

**RE: AB 925 (Low) – Oppose**

Dear Assembly member Quirk:

The Consumer Federation of California opposes AB 925 (Low), which is scheduled to be heard before the Assembly Committee on Public Safety on Tuesday, May 5.

AB 925 would eliminate an important consumer privacy law, and allow corporations to secretly record cellular or cordless telephone conversations with customers.

AB 925 would eviscerate Penal Code § 632.7, which provides that all parties to a phone conversation involving a cellular or cordless telephone must be informed of or consent to the recording of the conversation. This is often called “two-party consent”. This law does not preclude recording; it merely prohibits a party from secretly or surreptitiously recording the conversation, that is, from recording the conversation without first informing all parties to the conversation that the conversation is being recorded.

Almost all California and out-of-state businesses that record telephone calls comply with this law by announcing, usually in a pre-recorded statement at the beginning of the call that the call “may be recorded”. This standard introductory announcement is sufficient to establish notice and consent for the recording of the conversation that follows that announcement. The notice of recording that current law requires is not burdensome for businesses. California consumers are very familiar with hearing a recorded message stating; “this call may be recorded” at the beginning of many calls we place to a business. Businesses have no difficulty complying with the two-party consent laws that exist in California and about ten other states.

In upholding California law prohibiting the secret recording of phone calls, a unanimous state Supreme Court pointed out that in codifying Section 632.7 (AB 2465 of 1991) as an enhancement of less comprehensive privacy protections contained in Section 632, which was enacted in 1967, and in subsequent laws, the state legislature “repeatedly has enacted new legislation in related areas in an effort to increase the protection of California consumers' privacy in the face of a perceived escalation in the impingement upon privacy interests caused by various business practices.” *Kearney v. Salomon Smith Barney, Inc.*, (2006) 39 Cal. 4th at 124-25.

Advances in technology since this legislation was enacted have only made these corporate invasions of consumer privacy more pervasive, heightening consumer privacy concerns.

A 2014 Pew Research Center poll found that 91% of Americans agreed that consumers had lost control of how personal information is collected and used by corporations. 81% of respondents agreed that the content of phone calls was very sensitive or somewhat sensitive, and a large plurality agreed that cellular phone calls were less secure than land line calls (31% agreed that land line calls were not at all secure or not very secure, and 46% agreed that cell phone calls were not at all secure or not very secure).<sup>1</sup>

When a business secretly records a phone call it gains an unfair advantage over the consumer whose call is recorded. A dispute may subsequently arise between the consumer and the business concerning a price quote, billing or payment arrangement, the specific product that is purchased or service that is ordered, the quality or reliability of the product or service, or a consumer's agreement to pay for a transaction, among many other things. In a dispute, the parties may have different renditions of the content of a phone call in which they discussed any of these topics.

When a dispute arises, a business that has surreptitiously recorded the phone call can privately replay the recorded conversation during its internal review of the dispute. In the event that the secret recording supports the business' contention, it may inform the consumer that it had recorded the disputed phone call, and then play it back to defend its position —**only if the recording is supportive of the business' position.** But if the business' private internal replaying of the recorded phone call reveals that it discredits the business' contention in the dispute, it has no obligation to provide that information to the consumer. Instead the business is free to destroy or conceal the recording. The consumer would have no knowledge of, or access to, the secret recording. A secret recording gives the business an ace up its sleeve that it plays only when it assists the business to the detriment of the consumer.

The California Supreme Court stated that "companies may utilize such undisclosed recording to further their economic interests - perhaps in selectively disclosing recordings when disclosure serves the company's interest, but not volunteering the recordings' existence (or quickly destroying them) when they would be detrimental to the company." *Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal. 4th 95 at 124-25.

Companies that have been brought to justice under California law for violating the two-party consent law and making secret phone recordings include a subprime lender, debt collectors, a foreclosure business, a loan company, credit card issuers, a loan servicer, a hotel chain, health care providers, Las Vegas casinos, a security alarm company, an airline, and an automobile manufacturer. Several of these cases involved businesses secretly recording calls and harassing, badgering, or asking invasive questions of consumers, or selectively using clandestinely recorded information as a trump card in a subsequent consumer dispute. (Please contact me if you would like more details regarding the cases we cite).

Some cases involve businesses that are aware of the law and choose to disregard it. In one case involving tens of thousands of calls secretly recorded by a travel industry business, pre-trial discovery revealed that the rate at which consumers terminated calls ("abandonment rate")

---

<sup>1</sup> [http://www.pewinternet.org/files/2014/11/PI\\_PublicPerceptionsofPrivacy\\_111214.pdf](http://www.pewinternet.org/files/2014/11/PI_PublicPerceptionsofPrivacy_111214.pdf)

doubled when the company announced that the call would be recorded. While this case settled without a determination regarding the intentionality of the company's decision to not announce that calls were recorded, it is not an unreasonable conclusion that the company analyzed the differential abandonment rate and made a business decision to withhold this important consumer disclosure in order to increase its success in completing consumer purchases by phone.

Cases involving Las Vegas hotels and casinos reveal that the slogan "What happens in Vegas stays in Vegas" is one reason these corporations made a business decision to conceal the fact that consumer calls are recorded; at the same time the corporations violated that slogan and California law by recording calls for purposes that suit the business' interests.

An out of state insurance company secretly recorded phone calls from California employees and their covered dependents who received group health insurance coverage through their employer, a large chain of retail stores. The insurer clandestinely recorded numerous calls from the wife of a California retail store employee regarding a dispute over coverage of a claim for a medical procedure. The covered employee's spouse became angry and agitated in her unsuccessful calls to resolve the dispute with health insurer. The insurer contacted her husband's employer to complain about the spouse's phone calls, and played back to the husband's employer calls it had secretly recorded.

This consumer's anger with this insurer's call center is not an isolated case. A 2011 *Consumer Reports* survey found 71% of consumers were "tremendously annoyed" when they could not access a live customer service representative over the phone.<sup>2</sup> A 2013 survey found that 86% of consumers were put on hold every time they called a business, and that the average consumer spent 10 to 20 minutes a week, or 13 hours a year, on hold with businesses they had called.<sup>3</sup>

In 2010 *CBS TV* news reported on an Arizona State University survey that found that 70% of Americans who had a problem with a product or service "experienced rage", and that 60% who called a business with a problem "got nothing in response to their complaint".<sup>4</sup>

Hearing an announcement that a call "may be recorded" can influence the consumer's demeanor during the call. A consumer who is informed that a call is recorded may be more circumspect in expressing frustration with unfair treatment by a business. Knowledge of a recording may also influence the consumer's willingness to be forthcoming with sensitive information, including providing credit card numbers and security codes, social security numbers, bank account information, medical conditions, prescriptions, personal attitudes, political views, lifestyles, sexual preference, purchasing history and interests, and many other sensitive items. A consumer is entitled to know whether a call may be recorded before divulging any information.

The right to privacy and the right to know whether a call is recorded does not depend on whether the call is with a business that has a current or former customer relationship, or whether the

---

<sup>2</sup> <http://business.time.com/2013/01/11/could-2013-be-the-year-that-customer-service-gets-better/>

<sup>3</sup> <http://business.time.com/2013/01/24/you-probably-spent-13-hours-on-hold-last-year/>

<sup>4</sup> <http://www.cbsnews.com/news/call-centers-putting-customer-service-on-hold-07-11-2010/>



business “reasonably believed” the person on the call is a current or former customer, as AB 925 would allow. Most customers don’t want these businesses calling them. A 2014 poll found that 73% of American consumers were uncomfortable receiving phone calls from businesses, which was a much higher percentage than the level of discomfort consumers reported for receiving business text messages, emails or other social media contacts.<sup>5</sup>

AB 925 would allow the secret recording and selective business use of calls involving “billing, provisioning, maintaining or operating the product or service”. Secret recording of calls involving service provision and billing are precisely the kind of calls that a business would use selectively to tilt the playing field to its advantage should a dispute arise.

The California Supreme Court and other courts have opined that a phone call is confidential based on the objective circumstances, not the content of the call. See e.g. *Flanagan v. Flanagan* 27 Cal. 4<sup>th</sup> 766, 777 (2002) (section 632.7 “[p]rotect[s] against interception or recording of *any* communication.”) AB 925 would frustrate the right of consumers to privacy by introducing a new exception to a recording notice for a “nonconfidential” cell phone call. California should not alter a well-established principal that a cell phone call is confidential by virtue of the utilization of a telephone.

AB 925 would open a Pandora’s Box for courts to probe and analyze after the fact by vague and uncertain subjective standards whether the content of a phone call is confidential, guided only by the misleading and counter-intuitive language of AB 925 that calls regarding billing, provisioning, maintaining or operating a product or service, as well as myriad other unidentified topics, are not confidential. (AB 925 states that surreptitious business recording is “not limited to” these specific listed topics).

The *Kearney* court wrote that California has a “strong and continuing interest in the full and vigorous application” of laws prohibiting the recording the telephone conversations without the knowledge or consent of all the parties to the conversation. Businesses have no difficulty complying with the two-party consent laws that exist in California and several other states. AB 925 would eviscerate an important and non-burdensome consumer privacy protection. AB 925 would give corporations an unfair, clandestine and selective advantage when in a dispute with a California consumer. We urge your “No” vote on AB 925.

Sincerely,



Richard Holober

Consumer Federation of California

Cc: members of the Assembly Committee on Public Safety

---

<sup>5</sup> <http://www.accenture.com/SiteCollectionDocuments/PDF/Accenture-Survey-Eighty-Percent-Consumers-Believe-Total-Data-Privacy-No-Longer-Exists.pdf>