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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

KELLY KEARNEY et al., Plaintiffs and Appellants, v. SALOMON SMITH BARNEY, INC., Defendant and Respondent.	A101477 (San Francisco County Super. Ct. No. 412197)

I. INTRODUCTION

This an appeal by two individuals who filed a putative class action against respondent based on conduct allegedly violative of Penal Code section 632 (section 632) and Business and Professions Code section 17200 (section 17200). The conduct in question was the recording, in Georgia, of telephone calls between appellants, both California residents at the time, and their Atlanta-based brokers. The recordings were made without the consent of appellants, as would be required under California law, but were lawful in Georgia because they were made with the consent of one party to the calls, i.e., respondent and its agents. Based on this premise, the superior court sustained a demurrer to appellants' complaint without leave to amend. We affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs and appellants, Kelly Kearney and Mark Levy (appellants), are California residents, Kearney a resident of Alameda County and Levy a resident of Los Angeles County. Both were employed by a company which was acquired by WorldCom in 1996; thereafter, both were granted WorldCom stock options. They allege that their options "could only be exercised through [respondent]." Both thereafter opened accounts

with the Atlanta, Georgia, office of respondent Salomon Smith Barney, Inc. (respondent), Levy in 1998, and Kearney in 2001.[1] The complaint alleges that, after opening their respective accounts, each appellant made "numerous telephone calls to [his or her] broker at Defendant's Atlanta branch office and also received telephone calls from [his or her] broker in Atlanta." The complaint goes on to allege that, recently, appellants discovered that "numerous telephone calls" between respondent's Atlanta office and "its California customers" were tape-recorded without the latter's knowledge or consent. The complaint alleges that, by recording telephone calls without the customers' consent, respondent violated sections 632 and 17200.

Respondent demurred to the complaint and the parties briefed the purely legal issues involved to the superior court. On January 2, 2003, that court sustained the demurrer without leave to amend, ruling that "under both Georgia and federal law recordings may lawfully be made in Georgia with one party's consent. As such, defendant's conduct cannot be viewed as unlawful or unfair or deceptive under . . . § 17200. Further, any attempt to apply Penal Code § 632 to recordings made in Georgia would be preempted by federal law and violate the Commerce Clause." The order dismissed the action with prejudice. Appellants filed a timely notice of appeal.

III. DISCUSSION

A. *Standard of Review*

The parties agree that our standard of review is de novo. This is clearly correct. As our Supreme Court held in *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318: "In reviewing

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[1] Appellants' complaint does not allege that WorldCom required them, or the recipients of WorldCom stock options generally, to use respondent's Atlanta branch. The paragraph referring to Kearney alleges only that, after receiving the stock options, she "opened an account with Defendant's Atlanta, Georgia branch office." As to Levy, the complaint alleges that "WorldCom's Human Resources Department directed Levy to Defendant's Atlanta branch office, which Levy was told handled financial matters for WorldCom employees." Appellants' opening brief in this court states matters slightly differently, however. It asserts: "SSB's Atlanta Branch serviced all of these accounts ostensibly because SSB established a division there dedicated to serving the particular needs of WorldCom employees."

the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]" (See also, *Hirsch v. Bank of America* (2003) 107 Cal.App.4th 708, 717; *Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 742.)

This principle is especially applicable when, as here, the interpretation and application of statutes is involved. "[T]he interpretation of a statute is a question of law to be determined by the reviewing court de novo." (*Diamond Benefits Life Ins. Co. v. Troll* (1998) 66 Cal.App.4th 1, 5; see also: *International Federation of Professional & Technical Engineers v. City and County of San Francisco* (1999) 76 Cal.App.4th 213, 224; *Goodstein v. Superior Court* (1996) 42 Cal.App.4th 1635, 1641.)

B. *The Relevant Statutes*

As noted, appellants' complaint alleged violations of both sections 632 and 17200. But also clearly implicated are Penal Code sections 27, 777, 778 and 778a.

Section 632 was enacted in 1967 as a part of the "Invasion of Privacy Act," which is composed of Penal Code sections 630 et seq. (See *People v. Buchanan* (1972) 26 Cal.App.3d 274, 287-288.) The pertinent section of that statute reads: "Every person who, intentionally and without the consent of *all parties* to a confidential communication, by means of any . . . recording device . . . records the confidential communication, whether the communication is carried on among the parties . . . by means of a . . . telephone . . . shall be punished by a fine not exceeding two thousand five hundred

dollars ($2,500), or imprisonment in the county jail not exceeding one year. . . ." (§ 632, subd. (a), emphasis supplied.)

Section 637.2, enacted at the same time and also relied on in appellants' complaint, provides parties injured by a violation of any provision of the chapter a private right of action. (Pen. Code, § 637.2.)

Section 17200 is the lead section of California's unfair competition law (UCL) which our Supreme Court has described thusly: "[A]s relevant here, it defines 'unfair competition' to include 'any unlawful, unfair or fraudulent business act or practice.' [Citation.] . . . It governs 'anti-competitive business practices' as well as injuries to consumers, and has as a major purpose 'the preservation of fair business competition.' [Citations.] By proscribing 'any unlawful' business practice, 'section 17200 "borrows" violations of other laws and treats them as unlawful practices' that the unfair competition law makes independently actionable. [Citations.]" (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.)

Sections 27, 777, 778 and 778a of the Penal Code deal with the territorial reach of the provisions of that code. Section 27, enacted in 1872, provides in pertinent part: "(a) The following persons are liable to punishment under the laws of this state: [¶] (1) All persons who commit, in whole or in part, any crime within this state. [¶] (2) All who commit any offense without this state which, if committed within this state, would be larceny, carjacking, robbery, or embezzlement under the laws of this state, and bring the property stolen or embezzled, or any part of it, or are found with it, or any part of it, within this state. [¶] (3) All who, being without this state, cause or aid, advise or encourage, another person to commit a crime within this state, and are afterwards found therein." (Pen. Code, § 27, subd. (a.).)

Section 777, also enacted in 1872, provides: "Every person is liable to punishment by the laws of this State, for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States; and except as otherwise provided by law the jurisdiction of every public offense is in any

competent court within the jurisdictional territory of which it is committed." (Pen. Code, § 777.)

Section 778, yet another provision dating from 1872, provides: "When the commission of a public offense, commenced without the State, is consummated within its boundaries by a defendant, himself outside the State, through the intervention of an innocent or guilty agent or any other means proceeding directly from said defendant, he is liable to punishment therefor in this State in any competent court within the jurisdictional territory of which the offense is consummated." (Pen. Code, § 778.)

Section 778a, enacted in 1905,[2] also deals with the Code's geographic reach. It provides: "(a) Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of that intent, which culminates in the commission of a crime, either within or without this state, the person is punishable for that crime in this state in the same manner as if the crime had been committed entirely within this state." (Pen. Code, § 778a, subd. (a).)

Before leaving the subject of pertinent statutes, it is important to note that Georgia law provides that the consent of *only one party* is required for a telephone conversation to be recorded. This result derives from the interplay of sections 16-11-62 and 16-11-66 of the Georgia Annotated Code. The first-cited section broadly restricts the right of anyone "in a clandestine manner intentionally to overhear, transmit, or record . . . the private conversation of another which shall originate in any private place." (Ga. Ann. Code, § 16-11-62 (1).) But following shortly thereafter, and apparently enacted at the same time, the latter section states: "Nothing in Code Section 16-11-62 shall prohibit a person from intercepting a wire, oral, or electronic communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." (Ga. Ann. Code, § 16-11-66 (a).)

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[2] The statute was amended, in respects not pertinent here, by the addition of a subdivision (b) in 1991.

Similarly, the relevant federal statute on this subject, title 18 United States Code section 2511, starts out with a broad prohibition against ". . . any person who -- [¶] (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication" (18 U.S.C. § 2511 (1)(a)), but then follows with an exception similar to that of Georgia: "It shall not be unlawful under this chapter for a person . . . to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception . . . ." (18 U.S.C. § 2511 (2)(d).)

As a consequence of these statutes, the United States Court of Appeals for the Eleventh Circuit has written that "[b]oth Federal and Georgia law prohibit only clandestine tapings by persons who are not parties to the conversation." (*Parrott v. Wilson* (11th Cir. 1983) 707 F.2d 1262, 1271, fn. 18, cert. den. 464 U.S. 936 (1983); see also regarding Georgia law, *State v. Birge* (Ga. 1978) 241 S.E.2d 213, 213-214, cert. den. 436 U.S. 945 (1978); *Thompson v. State* (Ga.App. 1989) 383 S.E.2d 339, 341.) [3]

C. *The Critical Choice of Law Issue*

The parties cite us to numerous cases and statutes which, they assert, are helpful to the resolution of the issue presented by this appeal. Neither party, however, correctly defines that issue. The area of law principally involved here is conflict of laws. But, and within that overall field, what *is not* involved is any issue concerning "judicial jurisdiction" over the defendant.[4] Respondent, a corporation that does business

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[3] Georgia's approach to this issue is the same as that of over three-quarters of the states. Apparently 39 of the 51 states and the District of Columbia permit the recording of telephone calls with the consent of only one party. So, as just noted, does the federal government. California is one of a dozen states that "require all parties to consent to tape recording an oral conversation." (See Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping* (1998) 47 DePaul L.Rev. 837, 838-839, and Appendix C at pp. 931-932.)

[4] (See Code Civ. Proc., § 410.10 and Judicial Council Com., Bases of Judicial Jurisdiction, 14 West's Ann. Code Civ. Proc. (1973 ed.) foll. § 410.10.)

nationwide, did not move to contest jurisdiction over it and does not suggest, either via its demurrer below or in its briefs to this court, that the courts of California lack such jurisdiction. Thus, the many cases cited by the parties pertaining to the issue of "judicial" or "in personam" jurisdiction of the courts of a state over a person or entity located in another state who has acted so as to cause an adverse effect in the plaintiff's state are simply irrelevant to an analysis of the present issue.[5] Similarly not pertinent to a resolution of this appeal is the issue of "subject matter jurisdiction."[6]

Within the overall arena of conflict of laws, this appeal implicates a pure choice of law question: in the circumstances alleged in the complaint, and bearing in mind the quite different approaches of the California and Georgia statutes regarding the extent of permission needed to record a telephone call, which state's law applies, California or Georgia? Appellants, supported by the Attorney General appearing as amicus on their behalf, urge that California law should apply here because respondent's actions in recording, in Georgia, telephone calls between California customers and its Atlanta office resulted in an invasion of their privacy in this state.

There are two problems with this argument. The first is that the complaint filed by appellants is both vague and conflicting as to whether *these appellants'* telephone calls to or from respondent's Atlanta office were recorded.[7] But, secondly and more importantly,

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[5] Included in this category are many cases debated by the parties in their original briefs to this court, e.g., *Schlussel v. Schlussel* (1983) 141 Cal.App.3d 194, *People v. Jones* (1967) 257 Cal.App.2d 235, and *Rocklin De Mexico, S.A. v. Superior Court* (1984) 157 Cal.App.3d 91.

[6] We invited the parties and the Attorney General to submit supplemental briefs regarding whether the core issue in this case was in personam jurisdiction, subject matter jurisdiction, or conflict of laws. The parties effectively adhered to their original positions, i.e., appellants arguing that the case involves basically *both* in personam and subject matter jurisdiction and respondent contending that it involves "the absence of subject matter jurisdiction." To his credit, the Attorney General correctly recognized that what is really involved here is a conflict of law/choice of law issue.

[7] In the "Factual Allegations" portion of appellants' complaint, they allege that they "[r]ecently . . . discovered" that numerous telephone calls to and from California customers of respondent were tape recorded without the customers knowledge or consent,

there is the basic choice of law issue: does the act of legally taping, in Georgia, telephone calls to or from citizens of the dozen or so states which have laws similar to California's constitute a sufficient intrusion into the privacy of those citizens to justify application of California law to the allegations of the complaint?

In tort cases where a conflict of laws/choice of law issue arises, California applies the "governmental interest" test (sometimes referred to as simply the "interest test") to determine which state's law to apply. (See, e.g., *Reich v. Purcell* (1967) 67 Cal.2d 551, 555-556; *Hurtado v. Superior Court* (1974) 11 Cal.3d 574, 579-582; *Bernhard v. Harrah's Club* (1976) 16 Cal.3d 313, 316-323; *Offshore Rental Co. v. Continental Oil Co.* (1978) 22 Cal.3d 157, 161-165 (*Offshore Rental*); *VanWinkle v. Allstate Insurance Co*. (C.D.Cal 2003) 290 F.Supp.2d 1158, 1161-1168; 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, §§ 331-336, 339, and cases cited therein; Smith, *Choice of Law in the United States* (1987) 38 Hastings L.J. 1041, 1055-1058 (hereafter Smith); Kay, *Theory into Practice: Choice of Law in the Courts* (1983) 34 Mercer L.Rev. 521, 538-542).

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but omit any allegation that included in any of the recorded calls were those to or from the two specific appellants. The class action allegations immediately following allege the putative class as "all clients of [respondent] who resided in California and whose accounts were serviced by [respondent's] branch office in Atlanta," *not* those California clients whose calls were recorded. Indeed, among the alleged "questions of fact common to the Class" is whether respondent implemented a practice of recording telephone conversations "with respect to Plaintiffs and the members of the Class." However, in one of the two causes of action which follow, appellants plead that: "[Respondent] intentionally recorded the conversations with Plaintiffs and the Class members, yet failed to disclose that it was doing so." No similar allegation is made in the section 17200 cause of action, however. Further, in a brief to the trial court, appellants stated that respondent "had *selectively* recorded telephone conversations between [its] brokers and their clients."

Because of this state of the record, we also asked the parties to submit supplemental briefs regarding whether (1) the lack of more specific allegations of the recording of *these appellants'* telephone calls raised a standing issue and (2) any such issue might have been waived. After reviewing those briefs, we are of the opinion that the complaint sufficiently alleges (albeit barely) these appellants' standing.

This approach to choice of law issues was succinctly summarized by one of our sister courts as follows: "This governmental interest analysis involves three steps. (1) The court determines whether the foreign law differs from that of the forum. (2) If there is a difference, the court examines each jurisdiction's interest in the application of its own law to determine whether a 'true conflict' exists. [Citations.] When both jurisdictions have a legitimate interest in the application of its rule of decision, (3) the court analyzes the '"comparative impairment" of the interested jurisdictions.' [Citation.] The court applies '"'the law of the state whose interest would be the *more impaired* if its law were *not applied*.'" [Citations.]'" (*Tucci v. Club Mediterranee* (2001) 89 Cal.App.4th 180, 189; see also *Denham v. Farmers Ins. Co.* (1989) 213 Cal.App.3d 1061, 1065-1067, and Smith, *supra,* 38 Hastings L.J. at pp. 1047-1048.) The application of the "governmental interest test" is clearly an issue of law as to which an appellate court may make its "own determination of those policies and interests . . . ." (*Offshore Rental, supra,* 22 Cal.3d at p. 163, fn. 5.)

Clearly, California and Georgia law differ significantly regarding whose approvals of the recording of a telephone call are required to make that recording legal. Section 632 requires the consent of all parties to the call; Georgia law requires the consent of only one. (See pp. 3-5 and fn. 3, *ante*.) Thus, the first step in the "interest test" is satisfied.

So also is the second step, the step that asks if both states have a legitimate interest in having their laws apply. We agree with appellants and the Attorney General that California has a legitimate interest in not having telephone calls made or received by its citizens recorded without their consent; that is, after all, the very essence of section 632.

But Georgia, too, has interests. Those would include (1) assuring that its citizens (whether or not they know of and rely upon its one-party-consent statute) are not penalized when they record interstate calls to the minority of states that have different laws and (2) not having the laws of those states make illegal the (very likely routine) recording of telephone calls between the Georgia office of a financial services organization and its out-of-state clients.

A few comments about those interests: First of all, it will be recalled that 40 jurisdictions (including Georgia and the federal government) permit the recording of a telephone call with the consent of only one party to the call. California and approximately 11 other states require the consent of both parties to the call. (See fn. 3, *ante*.) If we were to adopt the choice-of-law argument proffered by the Attorney General in his amici briefs and adopted by appellants at oral argument, it would necessarily mean that anytime someone in one of the "majority" jurisdictions records a telephone conversation with a person in one of the "minority" states, and does so without the knowledge or permission of the latter, the second person has a cause of action under the laws of his or her state against the person doing the recording. This would, therefore, effectively mean that the laws of the minority of states control over those of the majority (plus the federal government) whenever the two collide, as they do here. We do not think our Legislature intended the Invasion of Privacy Act to have such a strict and rigid effect nor are we willing to impose such a far-reaching rule upon interstate communications. Any such imposition should, it seems to us, be the province of the United States Congress and not one state's intermediate appellate court.

Secondly, even if Georgia might not have such an interest in the case of an individual knowingly recording a call to another individual in California who does not know or have reason to know the call is being recorded, that is not the sort of situation involved here. We are dealing here with the Georgia office of a financial services organization, an office which apparently regularly records telephone calls to and from clients regarding those clients' proposed or actual financial transactions with that office. Clearly in this day and age such institutions routinely record such calls and do so for the perfectly understandable purpose of protecting themselves from the customer who might later claim the institution misunderstood his or her investment instructions.[8]

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[8] Indeed, such appears to be required by one major association of financial services organizations. Rule 3010 (b)(2)(C) of the National Association of Securities Dealers reads: "The procedures required by this paragraph shall include tape-recording *all* telephone conversations between the member's registered persons and both existing

Given the nature of the conflicting interests of California and Georgia, we conclude that, on the specific facts of this case, Georgia has the greater interest in having its law applied. Any other result would bless a legalistic "gotcha": the office of a financial services organization in a state which, like the majority of states, has a statute which permits it to record routine telephone calls to and from its clients without their specific consent is left at risk that a client in one of the minority of states that require *both parties* consent will sue it in the client's home state and attempt to apply that state's law.

We are not the only court to analyze almost exactly this fact situation under choice of law rules and come to the same result. In *Becker v. Computer Sciences Corp.* (S.D.Tex. 1982) 541 F. Supp. 694, a Texas federal court denied a defendant employer's motion to file a counterclaim in a wrongful termination action brought against it by a former employee. In the course of discovery in the action, the employer learned that the Texas-based plaintiff had made undisclosed recordings, legal in Texas, of telephone conversations with some of the defendant corporation's employees in California. The corporate defendant thereupon moved to amend its answer and also file a counterclaim based on the plaintiff's alleged violation of section 632. After an extended discussion of the applicable Texas and California law, the policy issues involved from the standpoint of each state, and Texas choice of law rules,[9] the court denied the motion, holding that "Texas rather than California has a significant aggregation of contacts of a more qualitative nature with the parties and the instant controversy, and accordingly, Texas law rather than California law should be applied . . . ." (*Id.* at p. 706.)

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and potential customers." (Emphasis supplied.) Subparagraphs (D) and (E) of the same rule require members to thereafter review "the tape recordings . . . to ensure compliance with applicable securities laws and regulations and applicable rules of the Association," to retain the tape recordings "for a period of not less than three years from the date the tape was created," and to "catalog the retained tapes by registered person and date." (http://cchwallstreet.com /NASD.)

[9] Texas, unlike California, has blessed and adopted the somewhat more complex choice of law test set forth in the Restatement Second of Conflict of Laws, sections 6 and 145.

Interestingly, the federal district court in Massachusetts has addressed a similar fact situation three times. Not all of its decisions have, however, utilized a choice of law analysis. But all three have held that the recording of a telephone call in a jurisdiction where such is legal does not become illegal because the other party to the call lives in a state (such as Massachusetts) where the consent of *both* parties is required.[10]

The earliest such decision, at least according to our research, is *Kolikof v. Samuelson* (D.Mass. 1980) 488 F.Supp. 881 (*Kolikof*). There, the principal issue facing the court was whether Massachusetts's long-arm statute was triggered by the action of a Pennsylvania corporation and its president, who tape-recorded two telephone conversations between the plaintiff and that officer while the former was in Massachusetts and the latter in Pennsylvania. The court held that, while the statute conferred jurisdiction over the corporation (because it had sufficient business contacts with Massachusetts), it did not confer jurisdiction over the corporate president because he had not, in the language of the statute, caused a "tortious injury by an act or omission in this commonwealth" because "[t]he only act necessary to establish the tort [the recording of the calls] . . . occurred in Pennsylvania." (*Id.* at p. 883.)

That court's next decision involving the recording of interstate telephone calls was *Pendell v. AMS/Oil, Inc.* (D.Mass. 1986) 1986 WL 5286 (*Pendell*). The *Pendell* court dismissed one count of a multi-count complaint, specifically a count alleging the wrongful recording by an agent of the defendant of a telephone conversation with one of the plaintiffs. The telephone conversation was initiated by the defendant's agent from Rhode Island to the plaintiff's home in Massachusetts. Relying on the earlier holding in *Kolikof*, but also using substantially choice-of-law principles, the court ruled that Rhode Island law governed the act of recording the telephone call. Noting that there was no

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10 (See, Mass. Gen. Laws, ch. 272, § 99B.4.; *Commonwealth v. Hyde* (Mass. 2001) 750 N.E.2d 963, 967; and *Commonwealth v. Barboza* (Mass.App. 2002) 763 N.E.2d 547, 551. At oral argument, appellants' counsel suggested that the result in these Massachusetts federal court cases is explainable by differences between that state's statute and California's section 632. We disagree; there is no material difference between the two statutes.

language in the Massachusetts statute indicating that it "was intended to be given extraterritorial effect," the court held: "As a general rule, when no such intention is clearly expressed, it is presumed that the statute was intended to be applicable only within the territorial jurisdiction of the enacting governmental body. [Citation.] Considering the interstate system as a whole, the better rule is that a local statute should not be given extraterritorial effect so as to regulate conduct in another jurisdiction. Further, it should be recognized that by applying Rhode Island law the interests of both states are furthered in that the privacy rights of citizens are protected, albeit to a lesser degree than perhaps they would be under Massachusetts law." (*Id.* at p. *4.)

Finally, in *MacNeill Engineering Co., Inc. v. Trisport, Ltd.* (D.Mass. 1999) 59 F.Supp.2d 199, 202, the Massachusetts federal district court was faced with an effort of a plaintiff in a patent infringement case to amend its complaint to allege a violation of the same Massachusetts statute at issue in *Pendell*, a statute which, as noted earlier, generally corresponds with California's section 632. Again, however, the defendant did the recording of the telephone call not in Massachusetts, but in England. The Massachusetts statute did not apply, the court ruled, citing *Pendell*. It stated: "[T]his Court holds that secretly recording a conversation outside Massachusetts does not give rise to liability under [the Massachusetts statute] even if the call originated within Massachusetts." (*Id.* at p. 202.)

Our research has disclosed only one case going the other way.[11] In *Koch v. Kimball* (Fla.App. 1998) 710 So.2d 5 (*Koch*), a Florida appellate court held that the recording by the defendant, in Georgia, of a telephone call placed by her from there to the plaintiff in Florida was subject to the Florida Security of Communications Act. The *Koch* court interpreted that statute to mean "that, for purposes of establishing a tort under

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[11] The other Florida case upon which appellants rely, *State v. Mozo* (Fla. 1995) 655 So.2d 1115 involved not an interstate telephone call but a "cordless" telephone call made by the defendant from his residence and intercepted by the police from a close-by location. Because that interception was done without a warrant, the Florida Supreme Court affirmed an appellate court decision that such was a violation of the Florida Security of Communications Act. This case simply does not aid appellants at all.

the Act, the interception occurs where the words or the communication is uttered, not where it is recorded or heard." (*Id.* at p. 7.)[12]

Appellants argue that, contrary to the result in the Massachusetts federal court cases cited above, California's Invasion of Privacy Act (including, as it does, section 632) should not be limited by "artificial geographic boundaries." But the "artificial geographic boundaries" appellants refer to are those between sovereign states of this nation. They are, therefore, not exactly "artificial" and much more than "geographic." Other states' statutes are deserving of recognition and possible application as and where appropriate, in accordance with accepted choice of law principles. According such recognition is not the same as erecting "artificial" boundaries to the reach of California law.

Appellants next argue that, because respondent conducts an extensive securities business in California and is a major national (if not international) business organization, its conduct can never be entirely extraterritorial. Respondent is, they note, licensed to conduct its securities sales and counseling business by the California Department of Corporations, maintains numerous offices in this state, has many employees here, and

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[12] The *Koch* court cited and relied upon a decision by a panel of the Eleventh Circuit, *United States v. Nelson* (11th Cir. 1988) 837 F.2d 1519. *Nelson* did not concern the recording of an interstate telephone call but, rather, the interception by Florida and federal authorities of a telephone call between two counties in Florida. The defendant in *Nelson* argued that the interception was not permitted under title III of the federal Omnibus Crime Control and Safe Streets Act (18 U.S.C. §§ 2510-2520) because, although the telephone call in question was recorded by the authorities in a county over which the court issuing the warrant had jurisdiction, it was first *heard* by those authorities in their offices in a county over which it did not have jurisdiction. This did not matter, the Eleventh Circuit held, because "the term 'intercept' as it relates to 'aural acquisitions' refers to the place where a communication is initially obtained regardless of where the communication is ultimately heard." (*United States v. Nelson, supra,* 837 F.2d at p. 1527.) We respectfully suggest that the *Koch* court's reliance on *Nelson* to support its conclusion is incorrect. In fact, *Nelson* says exactly the opposite of *Koch*; it held that the interception of a telephone call occurs where the call is "initially obtained," i.e., recorded. (*Ibid.*) Further, the Florida Supreme Court has recently noted that the appellate court that decided *Koch* had published a somewhat inconsistent opinion a year earlier. (See *Wendt v. Horowitz* (Fla. 2002) 822 So.2d 1252, 1259, fn. 6.)

"extensively markets its financial services throughout California." Thus, they contend, applying precedent pertaining to "wholly extraterritorial" conduct to an entity such as respondent would be unreasonable.

This argument overlooks the fact that the allegations of appellants' complaint do not implicate respondent's (obviously extensive) California operations. Rather, they involve the recording, *in Georgia*, of telephone calls to and from *some* California customers of respondent. That being the case, we decline to hold that California law prevails in such a context simply because of the economic reach of the defendant. The critical issue is not that reach, but the conduct alleged to be wrongful, where that conduct in fact occurred, and the proper choice of law by which to judge that conduct.

In his supplemental brief, the Attorney General argues that the Georgia statute should not control here because the original enactment stated: "'It is the public policy of this State and the purpose and intent of this Chapter to protect the citizens of this State from invasions upon their privacy. This Chapter shall be construed in light of this expressed policy and purpose.'" (See *Ransom v. Ransom* (Ga. 1985) 324 S.E.2d 437, 438.) This argument (in which appellants joined at oral argument) is simply not convincing. In the first place, the Georgia legislature's desire "to protect [its] citizens from invasions upon their privacy" is not in the slightest contradictory to an interest in protecting those same citizens from accruing liability in the court of another state when they comply with the provisions of the Georgia statute, albeit not with the foreign state's statutes. Secondly, the same point can be made regarding section 632: some of its legislative history suggests that, as a Penal Code provision, it was intended to govern conduct occurring in California, not elsewhere.[13]

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[13] Several communications from then Assembly Speaker Jesse Unruh, the original sponsor of the 1967 Invasion of Privacy Act, including his letter to then Governor Ronald Reagan urging the latter's approval of the bill, noted that the legislation was directed at activities taking place "in California." (Assembly Speaker Jesse M. Unruh, News Release, Mar. 1, 1967; Assembly Speaker Jesse M. Unruh, letter to Governor Ronald Reagan, July 31, 1967, re Assem. Bill 860.)

Which brings us to the law regarding the geographic reach of that code.[14] *People v. Morante* (1999) 20 Cal.4th 403 (*Morante*) is our Supreme Court's most recent exploration of this issue. There, the court interpreted the two most critical sections of the Penal Code in these words: "[S]ection 27, subdivision (a)(1), affords our courts jurisdiction over crimes partially committed within this state, and section 778a, subdivision (a), affords our courts jurisdiction over crimes committed outside the state if the defendant formed the intent and committed 'any act' within this state in whole or partial execution of that intent." (*Id.* at p. 434.)

In so holding, the court carved out an exception to the rule it had previously laid down in *People v. Buffum* (1953) 40 Cal.2d 709, that "statutes must be construed in light of the general principle that, ordinarily, a state does not impose punishment for acts done outside its territory." (*Id.* at pp. 715-716.) However, as another appellate court recently noted, *Morante* "carved out an exception to the general principle in conspiracy cases but did not otherwise modify application of the principle to cases involving [other types of offenses]." (*Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 196-197, fn. 23 (*Hatch*). Thus, as the *Hatch* court noted: "The assumption that extraterritorial enforcement of state criminal statutes is normative is incorrect." (*Id.* at p. 196.)

In a case quite similar factually to *Hatch*, Division Five of this District stated the applicable rule thusly: "California prosecutes only those criminal acts that occur wholly

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14 On the subject of "geographic reach," respondent argues that its position is supported by the "presumption against extraterritoriality" relied on by our Supreme Court in *North Alaska Salmon Co. v. Pillsbury* (1916) 174 Cal. 1, and briefly referenced by it more recently in *Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1058-1060 and fn. 20. (See also *Churchill Village, L.L.C. v. General Electric Co.* (N.D. Cal. 2000) 169 F.Supp.2d 1119, 1126.) We disagree. As one scholar has recently pointed out, "conflict-of-laws rules have changed" since the era of *North Alaska Salmon*, particularly but not exclusively because of the different approach taken by the Restatement Second of Conflict of Laws as compared to the first such Restatement. As a result of these more flexible and varied approaches to conflict of laws theory and practice, "domestic conflicts theory does not justify any presumption against extraterritoriality at all." (Dodge, *Understanding the Presumption Against Extraterritoriality* (1998) 16 Berkeley J.Int.Law 85, 115 and fns. 247-250.)

or partially within the state. [Citations.] Statutes 'must be construed in the light of the general principle that, ordinarily, a state does not impose punishment for acts done outside its territory. [Citations.]' [Citation.]" (*People v. Hsu* (2000) 82 Cal.App.4th 976, 985; see also *People v. Burt* (1955) 45 Cal.2d 311, 314-315.)

Citing *Yu v. Signet Bank/Virginia* (1999) 69 Cal.App.4th 1377 (*Yu*), appellants contend that the geographic scope of the UCL is broader than might otherwise be the case if only a Penal Code provision were involved.[15] In that case, our colleagues in Division Four of this District held that the defendant Virginia bank could be held liable under section 17200 for the systematic practice of suing delinquent California credit card holders in a Virginia trial court, securing default judgments against them there in substantial reliance on a "choice of law" provision in the credit card agreements, and then attempting to collect on those default judgments in California. Characterizing the

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[15] The only other cases cited by the parties regarding the territorial reach of the UCL are not particularly pertinent. Thus, in *Norwest Mortgage, Inc. v. Superior Court* (1999) 72 Cal.App.4th 214, the appellate court reversed the trial court's action in certifying a particular class of claimants in a UCL class action brought against a mortgage company incorporated in California but having its headquarters in Iowa. The class in question consisted of non-California residents for whom the defendant allegedly purchased "forced placement insurance" upon the lapse or cancellation of the home insurance on the real property on which the defendant held the mortgage. Not only were the putative class members in this purported category not Californians, but the alleged forcing of insurance "occurred in states other than California." (*Id.* at p. 222.) This was an inappropriate class, the appellate court ruled, stating: "We ordinarily presume the Legislature did not intend the statutes of this state to have force or operation beyond the boundaries of the state. [Citations.] Accordingly, we do not construe a statute as regulating occurrences outside the state unless a contrary intention is clearly expressed or reasonably can be inferred from the language or purpose of the statute." (*Ibid.*) Nothing in the language or legislative history of the UCL detracted from the application of this general rule, the court held. To the same general effect is *Churchill Village, L.L.C. v. General Electric Co.*, *supra*, 169 F.Supp.2d at p. 1126, where the federal court for the Northern District of California held, citing *Norwest Mortgage*, that "section 17200 does not support claims by non-California residents where none of the alleged misconduct or injuries occurred in California." Although respondent cites these cases as supportive of its position, we do not rely on them here. In the first place, neither involved, as this case does, a claim of "injury" inflicted in California. Second, and as discussed above, we believe this case can and should be resolved on a pure choice of law basis.

defendant's Virginia litigation practices as an abuse of process, the court turned to that party's contentions on the issue of the application of the UCL to those practices: "Respondents submit that no abuse of process can be found because California cannot 'regulate' conduct 'that is lawful in other states.' We are not persuaded that respondents' long-arm program was 'lawful' in Virginia, but there is no merit to respondents' sweeping assertion in any event. In the absence of any federal preemption, a defendant who is subject to jurisdiction in California and who engages in out-of-state conduct that injures a California resident may be held liable for such conduct in a California court. [Citations.] It is irrelevant whether the conduct was lawful in other states." (*Id*. at p. 1391.)

At this point, the *Yu* court inserted a pregnant footnote: "Choice of law principles may dictate that California law be applied to out-of-state conduct, even if the conduct is permissible there [citations], and in that sense California may also 'regulate' conduct which is 'lawful' in other states. Respondents do not seek to defend the judgment based on the choice of law provision in the credit agreement, and could not do so because there is no Virginia or federal law permitting their 'long-arm' practice." (*Yu, supra,* 69 Cal.App.4th at p. 1391, fn. 2.)

This footnote is significant because it demonstrates that the *Yu* court understood it was *not* dealing, as we clearly are here, with a "conflict of law" issue. This point is reinforced by other language on the same page of the opinion. At one point, the court notes that "[n]o Virginia appellate court has approved the exercise of 'long-arm' jurisdiction over out-of-state consumers for debt collection purposes." And two sentences later it similarly notes that the defendant bank had not established "that there was ever any Virginia law that purported to approve of what they were doing." (*Yu, supra,* 69 Cal.App.4th at p. 1391.)

Here, by contrast, there most assuredly was a Georgia law that purported to approve of what this respondent was doing. As we have already discussed, that places this case squarely within the "conflict of law" arena which, in turn, requires us to select the law of the state with the greater "governmental interest" in the issue. In such a

situation, it is surely not (to use the language of the *Yu* court) "irrelevant whether the conduct was lawful in other states."[16] (*Yu, supra,* 69 Cal.App.4th at p. 1391.)

To summarize, we conclude that neither sections 632 or 17200 were violated by respondent's actions in recording, in Georgia, telephone conversations with some of its customers in California. Having so concluded, we need not—and hence do not—reach the trial court's alternative holdings that the application of California law to the conduct at issue would also be preempted by federal law and violative of the dormant Commerce Clause.

IV. DISPOSITION

The judgment is affirmed.

_____
Haerle, J.

We concur:

_____
Kline, P.J.

_____
Ruvolo, J.

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[16] Candidly, we think these words in the *Yu* decision go a bit too far. It is true, as that decision says in the preceding sentence, that "a defendant who is subject to jurisdiction in California and who engages in out-of-state conduct that injures a California resident *may* be held liable for such conduct in a California court." (*Yu, supra,* 69 Cal.App.4th at p. 1391, emphasis supplied). However, where there is, as there surely is here, a pertinent statute in another state governing that conduct, the other state's law is clearly *not* "irrelevant." Nor do any of the authorities the *Yu* court relied upon suggest otherwise: none of the cases cited by it in support of the holding quoted above dealt with a conflict of laws/choice of law issue.

Trial Court: Superior Court of San Francisco County

Trial Judge: Hon. A. James Robertson, II

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A101477, *Kearney, et al. v. Salomon Smith Barney*