

Department of Legislative Services
Maryland General Assembly
2015 Session

FISCAL AND POLICY NOTE

House Bill 504 (Delegate Impallaria)
Economic Matters

Telephone Communications Consumer Protection Act

This bill prohibits a person from recording a telephone conversation with a consumer relating to an actual or prospective purchase, lease, or receipt of consumer goods, consumer services, or consumer credit for the purpose of quality assurance, unless the person (1) notifies the consumer that the telephone conversation may be recorded; (2) provides the consumer with the option to consent or refuse to consent to the recording of the telephone conversation; and (3) obtains consent from the consumer to record the telephone conversation. The bill also prohibits a person from discontinuing a telephone conversation with a consumer if the consumer does not consent to the recording of the telephone conversation for the purpose of quality assurance. Violation of the bill is an unfair or deceptive trade practice under the Maryland Consumer Protection Act (MCPA), subject to MCPA's civil and criminal penalty provisions.

Fiscal Summary

State Effect: The bill's imposition of existing penalty provisions does not have a material impact on State finances or operations. If the Consumer Protection Division of the Office of the Attorney General receives fewer than 50 complaints per year stemming from the bill, the additional workload can be handled with existing resources.

Local Effect: The bill's imposition of existing penalty provisions does not have a material impact on local government finances or operations.

Small Business Effect: Potential meaningful. Small businesses may need to institute new systems or amend existing systems to comply with the bill's requirements, as discussed below.

Analysis

Current Law: An unfair or deceptive trade practice under MCPA includes, among other acts, any false, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers. The prohibition against engaging in any unfair or deceptive trade practice encompasses the offer for or actual sale, lease, rental, loan, or bailment of any consumer goods, consumer realty, or consumer services; the extension of consumer credit; the collection of consumer debt; or the offer for or actual purchase of consumer goods or consumer realty from a consumer by a merchant whose business includes paying off consumer debt in connection with the purchase of any consumer goods or consumer realty from a consumer.

The Consumer Protection Division is responsible for enforcing MCPA and investigating the complaints of aggrieved consumers. The division may attempt to conciliate the matter, issue a cease and desist order, or file a civil action in court. A merchant who violates MCPA is subject to a fine of up to \$1,000 for the first violation and up to \$5,000 for each subsequent violation. In addition to any civil penalties that may be imposed, any person who violates MCPA is guilty of a misdemeanor and, on conviction, is subject to a fine of up to \$1,000 and/or imprisonment for up to one year.

Under the Maryland Wiretapping and Electronic Surveillance Act, it is unlawful to willfully intercept or endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication. Under the Act, “intercept” is defined, in part, as “the... acquisition of the contents of any wire, electronic, or oral communication through the use of any... device.” An “oral communication” means any conversation or words spoken in private conversation. A “wire communication” is any aural transfer made, in whole or in part, with the aid of wire, cable “or other like connection” between the point of origin and the point of reception. A person who violates the Act is guilty of a felony and is subject to imprisonment for up to five years and/or a fine of up to \$10,000.

Regarding intercepted oral communications, the Maryland Court of Appeals has ruled that a plaintiff must show a reasonable expectation of privacy in order for the oral communication to be protected under the Act. In contrast, wire communications are protected regardless of whether there was an expectation of privacy; an example of a wire communication is an office telephone conversation. *Fearnow v. C&P Tel. Co.*, 342 Md. 363 (1996).

The Act does, however, authorize the interception of a wire, oral, or electronic communication if all participants have given prior consent (sometimes called “two-party consent”). Federal law permits recording telephone calls if at least one party to the

conversation consents (“one-party consent”). Most states have adopted similar one-party consent laws; Maryland is 1 of 12 states that require two-party consent.

Background: A 2014 article in the American Bar Association’s *Litigation Journal* details the increasing frequency and overall complexity of call-recording litigation against companies. Companies frequently record customer service calls to help train employees and to resolve subsequent disputes between employees and customers as to the content of telephone conversations. Customers have claimed, however, that some calls contain private, confidential information, such as addresses and payment details, and have filed lawsuits against companies for recording calls without their permission. In particular, California’s call-recording statutes, which are part of California’s Invasion of Privacy Act (CIPA) and require two-party consent, have been the center of increasing litigation.

In 2006, a California Supreme Court case expanded CIPA to potentially reach nationwide, holding that companies operating outside of California must abide by CIPA for California callers. (see *Kearney v. Salomon Smith Barney Inc.*, 137 P.3d 914 (Cal. 2006)). However, subsequent litigation has cast doubt as to whether there is an implied exception for customer service calls; some California courts have held that CIPA is intended to prohibit eavesdropping and not the legitimate use of call recordings by businesses, but other California courts have disagreed. The article concludes that, while the law is still developing, the best way for companies to ensure compliance with strict call-recording statutes is to provide automatic notice before recording calls to and from call centers (e.g., “This call may be recorded for quality assurance purposes”).

Small Business Effect: Although small businesses in Maryland are already subject to the State Wiretapping and Electronic Surveillance Act’s requirements, the bill also requires businesses to provide customers with an option to consent or refuse to consent to the call’s recording and prohibits businesses from ending the telephone conversation if the customer refuses consent. Businesses may need to amend existing call recording systems or implement new systems to comply with the bill’s requirements, which may involve both technological updates and changes in employee training. In particular, small businesses may have to adopt procedures to address disputes that may arise from calls that were not recorded due to customer objection, since the bill requires businesses to continue such transactions.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): American Bar Association, Department of Legislative Services

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