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ALEXANDER P. RAMOS*

INTRODUCTION

Imagine making a call to your bank. Your credit card has been declined, so you want to ensure everything is functionally alright. You are placed on hold briefly, and while on hold, the automated phone system states, "This call may be monitored." Have you ever wondered if they are allowed to monitor you? You never directly agreed to be recorded. All you did was place a call to your bank. Is this recording of your phone call legal?

In most states, this process is completely harmless and perfectly legal.[1] In a minority of states, however, this process is violative of state wiretapping statutes and subject to civil or criminal punishment.[2]

In the majority of states, any communication can be recorded and maintained by the consent of only a single party.[3] The above warning need not even exist for legality under the majority law, because as long as the company agrees to the recording, the electronic information can be gathered as surreptitiously as desired.[4] In minority jurisdictions, where the caller's consent is also

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1. *See infra* § II.A.
2. *See infra* § II.A
3. *See infra §* II.A.
4. *See infra* § II.A.

required, it is per se illegal.[5] Now for any company who fully conducts their business in one state, the rule is simple: follow their principal place of business' official law.[6] Legal issues arise when the governing laws of the two jurisdictions conflict. This comment will focus on two jurisdictions. First, it will examine California, where this legal issue first developed.[7] Second, it will acknowledge the special relationships between Maryland, Virginia, and Washington, D.C.[8] This comment will also detail the development of the stricter Maryland wiretapping laws.[9] Then, it will discuss § 10-410, the civil cause of action clause within the Maryland statute and its interpretation.[10] Finally, this comment will consider the necessity for a clearer standard on § 10-410 so that non-Maryland resident businesses can efficiently mitigate risk while operating within the state.[11]

I. THE HISTORY OF WIRETAPPING CONSENT LAWS

A. Definition of One and Two-Party Consent

For legal purposes, all conversations via electronic communications are between two primary parties.[12] First, there is the entity initiating the electronic contact, and second, there is the entity on the receiving end.[13] A party can be a single individual, several individuals, a corporation, or multiple corporations, but the party must be instrumental to the recorded conversation.[14]

The majority rule for electronic recording is one-party consent.[15] Under that rule, only one of the primary parties needs to grant their consent for the communication to be recorded.[16] This

5. *See infra* § II.A.
6. *See infra* § II.A.
7. *See infra* § II.B.
8. *See infra* § III.
9. *See infra* § III.
10. *See infra* § IV.
11. *See infra* § V.
12. 18 U.S.C. § 2511.
13. *Id.*
14. *Id.*
15. Justia, *Recording Calls and Conversations: 50 State Surveys*, 1-2, https://www.justia.com/documents/50-state-surveys-recording-calls-and-conversations.pdf, (Jan. 2018).
16. For definitions of one-party and two-party jurisdictions, *see* State v. Mullens, 650 S.E.2d 169, 180-182 (W.Va. 2007).

consent can either be made manifest to the other party, or it can be done in complete secret.[17] A minority of jurisdictions enforce what is referred to as either two-party or all-party consent.[18] Here, the party who seeks to record conversations must disclose their intention to the other parties and receive explicit or implicit consent to record and save the communications.[19] Only these two parties are ever permitted to record conversations.[20] External third-parties observing the communication have no right to maintain the information.[21] Even if consent is granted, the third party legally cannot record the communication.[22] For an entity to be a third-party with no right to record, it must be completely unaffiliated with either side of the communication.[23]

In the United States, all jurisdictions have laws requiring the consent of at least one party to record a conversation.[24] This is enforced via federal criminal statute.[25] States cannot eliminate the requirement that at least one party knows that a communication is being recorded.[26] Thirty-five states plus the District of Columbia have enacted state laws that mirror the federal law, requiring just one party's consent to record a conversation.[27] The remaining fifteen states – California, Connecticut, Delaware, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Oregon, Pennsylvania, Vermont, and Washington – all go beyond the federal bar and require both parties' consent.[28] The punishments for violating the state statutes run the gambit from civil liability, to criminal misdemeanor, to even felony charges that could result in fines or long-term incarceration.[29]

17. *Id.*
18. *Id.* at 183-85.
19. *Id* at 183.
20. *Id* at 183.
21. *Id* at 184-85.
22. *Id* at 184-85.
23. *Id.*
24. 18 U.S.C. § 2511(2)(d).
25. *Id.*
26. *Id.*
27. Justia, *supra* note 15, at 1-2.
28. *Id.* at 2.
29. *Id.*

B. The Issue of Interstate Communication: Kearney v. Salomon Smith Barney, Inc.

Contacting an out-of-state party invokes considerations of potential consequences arising from standard interstate business operations.".[30] This was the situation in the seminal case between one- and two-party jurisdictions: California's *Kearney v. Salomon Smith Barney, Inc.*[31]

Salomon Smith Barney was a large national investment brokerage firm, ridden by scandal.[32] During discovery for a claim alleging federal securities fraud, officials discovered that the firm's Atlanta, Georgia office recorded all communications with clients in California.[33] This was in line with the firm's policy and with Georgia state recording laws, but was in clear violation of California's all-party standard.[34] This initiated an additional class-action suit against the firm heard by the California Supreme Court.[35]

The subsequent decision by the California Supreme Court became the general rule for resolving interstate recording disputes.[36] Generally, when a business contacts an out-of-state client in pursuit of its business, the law of the client's state applies to that communication.[37] The Court reached this conclusion using a three-step analysis.[38] First, the Court must determine if it is constitutional for one state to use its power to exert its law over another.[39] Second, the Court must determine if there is a legitimate conflict between the two systems of party consent. Then, if there is a conflict, the third step is for the Court to determine if the state has any vested governmental interest in enforcing its own law over the other state's law. Once all three steps are satisfied, the statute can be enforced externally.[40]

The Due Process Clause of the Fourteenth Amendment requires that "no state shall … deprive any person of life, liberty, or

30. U.S. CONST. art. I, § 8, cl. 3.
31. Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914 (Cal. 2006).
32. *Id.* at 918.
33. *Id.* at 918-19.
34. *Kearney*, 137 P.3d at 918
35. *Id.* at 918.
36. For a Fourth Circuit case detailing this point, s*ee* Beach v. Ethicon, Inc., No. 2:12-cv-00476, 2017 WL 470907, *4-5 (S.D. W. Va. Feb. 3, 2017).
37. *Kearney*, 137 P.3d, at 922.
38. *Id.* at 920.
39. *Id.*
40. *Id.*

property, without the due process of law[.]"[41] For a law to apply to a person or entity outside of the state's jurisdiction in accordance with the Due Process Clause, the state needs to show that there is "legitimate or sufficient state interest."[42] Under California common law, there is a history of regulating non-Californian corporations to prevent abuse of the state's citizenry.[43]

To determine if a conflict is legitimate, the courts look to see if the two laws are in a true conflict.[44] First, the language of the specific provisions in alleged disagreement must be compared.[45] In the *Kearney* case, the two direct provisions facially appeared to be contradictory because California made illegal a conduct which Georgia did not prohibit.[46] Once the exact law at issue is analyzed, the court then looks to the statutory schemes as a whole, not to just to the single provision at issue.[47] The California privacy statute is one of the nation's most comprehensive bills on personal protection.[48] It has been read to protect any communication where an individual person is in California.[49] The Georgia statute also shows how the state intends its privacy protections to be interpreted, and how those matters affecting its citizens can be enforced.[50] Since corporations are separate and distinct legal entities from their officers, Georgia has an interest in protecting the privacy rights of its citizen corporation exactly as California has an interest in protecting individual privacy.[51] Thus, a true conflict exists when all potential jurisdictions have a vested contradictory interest in enforcing the rights of parties in a suit.[52]

Once a true conflict between the two privacy laws is proven to exist and all states relating to the claim are shown to have an interest in the matter, analysis then turns to which of all the potential states at issue is most significantly burdened by not enforcing

41. U.S. CONST. amend. XIV, § 1, cl.. 3.
42. *Kearney*, 137 P.3d, at 933.
43. *Id.*
44. *Id.* at 924-25.
45. *Id.* at 927-34.
46. *Id.*
47. *Id.*
48. *Id.* at 935-36.
49. *Id.* at 936.
50. *Id.* at 935.
51. *Id.*
52. *Id.*

their laws and allowing the enforcement of another state's laws.[53] This is determined first by comparing the legislative history of the two conflicting laws.[54] If preventing the action at issue is an explicit argument advocated on the legislative floor of the more restrictive law, that is an indication that that act will create a more significant burden on governmental interests.[55] After looking to the legislative history, other factors are examined to determine whether there is further evidence of a state's continual interest at the matter at hand.[56] First, if the statute is rarely enforced or is an outdated law that has been left on the books or clearly replaced by subsequent legislation without directly striking it down, overcoming the less restrictive law with the more restrictive law will not be deemed a burden on the state's interest.[57] If the law, however, is regularly enforced in current litigation, that will serve as the second factor in favor of enforcing the more stringent law.[58] Thirdly, if the provision at issue is continually amended and debated legislatively, but the initial intent of the legislation remains on enforcing the stronger protections, there is a greater chance the state can demonstrate a burden.[59] The final factor is determining whether non-enforcement in the current instance will substantially undermine the protections of the statute.[60] This factor test is to be conducted on the laws of all potential states, and if there is a significant difference in damaging effects by non-enforcement, the law of the state that suffers more severely should be applied.[61]

Using this test, the *Kearney* court found that California's interests would be more severely damaged by applying Georgia's one-party consent law than Georgia's interests would be by applying California's all-party law.[62] Despite the opposing state's interest in not having a party be liable for actions which are perfectly fine inside its borders, the court deemed that privacy of the second-party

53. *Id.* at 936.
54. *Id.*
55. *Id.* at 928.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 936.
62. *Id.*

is the graver harm under the protections granted exclusively by California over the standard rule.[63]

In a subsequent case, *McCann v. Foster Wheeler LLC*, the court restricted the *Kearney* holding to its current form.[64] *McCann* presented the opposite scenario where a California resident tried to enforce the laws of California regarding an incident that took place primarily outside of California.[65] The California Supreme Court's holding clarified that residents' rights must be abided by when in that jurisdiction, but that residents cannot enforce laws outside of the official borders of the State.[66] The holdings of *Kearney* and *McCann* resulted in the change of electronic recording policy throughout the business world, outside of purely Californian interactions.[67]

II. EARLY MARYLAND LAW

In the remaining two or all-party jurisdictions, the question remains if the courts will apply the California standards or allow for recording to continue as normal.[68] This question significantly affects geographic areas where large amounts of interstate commerce are conducted on a regular basis.[69]

One of the largest areas where continual actions of interstate commerce occur is between the jurisdictions of the District of Columbia, Maryland, and Virginia (collectively the "DMV").[70] Laws detailing the special relationship between these jurisdictions predate the U.S. Constitution.[71] In 1785, Maryland and Virginia were united by George Washington to jointly determine navigational

63. *Id.* at 937.
64. McCann v. Foster Wheeler LLC, 225 P.3d 516, 537 (Cal. 2010).
65. *Id.* at 530.
66. *Id.* at 537.
67. CHARLES A. GILMAN & JOHN J. SCHUSTER, FIRM MEMORANDUM FROM CAHILL GORDON & REINDEL LLP, KEARNEY V. SALOMON SMITH BARNEY, INC., 6 (Jul. 24, 2006) (detailing a need for disclosure between one- and two-party consent jurisdictions outside of California in the aftermath of the *Kearney* decision).
68. *Id.*
69. U.S. CONST. art. I, § 8, cl.3.
70. The area is collectively responsible for $559 billion in revenue. U.S. BUREAU OF ECONOMIC ANALYSIS & ST. LOUIS FEDERAL RESERVE, WASHINGTON-ARLINGTON-ALEXANDRIA, DC-VA-MD-WV (MSA) (2019).
71. Kate Mason Rowland, *The Mount Vernon Conference*, 11 PA. MAG. HIST. & BIOGRAPHY 410, 410 (1888).

rights over the Potomac River and Chesapeake Bay.[72] The Mount Vernon Compact was the first bill of cooperation between the States and established a precedent of mutual concern for joint interaction between the States.[73]

But this base commitment to furthering the interests of both Maryland and Virginia is not always given top priority.[74] One of the areas of the law in which Maryland interests dominate is in privacy matters.[75] Ever since 1868, upon the rise of the telegraph, Maryland has criminalized the disclosure of private electronic communication.[76] The invention of the telephone brought about further expansion of the law.[77] The laws, however, were specific and only prohibited the actions of employees of companies specializing in telephonic messaging.[78] If any party outside of the company managed to acquire the private communications, they could not be punished under the law.[79] The punishment for using one's private telegraph or telephone communication was a maximum fine of $500, a three-month imprisonment, or both.[80]

The 1900 amendment caused confusion in Maryland by creating no statutory guidelines on the admissibility of wiretap evidence in court, or if it was criminal in any context.[81] To clear up those issues, the Maryland General Assembly passed the Maryland Wiretapping Act of 1956.[82] This law banned all private interception of telegraphic or telephonic communications, both by the police and other public actors and private citizens.[83] The only exception was

72. *Id.*
73. *Id.* at 424.
74. Marianne B. Davis & Laurie R. Bortz, *Legislation: The 1977 Maryland Wiretapping and Electronic Surveillance Act*, 7 U. BALT. L. REV. 374, 375 (1978).
75. *Id.*
76. MD. CODE ANN., art. 27 § 556 (1868) (last amended 1976) (repealed 1977) (criminalizing the disclosure of private telegraph messages by the telegraph operator).
77. Act of April 10, 1900, ch. 610 § 252, 1900 Md. Laws 941 (amended into MD. CODE ANN. art. 27 § 556 (1976)).
78. *Id.*
79. *Id.*
80. *Id.*
81. *See* Hitzelberger v. State, 197 A. 605, 612-13 (Md. 1938) (permitting wiretapping evidence for the first time in Maryland); *see also* McGuire v. State, 92 A.2d 582, 585 (Md. 1952) (holding wiretapping evidence inadmissible in the federal Maryland District Court could be admissible in the state court system).
82. MARYLAND WIRETAPPING ACT OF 1956 (repealed 1973).
83. *Id.*).

for public benefit and only under unusual circumstances.[84] To create this exception, either Maryland's or an opposing jurisdiction's attorney general would have to petition either a circuit court judge or a judge of the Baltimore City Supreme Bench.[85] The application would have to set forth three mandatory elements for which the State had reasonable grounds.[86] First, either "that a crime has been … or is about to committed, … " [or that] evidence will be obtained essential to the solution of such crime."[87] Then, the State must show there is no other method possible to obtain the evidence other than wiretapping.[88] And finally, the State must depict that the exact telegraph or telephone line the State wishes to tap can indeed be used to record.[89] Any other situations would be illegal and subject to criminal fines or imprisonment.[90]

In 1965, the General Assembly made the possession or creation of a device capable of wiretapping a crime unless it was reported to authorities for a potential license immediately upon acquisition.[91] This license required both the individual owner and the device's identifying characteristics be provided for each device.[92] This was not designed to apply to either law enforcement or telegraphic communication employees for whom it was necessary for employment, but for every other civil party in Maryland.[93]

In 1977, the General Assembly repealed all of the State's electronic privacy laws and replaced them with the Maryland Wiretapping and Electronic Surveillance Act (MWESA).[94] The new law clarified that only "an investigative or law enforcement officer" could, under special circumstances, record with only one-party consent.[95] Anyone else who secretly recorded another party was

84. MD. CODE ANN., art. 35 § 94(a).
85. *Id.*
86. *Id.*
87. MD. CODE ANN., . § 94(a)(1-2).
88. *Id.* § 94(b).
89. *Id.*
90. *See* Manger v. State, 133 A.2d 78, 81 (Md. 1957).
91. MD. CODE ANN. art. 27 § 125D(a) (1976) (repealed 1977).
92. *Id.* § 125D(b)
93. Violations of the law could result in criminal punishment, either as a fine or incarceration. *See* MD. CODE ANN., § 125D(c) for the penalties.
94. MD. CT. & JUD. PROC. CODE ANN. § 10-402 (1977) (amended 2019).
95. *Id.* § 10-402(c)(2).

committing a felony.[96] MWESA remains the law on the matter in 2022.[97]

The most notable feature of MWESA is section 10-410.[98] Section 10-410 establishes a private civil cause of action for invasion of privacy.[99] The party alleging that they were recorded without consent can bring suit against "any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose or use the communications[.]" [100] Actual damages from the recording are "computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher[.]"[101] The injured party is also able to recover attorney's fees, litigation costs, and punitive damages.[102] These suits can be brought by a Maryland resident in any court within the State, and there is no minimal amount in controversy requirement.[103] Even if it was a singular occasion, that is enough to bring suit for recovery in damages.[104]

III. CIVIL APPLICATION OF THE MARYLAND WIRETAPPING AND ELECTRONIC SURVEILLANCE ACT

MWESA remains one of the most expansive electronic privacy statutes in the nation.[105] Yet, over the Act's lifetime, the full potential of private causes of action has never been entirely defined by the appellate courts.[106] There is no equivalent to *Kearney* in Maryland privacy law.[107] Until there is a settled decision, out-of-state businesses will have to be deeply cautious that they are not automatically infringing on the rights of their Maryland clients.[108]

96. *Id.*
97. *Id.* § 10-402.
98. MD. CT. & JUD. PROC. CODE ANN. § 10-410. (1977) (amended 1988).
99. *See* MD. CT. & JUD. PROC. CODE ANN., § 10-410(a).
100. *Id.*
101. *Id.* § 10-410(a)(1).
102. *Id.* § 10-410(a)(2-3).
103. *Id.* § 10-410(a)(1).
104. *Id.*
105. Justia, *supra* note 15, at 2.
106. *See* Mobley v. Coby, Civil Action No. HAR 94-1749, 1996 WL 250655, 8 (D. Md. Mar. 22, 1996) (commenting on the lack of civil suits arising out of § 10-402).
107. *Id.* (citing the lack of a need to consider the issue in its current stance).
108. GILMAN & SCHUSTER, *supra* note 67, at 6.

Since the passage of MWESA, there has not been a test over the potential extraterritoriality created through section 10-410.[109] Only over the past six years has the issue begun to arise in the courts.[110] So far, all claims intending to determine the issue have been dismissed.[111] These grounds have formed general guidelines on who may be able to sue, but do not provide full clarity to the potential for civil liability.[112] The fact that only trial courts have made the decision makes the potential of subsection 10-410 having an extraterritoriality provision unconfirmed throughout Maryland jurisprudence.[113]

The first case to raise the subsection 10-410 issue was *Maryland v. Washington Metropolitan Area Transit Authority.*[114] The aptly named Abdul Jalil Maryland brought the suit against the Washington Metro for unfair firing practices of Maryland residents.[115] The Metro system was recording its employees' private phone conversations and using it to release employment contracts.[116] The Metro system is an instrument of the governments of three separate jurisdictions: Maryland, Virginia, and Washington, D.C.[117] This joint instrumentality is what gave rise to the § 10-410 claim.[118]

The Maryland District Court held that the Metro could not be held liable under section 10-410.[119] Under the agreement that allows joint-jurisdiction over the Metro system, any of the associated governments "may not enact legislation which would impose burdens upon the compact absent the concurrence of the other signatories."[120] Virginia and Washington, D.C., have not expressly consented to the application of MWESA over the system, so the Metro cannot be held liable.[121] The Court did not expressly dictate

109. MD. CODE ANN., CTS. & JUD. PROC. § 10-410.
110. Civil Action No. TDC-14-3397, 2015 WL 4389885 (D. Md. July 13, 2015).
111. *Id.*
112. *Id.*
113. *Id.*
114. Maryland v. Wash. Met. Area Tran. Auth. Civil Action No. TDC-14-3397, 2015 WL 4389885 (D. Md. July 13, 2015), 6.
115. *Id.* at 4-5.
116. *Id.* at 5.
117. WASH. METRO. AREA TRANSIT AUTH., WASH. METRO AREA TRANSIT AUTH. COMPACT (1967) (amended 2009).
118. *Maryland*, Civil Action No. TDC-14-3397, 2015 WL 4389885.114, at 5.
119. *Id.* at 11, 15.
120. *Id.* at 11.
121. *Id.*

categorically that all governmental entities would always be free from liability, but it implied that in most instances these claims would be covered under governmental tort exemptions.[122]

In 2017, in *Sprye v. Ace Motor Acceptance Corp.*, the Montgomery County Circuit Court officially resolved the issue of § 10-410's maximum coverage.[123] In that case, calls to an automobile insurance agency were being forwarded to a North Carolina call center for recording, while indicating all calls were going to only the company's Maryland office.[124] The court held that on a plain reading of the statute, no extraterritoriality exists in the statute.[125] This is because there is no clause in § 10-410's statutory language which expressly names "any person" as to include any person outside of Maryland.[126] As such a provision does not exist, there is a high presumption that that is the meaning of the statute.[127] This was reasoned by applying the traditional Maryland choice-of-law doctrine of *Lex loci delicti.*[128] *Lex loci delicti* means "The law of the place where the tort or other wrong was committed."[129] Montgomery County's statutory interpretation would completely eliminate the issue, should it be accepted widely throughout the Maryland courts.[130] While *Sprye* can be perceived to be the official language on § 10-410, until further litigation is pursued, this cannot be the guaranteed result, because it remains unreported.[131]

In the 2020 case *E.M. v. Shady Grove Reproductive Science Center P.C.*, the reverse situation was attempted to be enforced.[132] E.M. was a resident of D.C., with temporary residency in Virginia, who was a patient of Shady Grove Reproductive Science Center P.C.[133] Shady Grove maintains its principal place of business in

122. *Id.*
123. Spyre v. Ace Motor Acceptance Corp., Civil Action No. PX 16-3064, 2017 U.S. Dist. LEXIS 67840 (D. Md. May 3, 2017).
124. *Id.* at 4.
125. *Id.* at 9.
126. *Id.* at 7-8.
127. *Id.* at 8.
128. *Id.* at 9.
129. *Lex Loci*, BLACK'S LAW DICTIONARY (11th ed. 2019).
130. The *Sprye* case has never been cited to, despite being the most definitive response on the subject of the breadth of § 10-410.
131. *Spyre,* LEXIS 67840 at 122.
132. E.M. v. Shady Grove Reprod. Ctr., 496 F. Supp. 3d 338 (D.D.C. 2020).
133. *Id.* at 367.

Maryland.[134] E.M. sued outside of the Maryland court system but still wanted to apply the two-party consent law to a recorded phone call.[135] E.M. took the disputed call outside of Maryland.[136] The D.C. court held that due to the decisions made in pleading, the plaintiff could not implicate Maryland law and could only rely on either D.C. or federal law, where under both there exists only one-party consent and thus no injury.[137] *Shady Grove* indicates that it will be highly unlikely to implicate the Maryland law onto non-Marylander plaintiffs, even if it was brought in the Maryland system.[138]

IV. ARGUMENT

Until either the legislature amends § 10-410 to expressly clarify the rule, or an appellate Maryland court clarifies the matter, non-Maryland businesses are at risk of violating their clients' privacy rights.[139] There needs to be an express acknowledgement of binding authority on the full extent of § 10-410 so that non-Maryland businesses can properly mitigate their risk as communication systems become easily recordable.[140] Clearer rules are necessary in the ever-increasingly digital and interstate corporate space.[141] Without a definite rule or analytical framework in the model of California's *Kearney*, interstate telephonic or digital businesses may relocate to jurisdictions with more defined practices.[142]

Under the Montgomery County Circuit Court's ruling, the Maryland General Assembly is in the greatest position to clarify the matter.[143] The main issue of subsection 10-410(a) turns on what the definition of the word "person" is in relation to the statute.[144] If the General Assembly defined the word to mean Maryland resident, they would eliminate any future claims of extraterritoriality and

134. *Id.* at 369.
135. *Id.* at 370.
136. *Id.*
137. *Id.* at 371.
138. *Id.*
139. GILMAN & SCHUSTER, *supra* note 67, at 6.
140. STATE OF MD. OFF. OF THE ATT'Y. GEN., LETTER TO DELEGATE ROSENBERG ON THE MARYLAND WIRETAP ACT, 4 (Jul. 7, 2010).
141. GILMAN & SCHUSTER, *supra* note 67, at 6.
142. *Kearney*, 137 P.3d, at 928.
143. *Sprye*, LEXIS 67840, at 8.
144. *Id.*

be in line with the trial court's reading of MWESA.[145] They could also explicitly allow the opposite to be true by defining "person" as both a Maryland resident and a non-resident.[146] This would allow for the judiciary to successfully clarify this potential legal issue to prevent future litigation.[147]

Maryland, unlike California, traditionally uses the *lex loci delicti* principal in torts suits with choice-of-law issues. Should the legislature either amend the statute to define "person" in the broadest possible sense, this is likely the test that would be applied.[148]

But unless the legislature or an appellate court clarifies the provision, the trial court's unreported *Sprye* reading is the most persuasive.[149] There is no active extraterritoriality provision present in subsection 10-410(a) and no non-Marylander parties need worry.[150] Unless there are any further challenges to privacy rights, this matter is a non-issue for non-resident businesses who record their conversations as part of standard protocol.[151]

Risk management may require businesses to question the livelihood and persuasiveness of the *Sprye* court.[152] Non-Maryland parties can voluntarily protect themselves from a change in position by simply receiving consent from the Marylander.[153] This can be done by sending a written consent form to the Maryland party in advance of the automatically recorded conversation.[154] Unless the party then explicitly denies the act of recording, it will create a presumption of at least implicit consent which would eliminate liability.[155]

145. *Id.*
146. *Id.*
147. *Id.*
148. *See* Lewis v. Waletzky, 31 A.3d 123, 130-32 (Md. 2011).
149. *Sprye*, LEXIS 67840, at 8.
150. *Id.*
151. *Id.*
152. *Risk Management,* BOUVIER LAW DICTIONARY, (desk ed. 2012).
153. *See E.N. v. T.R.* 255 A.3d 1, 23-24 (Md. 2021) (detailing all valid forms of consent as a defense in Maryland).
154. Model templates of what an electronic consent form looks like are available through the federal government through the General Services Administration. GEN. SERV. ADMIN., https://www.usability.gov/how-to-and-tools/resources/templates/digital-recording-release-form.html.
155. *See E.M.*, 255 A.3d at 24.

CONCLUSION

For proper risk mitigation for businesses, the judiciary or legislature need to develop a test on the civil liability provision of the Maryland Wiretapping & Electronic Surveillance Act.[156] It could be in the model of the *Kearney* test, as is the standard for two-party consent jurisdictions.[157] It could be an application of the *Lewis lex loci delicti* doctrine.[158] Under *lex loci delicti*, the rule need only be as simple as applying the law of the state of the non-recorded caller, but a test of some variety must be made to exist.[159] Or, it may be as simple as the legislature amending the Maryland Courts and Judicial Proceedings Code Annotated § 10-410 to accurately define who the General Assembly intends to cover by the word person in § 10-410(a).[160] But eventually this needs to be clarified.[161]

While there have been very few cases alleging civil injury so far under § 10-410 for a violation of § 10-402, the world is turning ever more digital.[162] Assuming the current trend towards complete digitization of the corporate workspace continues in the direction it has been heading, this issue could finally lead to cases of potential liability.[163] Even though this has not yet been the situation, the precedent of the *Kearney* decision could result in businesses being extra cautious and avoiding potential expansion into Maryland until a final decision is made.[164] The *Sprye* case established the groundwork for such a ruling, by stating it is non-applicable and not an issue to place in the calculus.[165] But the lack of appellate confirmation of the *Sprye* statutory interpretation still leaves the question open for debate.[166]

Civil rights violations of clientele are not a business's top prioity.[167] When there are legal situations where a state voluntarily

156. *See supra* § IV, 19-21.
157. *See supra* § IV, 19-21.
158. *See supra* § IV, 19-21.
159. *See supra* § IV, 19-21.
160. For a potential example of what a test in Maryland may be, *see Lab. Corp. of Am. v. Hood,* 911 A.2d 841 (Md. 2006).
161. *See supra* § IV, 19-21.
162. *See supra* § IV, 19-21.
163. *See supra* § IV, 19-21.
164. *See supra* § IV, 19-21.
165. *See supra* § IV, 19-21.
166. *See supra* § IV, 19-21.
167. *See supra* § IV, 19-21.

and significantly ratchets up the baseline of citizen's rights over the requirement of most American jurisdictions, it is imperative that the higher standard be known so that does not happen.[168] Unknown rules, such as the extent to which § 10-410 applies, are not beneficial to any party hoping to mitigate risk:[169] not to the company unsure if they are violating the law,[170] not to the individual who may or not have suffered an injury by being recorded without knowledge,[171] and especially not to the State, which has to accurately and justly apply the unclear law.[172] For the benefit of all involved, the full breadth of coverage under § 10-410 must be defined.

168. *See supra* § IV, 19-21.
169. *See supra* § IV, 19-21.
170. *See supra* § IV, 19-21.
171. *See supra* § IV, 19-21.
172. *See supra* § IV, 19-21.