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Eleventh Circuit's Ruling in *Breslow* Is Not As Dire For TCPA Defendants As It Might Appear

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One of the more troubling issues to arise in Telephone Consumer Protection Act litigation involves calls to reassigned cell phone numbers. "Almost 37 million phone numbers get recycled each year, a 16 percent increase since 2007, according to the most recent figures from the Federal Communications Commission."[1] While consent is a defense to a TCPA claim, that consent must come from the "called party." When a telephone number is reassigned from one person to another, and a company dials the number of the first person (who consented to receive calls at that number) but the phone is answered by a different person (who now uses a cell phone with the same number), who is the called party?

The TCPA itself doesn't answer this question. Though it uses the term "called party" seven times, the statute never defines the term, and doesn't address the issue of reassignment of cell phone numbers.

In *Breslow v. Wells Fargo Bank, N.A.*,[2] an opinion issued on June 5, 2014, the Eleventh Circuit joined the Seventh Circuit in ruling that the TCPA is essentially a "strict liability" statute, and that the "called party" "for purposes of § 227(b)(1)(A)(iii) means the subscriber to the cell phone service or user of the cell phone called."[3] The Seventh Circuit had earlier reached the same conclusion in *Soppet v. Enhanced Recovery Company, LLC*.[4] While a blow to defendants, who had argued that such an interpretation was unfair when they obtained consent from a person assigned a particular phone number, attempted to call that person without knowledge that the number was reassigned to another person, and then face a class action lawsuit from the second person, the decisions in *Breslow* and *Soppet* are not as dire as they might appear at first. While these decisions may preclude summary judgment in a TCPA case presenting this situation, plaintiffs face a very difficult task in obtaining class certification in such cases, and even if they are able to surmount the multiple difficulties inherent in obtaining certification, the resulting class is likely to be small.

Both *Breslow* and *Soppet* relied on legislative history, the purpose of the TCPA, and the fact that the statute's provision of treble damages for "willful" violations means that a violation with no knowledge or intention was still actionable. In the end, both courts clearly felt that as between protecting consumers from unwanted cell phone calls and businesses that acted in good faith, consumers prevail.

On January 16, 2014, United Healthcare Services, Inc. filed a petition for an expedited declaratory ruling with the FCC, seeking "clarification" of the applicability of the TCPA to "informational, nontelemarketing autodialed and prerecorded calls to wireless numbers for which valid prior express consent has been obtained but which, unbeknownst to the calling party, have subsequently been reassigned from one wireless subscriber to another."[5] In its petition, United Healthcare takes the position that "organizations cannot always know whether a telephone number has been reassigned."[6] The U.S. Chamber of Commerce weighed in on March 10, 2014 with a letter in support of United Healthcare's petition in which the Chamber took the position that there is no practical way for businesses to protect themselves against the possibility of calling a number that has been reassigned to someone new. "There is no single, authoritative wireless telephone number directory or currently available tool that can prevent all calls to phone numbers that once belonged to a client, customer, or other contact but have been reassigned without the knowledge of the caller."[7]

In *Soppet*, the Seventh Circuit expressed little concern for businesses or sympathy for the positions taken by the U.S. Chamber of Commerce and United Healthcare. The court offered several suggestions for how defendants might ensure they do not call persons to whom cell phone numbers were recently reassigned:

- Have a person make the first call (§ 227(b)(1) is limited to automated calls), then switch to a predictive dialer after verifying that Cell Number still is assigned to Customer.
- Use a reverse lookup to identify the current subscriber to Cell Number.
- Ask Creditor, who obtained Customer's consent, whether Customer still is associated with Cell Number—and get an indemnity from Creditor in case a mistake has been made.[8]

These suggestions are impractical and suggest that the court is somewhat out of touch with the everyday reality of the kind of volume calling at issue in most TCPA cases. As the U.S. Chamber of Commerce put it in its comment on the United Healthcare petition: "such a solution is impractical and prohibitively expensive, especially for informational, non-telemarketing calls."[9]

However, the Seventh Circuit was clearly correct when it held that keeping the TCPA in line with current technology and business practices is not the province of the courts. Recognizing that a statute originally enacted in 1934 and amended in 1991 required updating yet again after 25 years (a virtual epoch when it comes to technology), the Seventh Circuit rightly refused to assume that job. "Carl von Clausewitz wrote that war is the continuation of politics by other means, *Vom Kriege* (1832), but adjudication is not the continuation of legislation by other means."[10] The TCPA desperately requires revision and updating, and only Congress or the FCC can do it. It is unlikely, however, that the FCC will act in a way inconsistent with the positions taken by the Seventh and Eleventh Circuits, and Congress seems to have little appetite for fixing the TCPA.

Despite the disappointments of *Breslow* and *Soppet*, companies that engage in high volume calling are not left defenseless against enormous class action liability. Both *Breslow* and *Soppet* involved motions for summary judgment. Every TCPA case provides a defendant with at least two opportunities to "win." In cases involving reassigned phone numbers, and in light of decisions like *Breslow* and *Soppet*, defendants are likely better off concentrating their efforts on defeating class certification.

With the recent trend against certification based on lack of ascertainability of the proposed class, as seen in cases like *Carrera v. Bayer Corp.*,[11] cases involving reassigned numbers will be susceptible to an argument that the class cannot be ascertained. A strong argument can be made that the classes in these cases would need to be limited to individuals who received calls intended for the person to whom the cell phone number was previously assigned. In order to ascertain who these people are, the plaintiff (who bears the burden of proof on a motion for class certification) would need to show that, on each and every date phone calls were made, which numbers as of that date had been reassigned subsequent to the provision of consent to the defendant. This in turn would require the plaintiff to have a concrete list of the persons who had given consent and the dates on which that consent had been given. That list would then need to be checked to see if those numbers were subsequently reassigned. That sublist would then need to be reconciled against call records to see if calls were attempted to the number of the persons who consented but whose numbers were subsequently reassigned, and the individuals assigned those numbers as of the dates of the calls identified. Theoretically, this is possible. As a practical matter it seems unlikely.

Even if a plaintiff is successfully able to obtain all the necessary pieces of the puzzle and assemble them, chances are good that the resulting number of putative class members will be low. The point is, this does not seem to be a scenario that lends itself to large class sizes. A defendant who has solid evidence of consent from the persons it intended to call will face liability only to a small class of individuals who were reassigned numbers previously held by those consenting persons and whom the defendant called subsequent to the reassignment.

TCPA litigation is virtually out of control. An update is desperately needed. A damage cap in the style of those found in other consumer protection statutes such as the Fair Debt Collection Practices Act and Truth in Lending Act would fix the problem, along with some common sense decisions from the FCC and the courts. While the first battles over the issue of reassigned cell phone numbers have gone in favor of the plaintiffs' class action bar, it remains to be seen whether classes can be ascertained and certified in cases involving this issue, or if they can, whether they will be of any consequential size.

Endnotes

1 Alyssa Abkowitz, "Wrong Number? Blame Companies' Recycling," The Wall Street Journal (Dec. 1, 2011)
2 No. 12-14564, --- F.3d ----, 2014 WL 2523091 (11th Cir. June 5, 2014)
*3 Id. at *1*
4 679 F.3d 637 (7th Cir. 2012)
5 United Healthcare Petition at 1
6 Id. at 5
7 U.S. Chamber of Commerce Letter at 2
8 Soppet, 679 F.3d at 642
9 U.S. Chamber of Commerce Letter at 2
10 Soppet, 679 F.3d at 642
11 727 F.3d 300, 309 (3d Cir. 2013)

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