Published on *The National Law Review* https://natlawreview.com

Serial Litigant Potentially Lacks Standing to Sue in TCPA Lawsuit Arising From B2B Marketing Calls to Cell Number "Held Out to the World" as a Business Phone Number

Article By:

Womble Bond Dickinson (US), LLP

The TCPA (Telephone Consumer Protection Act) is a serial litigant's playground. Each has their own playbook, but one of the most common plays is listing a cell number online as a business phone number to lure calls from business-to-business marketers. Unwary businesses will walk right into that trap, then be faced with a lawsuit by the serial litigant demanding thousands of dollars in statutory damages for calls they allege violated the TCPA.

That common play was front and center in the recent ruling in *Shelton v. Target Advance LLC*, No. 18-2070, 2019 U.S. Dist. LEXIS 64713 (E.D. Pa. Apr. 16, 2019). As broken down below, that ruling shows two things. The first, that a plaintiff likely won't have standing to sue for calls to cell phones made with an ATDS if they post that cell number online solely for the purpose of drumming up TCPA lawsuits. The second, that if a cell number is used for business purposes, a plaintiff will not likely have standing to sue for calls to that cell number based upon violations of the TCPA's separate National Do-Not-Call Registry ("DNC") rules.

Before jumping in, it's important to have a quick primer. The TCPA regulates two main things. The first, and most heavily litigated rule, is the Act's prohibition on calls made with an ATDS to cell phones. *See* 47 U.S.C. § 227(b)(1)(A). The second, is telemarketing calls (no matter how they are made) to any "residential" telephone line (which would include both residential landlines, and personal use cell lines) registered on the DNC. *See* 47 C.F.R. § 64.1200(c).

In *Shelton*, Plaintiff James Shelton sued Defendant Target Advance LLC for violating both of these rules under the TCPA. According to the ruling, Defendant is in the business of providing business loans and merchant cash advance services, and engages in B2B marketing. In the course of marketing to businesses, Defendant had called Plaintiff's cell number because it was listed online as the number for a business called "Final Verdict Solutions". The court explained in its ruling that the cell number at issue was used by Plaintiff for both personal matters, and the "Final Verdict Solutions" business which Plaintiff claimed was a "judgment collections" business.

In response to the lawsuit, Defendant moved to dismiss Plaintiff's claims on the basis he lacked Article III standing to sue under the TCPA because he did not suffer a concrete injury since "Plaintiff had formulated a business model to encourage telemarketers to call his cellphone number so that he

can later sue the telemarketers under the TCPA." Defendant had based its argument in part on the ruling in *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782 (W.D. Pa. 2016), in which the court found that the plaintiff lacked standing to sue because she had purchased at least 35 cell phones "with the specific intent of receiving robocalls so that she could thereafter bring lawsuits under the TCPA," and did not use those cell phones "for any other purpose."

However, the court drew a distinction based upon the fact that the Plaintiff in *Shelton* had alleged that he used his cell phone for *both* personal and business purposes, and did not concede—as the plaintiff did in *Stoops*—that the cell number at issue was used solely for the purpose of manufacturing TCPA lawsuits. Notably, the court also found that regardless of the dual use, the calls at issue were "directed and made to the business use of the cellphone," since the purpose of the Defendant's calls was to market its B2B services.

Based upon this analysis the court made two important findings. The first, that since the TCPA prohibits ATDS calls to "*any* cellphone whether used for personal or business reasons," the Plaintiff's claims did not fail based solely on the fact that he used the number at issue for business purposes. The second, that the Plaintiff *might* lack standing if, as a factual matter, "the sole purpose of [Plaintiff's business] is to drum up TCPA litigation by inducing business-to-business robocalls." However, the evidence was in conflict on this point (Plaintiff had denied this was the sole purpose of his business) so the court found that a determination was "premature" without further factual development.

In contrast, the court had no trouble concluding that Plaintiff lacked standing to sue for violations of the TCPA's DNC provisions. It found that Plaintiff lacked standing to bring claims predicated on the TCPA's prohibition against sales calls to telephone numbers listed on the DNC because the cell number at issue was "also for business use, and business numbers are not permitted to be registered on the National Do Not Call Registry." The court went on, explaining that "because Plaintiff held the Phone Number out to the world as a business phone number, he could not register it on the National Do Not Call Registry for purposes of avoiding business-to-business calls, such as those giving rise to this action."

The ruling in *Shelton* is mostly positive. It seems fairly obvious that phone numbers held out as business phone numbers are not entitled to the protections of the TCPA's DNC rules since those rules are geared towards calls to residential or personal numbers. The question of standing to sue for an ATDS violation, however, was a closer call. But it seems that with a more fully developed factual record concerning the nature of the business tied to the cell number at issue, the Defendant might have a shot of persuading the court that Plaintiff also lacks standing to sue under the TCPA's ATDS rules.

What is interesting here as well is that the court's ruling helps light the way to a counter-playbook for the defendant, and potentially opens the door to discovery relating to the nature of the business tied to the cell number at issue. If discovery reveals that the only purpose of the Plaintiff's business is to "drum up" TCPA lawsuits, then it seems like it's game over for the Plaintiff's remaining ATDS claim. But at minimum, *Shelton* demonstrates the availability of a potent defense to B2B marketers when they have the misfortune of calling a cell number that a serial TCPA filer uses as a Venus flytrap by posting it online as the telephone number for a supposedly legitimate business.

Having said all of this, one of the most important takeaways here is that *using an autodialer to call telephone numbers scraped from the internet is risky business*. As the court in *Shelton* explained, the TCPA's ATDS rules do not distinguish between calls made to business versus personal cell

lines. Thus, while the serial filer element of this case might end up being the Defendant's saving grace, that's a fairly unique defense that likely won't be available in most cases—which means that these sorts of practices will still undoubtedly result in significant exposure to liability for TCPA violations.

National Law Review, Volume IX, Number 107