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Eleventh Circuit Rejects "Intended Recipient" Interpretation of Telephone Consumer Protection Act's (TCPA) "Called Party" Language

Article By:

Laura H. Phillips

The Eleventh Circuit recently ruled that the **TCPA's prohibition** on prerecorded calling applies to wireless numbers that have been reassigned from a consenting subscriber to a new, presumably nonconsenting one, regardless of the caller's knowledge of the reassignment. ***Breslow v. Wells Fargo Bank***, No. 12-14564 (11th Cir. 2014). Currently, the Act permits businesses to place prerecorded telemarketing calls to wireless subscribers with "the prior express consent of the called party," *see* 47 U.S.C. § 227(b)(1)(A), but does not specify whether the term "called party" refers to the intended recipient of the call or the actual recipient.

In *Breslow*, the Eleventh Circuit rejected Wells Fargo's proposed interpretation, where a "called party" would denote the intended recipient of the call, thereby protecting callers who are unaware that a number has been transferred to a different subscriber. *Breslow*, No. 12-14564 (11th Cir. 2014). It reasoned that Congress anticipated penalizing businesses that unintentionally call nonconsenting subscribers because the TCPA provides a separate, stiffer penalty for businesses that willfully call in violation of the statutes. *Id*. This line of argument is consistent with several pending, unresolved petitions pending at the FCC seeking guidance on the thorny issue of recycled wireless numbers and calls to unintended recipients. After evaluating the TCPA's language and legislative history, the court held that the term refers either to the telephone subscriber (i.e., the person paying the phone bill) or to the actual recipient of the call. *Id*. That result comports with the Seventh Circuit's conclusion in a similar case from 2012. ***See Soppet v. Enhanced Recovery Co***., 679 F.3d 637 (7th Cir. 2012). Accordingly, under Seventh and Eleventh Circuit jurisprudence, businesses making prerecorded telemarketing calls to wireless phones cannot rely on past representations of consent on the part of subscribers. Under this view, even a one-month-old express written consent could be outdated because cell numbers may be reassigned in as little as 30 days.

The rulings represent an outcome that businesses have long sought to avoid by petitioning the FCC to clarify that "called party" does, in fact, mean "intended recipient." To date, however, the FCC has declined to issue its own interpretation of the phrase. Meanwhile, cell phone proliferation has resulted in relatively transitory number assignments as consumers acquire and relinquish cell numbers more frequently than residential ones, so businesses today run a heightened risk of accidentally reaching a nonconsenting subscriber with each call they place. The Eleventh Circuit's decision makes it more likely that, without FCC action, prerecorded calling will become increasingly

fraught with potential TCPA liability, leaving the many businesses that rely on telemarketing in a difficult position. Businesses using telemarketing should take care to ensure that the numbers dialed actually belong to persons who have consented to receive telemarketing calls. In addition, businesses that are presently considering investing in the requisite technology or services to capture the efficiencies of prerecorded or autodialed calling should evaluate their degree of TCPA risk tolerance in light of *Breslow*. Ultimately, the FCC may help to chart a way forward for TCPA compliance with respect to recycled wireless numbers.

Anthony D. Glosson, a summer associate, contributed to this article.

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