

## Death And Taxes Are Certain; TCPA Claims Are Not

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In *Hannabury v. Hilton Grand Vacation Co., LLC*, No. 14-cv-6126, 2016 WL 1181789 (W.D.N.Y. Mar. 25, 2016), the District Court for the Western District of **New York** held that a named plaintiff's TCPA claims do not survive his death.

Plaintiff had filed a putative class action against *Hilton* for placing calls to his cell phone in an attempt to sell interests in timeshare properties, even though he alleged that his phone number was listed on the national Do Not Call Registry. The named plaintiff, however, passed away before moving to certify a class. His estate brought a motion to substitute itself as the named plaintiff.

The district court held that because the case had been filed in federal court that survivorship was a question of federal common law and that under federal common law, "the test for survivorship turns on whether the statutory claims at issue are primarily penal or remedial in nature" where penal claims extinguish at the party's death. 2016 WL 1181789, at \*3. To determine whether a claim is penal or remedial in nature, courts look to three factors: whether (i) the purpose of the claim is to redress individual or public wrongs; (ii) the recovery is an individual or public recovery; and (iii) the recovery is disproportionate to the harm suffered.

Weighing these factors, the court held that TCPA claims are penal in nature. First, the court found that the primary purpose of private TCPA actions is to redress public and not individual wrongs. The court reasoned that the "TCPA is meant primarily to deter" defendants from making offensive calls to the public and found support for its conclusion from the fact that Plaintiff sought \$3,000 for two phone calls that lasted a minute each and sought to bring an action on behalf of approximately two million people. *Id.* at 4. "It is difficult to see how this lawsuit, which is a powerful reaction to two brief phone calls, is anything other than a tool to redress and deter public wrongs." *Id.* The court also found the fact that the plaintiff did not seek actual damages for monetary losses suffered as a result of the phone calls as further evidence that Mr. Hannabury did not seek redress for individual harm.

Second, the court acknowledged that the recovery runs to the individual and not the public, suggesting the claims are remedial. The court, however, concluded that "the *benefit* of the award would primarily flow to the public by punishing and deterring the prohibited conduct." *Id.* at \*5.

Third and finally, the court found that the TCPA's statutory damages are "wholly disproportionate to the harm suffered." *Id.* The court concluded that "[t]he reality is that the TCPA's damages provision is specifically designed to be disproportional to the harm suffered; such disproportion both deters the volatile conduct and encourages victims to bring suit to redress violations." *Id.* (internal quotation marks and alterations omitted).

Weighing all this, the court held that the TCPA claims are penal and do not survive the plaintiff's death. The court then held that because the named plaintiff's claims became moot prior to class certification, the entire action became moot. As a practical matter, while *Hannabury* confirms the penal nature of the TCPA's draconian statutory damages, it also likely provides plaintiffs another reason to attempt to certify a class early in the litigation. Because death, like taxes, is inevitable.

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