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Conflicting Eleventh Circuit Decisions Underscore the Perils of the Telephone Consumer Protection Act (TCPA)

July 14, 2014

The Telephone Consumer Protection Act (TCPA)—which regulates aspects of robocalls, text messaging, and junk fax advertisements—is far from a model of legislative clarity. Indeed, the rapidly increasing amount of TCPA-related litigation and regulatory activity at the Federal Communications Commission (FCC) points up the confusion inherent in the TCPA's statutory terms and implementing rules.

At times, the TCPA's terms can be so unclear that even *the same court* interprets the same TCPA term in two different ways.

In *Breslow v. Wells Fargo* and *Osario v. State Farm Bank, F.S.B.*, the Eleventh Circuit had two recent occasions to determine the meaning of the term "called party" under the TCPA. Under Section 227(b) of the TCPA, it is generally unlawful "to make any call . . . using any automatic telephone dialing system ["ATDS"] or an artificial or prerecorded voice" unless that call is made for emergency purposes or made with the "prior express consent of the called party."

In *Breslow*, the plaintiff sued Wells Fargo for calling her phone through an ATDS without her consent. (What systems constitute an ATDS is itself the subject of litigation and pending petitions at the FCC.) Wells Fargo defended its actions by arguing that it had received consent from the prior owner of the cell phone number and it was unaware that the cell phone number was no longer assigned to the former customer. Wells Fargo argued that it should not be liable because the "called party" should be the "intended recipient," which in this case was the prior user of the number. After an extensive analysis of the TCPA's text, the statute's purpose, and its legislative

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history, the Eleventh Circuit rejected Wells Fargo's definition, concluding that "called party" means either "the subscriber to the cell phone service" or "the user of the cell phone called."

Unbeknownst to the Court in *Breslow*, however, two months earlier another panel of the Eleventh Circuit had articulated a *different* definition of the term "called party." In *Osorio v. State Farm Bank*, the Eleventh Circuit—after conducting a similar statutory analysis of the term "called party"—determined that the term means only the "current subscriber" to the cell phone service. Thus, in *Osorio*, the company was liable under the TCPA even though it had received consent from the plaintiff's housemate to call the plaintiff's phone. Four days after *Breslow* was issued, the Eleventh Circuit panel vacated the opinion on its own motion and issued a short *per curiam* opinion adopting the reasoning in *Osorio*.

This incident illustrates the confusion that abounds throughout the TCPA and its implementing regulations. This confusion with respect to the TCPA has led to an explosion of TCPA lawsuits around the country. As the U.S. Chamber of Commerce has reported, in 2013 alone, there were 1,862 TCPA lawsuits filed. That number was up from 1,101 in 2012 and 825 in 2011, an increase of 69% and 126%, respectively. Similarly, Commissioner Michael O'Rielly of the FCC recently acknowledged that "this lack of clarity" is evidenced by "a growing backlog of [TCPA] petitions pending at the FCC." All of this ambiguity inherent in the TCPA translates into business risk for companies that employ robocalling, text messaging, and/or fax advertisements in their marketing plans.

Wiley Rein LLP regularly represents businesses in TCPA-related litigation across the country and in regulatory proceedings before the FCC.