

Alert: Seventh Circuit Addresses the Meaning of Called Party Under the TCPA

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On May 11, 2012, the Seventh Circuit was the first appellate court to address the meaning of "called party" in relation to "prior express consent" under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(b)(1). *Soppet v. Enhanced Recovery Co.*, --- F.3d ---, 2012 WL 1650485 (7th Cir. May 11, 2012).

In *Soppet*, a debt collector used a predictive dialer to place a total of 45 calls to two different cell phone numbers to collect two debts owed to AT&T. Both cell phone numbers were provided to AT&T by the debtors. However, by the time the collector attempted to call the debtors (nearly three years later), the cell phone numbers had been reassigned. The new subscribers had not provided consent to receive automated or recorded calls from the collector. The new subscribers then filed suit seeking to represent a class of people who received calls on their cell phone from the collector using automatic telephone dialing systems or artificial or prerecorded messages without their prior express consent.

The district court granted the plaintiffs' motion to certify a class and then rejected the collector's defense that the debtors' consent to call the two cell phone numbers satisfied the "prior express consent" requirement under the TCPA. The district court held "only the consent of the subscriber assigned to [the cell phone number] at the time of the call (or perhaps the person who answers the phone)" constitutes "prior express consent." *Id.* at 3. The Seventh Circuit agreed and held that the text of the statute could not support an interpretation that "called party" means the "intended recipient of the call." *Id.* at 6-7. As the court noted, it must enforce the statute as written and is not permitted to modernize legislation. "Legislation means today what it meant when enacted." *Id.* at 9. Based on the text of the statute, the Seventh Circuit held "called party" must mean the current subscriber at the time the call is made. *Id.* at 12. "[A] Customer could consent expressly to receive calls at his *current* Cell Number, even if that number changes, but simply providing Creditor with a number – which is how Customer consented here – does not authorize perpetual calls to that number after it has been reassigned to someone else." *Id.* at 8.

The Seventh Circuit offered the following three alternatives to abandoning the use of predictive dialers:

1. "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" – We note this would only work as long as that person continues to be the current subscriber of that number.
2. "Use a reverse lookup to identify the current subscriber to Cell Number" – We note that to be completely effective, this would be required daily because the subscriber could change at any moment.
3. "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" – We note this is just a risk shifting move; it does not provide any ultimate guidance on how to avoid liability.

Finally, the Seventh Circuit suggests that collectors and their trade associations "should alert their lobbyists." *Id.* at 10-11. It is clear that lobbyists have been alerted. However, as we have seen, prior efforts to amend the TCPA to provide clarity for creditors and collectors have failed. See *Mobile Informational Call Act of 2011*, H.R. 3035, 112th Cong. (2011).

This decision highlights the potential liability associated with the use of automatic telephone dialing systems or artificial or prerecorded messages when calling cell phone numbers and the difficulties creditors and collectors face when trying to comply with the TCPA. Creditors and collectors should continue to explore methods of routinely verifying borrowers' contact numbers and confirming their consent to be called on those numbers using this technology.

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