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Case Study: Soppet V. Enhanced Recovery

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On May 11, 2012, the Seventh Circuit in Soppet v. Enhanced Recovery Company LLC, 2012 U.S. App. LEXIS 9560 (7th Cir. May 11, 2012), issued an opinion illustrating the risks of using an automated dialer to place calls to a stale cellular telephone number.

In Soppet, the defendant was accused of making a call to a cellphone number using an automated dialer regulated by the Telephone Consumer Protection Act, and that it had received consent from a prior consumer who had been assigned the number. Such consent is required prior to making a lawful call to a cell phone using an autodialer regulated by the TCPA. The current subscriber, however, had not provided any form of consent. The defendant did not know that the telephone number had been reassigned to another individual.

The Seventh Circuit ruled that a consumer who owned the telephone number previously used by another consumer could bring a cause of action under the TCPA because that person did not consent to the calls. “[O]nly the consent of the subscriber assigned to that cell number at the time of the call (or perhaps the person who answers the phone) justifies an automated or recorded call.” Id. at *6.

The Seventh Circuit considered at length the definition of a “called party,” a phrase used seven times, all told, in the language of the TCPA, 47 U.S.C. § 227, et seq. Because four of these times unmistakably “denote the current subscriber … [and] one denotes whoever answers the call (usually the subscriber)[,]” a called party must refer to the current subscriber. Id. at *7-8. The defendant argued that because people are moving from landlines to cell service, it makes it riskier to use predictive dialers that in the long run will lead to higher prices across the board. Id. at *11. The court, however, listed three options to ensure that dialers need not be abandoned due to the risk that the subscriber had changed for a given number:

Consent First

Although Soppet deals with the idea of transferred consent, before this issue can be addressed, actual express consent must have been given originally.

On Jan. 4, 2008, the Federal Communications Commission adopted Declaratory Ruling 07-232, stating that: “[A]utodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt [that] are made with the ‘prior express consent’ of the called party, we clarify that such calls are permissible.” In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, 23 FCC Rcd. 559

(F.C.C. 2008)).

The FCC also concluded that "the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt." Id.

The FCC, in clarifying the credit application rule, further stated that:

> We emphasize that prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed. To ensure that creditors and debt collectors call only those consumers who have consented to receive autodialed and prerecorded message calls, we conclude that the creditor should be responsible for demonstrating that the consumer provided prior express consent. The creditors are in the best position to have records kept in the usual course of business showing such consent, such as purchase agreements, sales slips, and credit applications. Should a question arise as to whether express consent was provided, the burden will be on the creditor to show it obtained the necessary prior express consent. Similarly, a creditor on whose behalf an autodialed or prerecorded message call is made to a wireless number bears the responsibility for any violation of the Commission's rules. Calls placed by a third party collector on behalf of that creditor are treated as if the creditor itself placed the call.

1992 TCPA Order, 7 FCC Rcd at 8769, para. 31 (citing House Report, 102-317, 1st Sess., 102nd Cong. (1991) at 13 (noting that "in such instances the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications").

The question of what constitutes "express prior consent" has mainly been discussed with regard to the credit card application process. The defendant, whether it is a debt collector or a creditor, has the burden of establishing prior consent. See Pollock v. Bay Area Credit Service LLC, 2009 U.S. Dist. LEXIS 71169, *9-10 (S.D. Fla., Aug. 13, 2009). The FCC also has determined that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." 23 F.C.C.R. 559, 564.

The Ninth Circuit has addressed the issue of consent, defining it as "[c]onsent that is clearly and unmistakably stated." Satterfield v. Simon & Schuster Inc., 569 F.3d 946, 952 (9th Cir. 2009) (quoting Black's Law Dictionary). In Satterfield, the plaintiff brought an action against the defendant for violating the TCPA by text messaging an advertisement to a cellular phone that the plaintiff owned. Id. at 949.

The plaintiff received the text message after she became a registered user of Nextones.com, which was not a defendant in the case. Id. However, the message was sent by defendant, a company who purchased cellular phone numbers from Nextones.com. The court held that plaintiff's consent to receiving promotional material from Nextones or their affiliates and brands did not amount to express consent to receiving a text message from the defendant company, which was not owned or controlled by Nextones nor was its subsidiary. Id. at 950.

Nuts and Bolts

Consent — in various iterations — continues to be a crucial issue with most TCPA claims. The Federal Communications Commission recently issued pronouncements that express consent — in writing — will be required

before making calls to wireless numbers with an autodialer. Now comes this Seventh Circuit decision, which looks at whether consent is transferable.

Soppet emphasizes an important point — businesses must recognize that autodialing old cellphone numbers is risky. Further, Soppett counsels that businesses should use due diligence to ensure that they are contacting the intended consumer. For example, if consent is in question because of the passage of time, Soppett suggests the important of having an initial, manual call in order to obtain recorded consent from the consumer to receive calls from an autodialer.

This decision is of substantial significance to businesses subject to the TCPA, most especially to businesses that use predictive dialers or other automated-call systems to contact consumers. Companies should consider steps to update their records when telephone numbers have been reassigned to new subscribers.

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