CLIENT ALERTS & INSIGHTS

Serial TCPA Litigant's Claims Dismissed For Inadequately Pleading Whether His Number is Protected By TCPA

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Little details matter, particularly in TCPA class actions. The court's decision in Perrong v. Victory Phones LLC, No. 20-5317, 2021 U.S. Dist. LEXIS 26159 (E.D. Pa. Feb. 11, 2021) is a good reminder not to simply gloss over standard and routine factual allegations, but to take a hard look at whether a complaint alleges the facts necessary to state a claim for relief.

Repeat-plaintiff (some may say, "serial litigant") Andrew Perrong filed a putative class action against Victory Phones LLC arising from a political survey call he received. Perrong alleged that the call violated Section 227(b)(1)(A) of the TCPA, which generally speaking prohibits making "auto-dialed" or prerecorded voice calls without consent to cell phones "or any service for which the called party is charged for the call." Perrong alleged that Victory's call to him was made using an "auto-dialer" and prerecorded voice and he was charged for the call. So, Perrong pled a sufficient claim under the TCPA, right?

Not so fast. Victory moved to dismiss the Amended Complaint because Perrong did not actually specify whether his telephone number was a residential landline (not covered by Section 227(b)(1)(A)), a cell phone, or whether it was one of the unspecific other services "for which the called party is charged." The distinction is not as trivial as it may seem.

In opposing Victory's motion to dismiss, Perrong admitted that his phone number was not a residential landline or a cell phone, but rather a Voice Over Internet Protocol ("VoIP") phone service. Noting that Perrong was "pleading by omission," the court noted that VoIP phones are treated differently from cell phones by many courts. VoIP phones can be assigned to residential lines, or even if answered on a wireless phone, require proof that the called party was in fact charged for the call to state a claim. And while Perrong made general allegations about being charged for the call, the court granted Victory's motion to dismiss, because Perrong did "not plead that he has such a 'protected number'" under this section of the TCPA, but instead "vaguely asserts he has *a* telephone number."

Now, the court's decision will not be the death-kneel of this litigation (yet), because the court granted Perrong leave to file another complaint to try and state a plausible claim. Ultimately, you may be thinking that "Perrong said he was charged for the call, so who cares?" But even when leave to file a new complaint is granted, such pleading deficiencies-particularly when they seem *intentional* as the court noted in this case-may cause the court to give increased focus and attention to these allegations down the road. Victory is convinced that Perrong's number is a residential landline in the first place. Even if Perrong's number is ultimately a VoIP wireless number, Perrong's "pleading by

omission" will likely cause the court to take a hard look at the facts down the line come summary judgment.

And while Perrong made allegations regarding being charged for the call, many of these may not hold up to factual scrutiny later. For example, general claims of a phone being "tied up" from a call isn't being *charged* for the call, which is the standard required by the FCC for these "other" services like VoIP under the TCPA. And while some VoIP providers do charge for calls, a very large number do not-for example, anyone can get a Google VoIP number and send and receive calls or texts without incurring any actual charges.

Which is Perrong's number ultimately? Perrong quickly filed a Second Amended Complaint acknowledging that not only is his number a VoIP number, but is a VoIP number assigned a residential landline. Perrong now also alleges that the VoIP service is provided by Anveo and is subject to a "per-minute charge of $0.004 per minute for voice charges." Perrong then went out his way to "respectfully" preemptively state that residential numbers are subject to Section 227(b)(1)(A) of the TCPA so long as the called party is charged.

Are residential landlines covered by Section 227(b)(1) of the TCPA so long as the called party is charged for the call? That's a discussion for another day, and will likely be subject to another motion to dismiss by Victory shortly. But Perrong's "pleading by omission" to try and avoid that issue in the first place is not a good look to start the case or a credibility enhancer for when the court will inevitably look to this same issue later.

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