TCPA Compliance Curveball: First Circuit Holds That Landline Phone May Be Treated As A Cell Phone For TCPA Purposes

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Just when the Ninth Circuit has almost cemented its status as the undisputed champion of ignoring the plain language of the TCPA, the First Circuit swoops and decides to be a major contender in that race with its decision in Breda v. Cellco P'ship, No. 18-1010, 2019 U.S. App. LEXIS 24148 (1st Cir. Aug. 2, 2019).

In doing so, the First Circuit both expanded the scope of TCPA liability while simultaneously making compliance virtually impossible for callers.

Cellular services and VOIP

The ATDS prohibition of the TCPA regulates calls "to any telephone number assigned to a … cellular telephone service," "or any service for which the called party is charged for the call" (an "Other Service"). Based on this language, courts have near uniformly concluded that the TCPA prohibits ATDS-initiated calls made to cell phone regardless of whether there is a charge for the calls, but prohibits calls to an Other Service **only** if the called party is charged.

Today, the most common type of Other Service at issue is Voice-Over IP ("VOIP") technology. VOIP is a growing telecommunications technology that allows a person to make voice calls using a broadband internet connection instead of a regular analog telephone line or using the traditional cellular network. VOIP can be a standalone service not interconnected with the public switched telephone network (i.e., no "telephone number"), such as using Skype to make computer-to-computer calls. VOIP can also be used with a telephone number and have a "last-mile" mobile transmission component; think using Google Voice on your phone. If your phone is not connected to the internet, no call can be made to the Google Voice number. The expansion of VOIP is particularly important in the context of mobile communications, as carriers continue to deploy more advanced technology (think, 5G) that overlay with traditional cellular telephone networks. These have led to what some have dubbed "hybrid" services, where a telephone number may be used to make and receive calls using both VOIP and traditional cellular networks.

To date, nearly all courts to have examined the issue have concluded that VOIP is an Other Service, for which the called party must prove that he or she was charged for the call in order to state a TCPA claim. The reason is simple: VOIP is not a cellular telephone service but is an internet-based service, regardless of whether there is a "last-mile" wireless component. Further, the TCPA itself-not to mention other statutes and FCC regulations-recognizes and identifies VOIP as a distinct form of communications from cellular service. As such, the fact that VOIP is not expressly listed in the

ATDS-prohibition, the way cellular telephone service is, supports that it falls into the category of unspecified Other Services.

In *Breda*, the plaintiff had a telephone number that was previously assigned to Verizon, a cellular telephone service. In 2015, the plaintiff switched ("ported") services from Verizon to Republic Wireless, a VOIP provider. In doing so, the plaintiff's telephone number was reclassified as a wireline-*i.e.*, **not a wireless**-telephone number. But the plaintiff used a mobile phone, and under Republic Wireless's service, if the voice call could not be made or received through VOIP, the call would instead be transmitted through a cellular telephone network.

After Verizon began to call the plaintiff, she sued Verizon, alleging that the calls violated the TCPA because they were made to a cellular telephone service. Verizon moved for summary judgment on two key grounds: (1) that VOIP was not a cellular telephone service; and (2) even if it was, the telephone number at issue was still not "assigned to" a cellular telephone service. (There was also a separate dispute over an arbitration agreement, but that goes beyond present purposes.)

The district court in *Breda* granted summary judgment in favor of Verizon on the grounds that VOIP was not a cellular service, but an Other Service. And because the plaintiff was not charged for the calls, she could not establish a TCPA violation. On appeal, the First Circuit reversed. The First Circuit agreed with the proposition that a telephone number assigned to a service that is *exclusively* a VOIP service constitutes an Other Service for which the called party must prove that he or she received a call. However, the First Circuit concluded that Breda's service being a "hybrid" service-where both VOIP and traditional cellular service are available for the same number-was "meaningfully distinguishable from exclusive VoIP service and constitutes 'cellular telephone service' within the meaning of the TCPA." The First Circuit further argued that because "hybrid services using both cellular networks and VoIP technology are becoming more common," a more restrictive meaning of the definition of a cellular telephone service "would create a significant rent in the consumer-protective fabric of the TCPA."

Bigger issue: how do callers comply with the TCPA?

While the First Circuit was wrong regarding VOIP, that is not the biggest error and implication of the case. The critical issue is whether a telephone number is "assigned to" a cellular service versus a wireline service. In *Breda*, the telephone number itself was ***assigned to*** a wireline service, regardless of whether the plaintiff was ultimately receiving calls through a mobile phone.

Verizon argued that because Breda's telephone number was listed as being assigned to a *wireline* service, that controlled over whether the consumer used the number differently. This makes sense, and callers and contact centers routinely rely on a telephone number's classification in deciding what contact strategies to employ-after all, such designation determines what type of service the telephone number is "assigned to" as required by the TCPA.

The First Circuit rejected this argument, concluding that the technical classification of the number was irrelevant, so long as the telephone number was ultimately "being used in connection with" a cellular service. Let that sink in for a moment. The crystal-clear language of the TCPA requires that the telephone number be "assigned to" a cellular telephone service. The First Circuit concluded that this plain language does not matter. Under the First Circuit's reasoning, even if a telephone number is “assigned to” a wireline, callers will face liability if the consumer ultimately uses that telephone number on a mobile device.

The court reached this conclusion, despite acknowledging that Verizon had no reason to know the plaintiff was using a wireless service given that the number was classified as wireline service. Instead, the court observed that even if a call is to a wireline there could be TCPA liability if the called party was charged, and that the third-party database Verizon relied upon still did not identify whether the “telephone number is associated with a plan under which the called party is charged for incoming calls.” Of course, the First Circuit did not address whether there was a realistic or feasible option in the first place (it’s not), or the fact that it simply is not required by the plain language of the statute.

Implication of *Breda*

The First Circuit’s decision in *Breda* is wrong, goes against the overwhelming majority of other cases to have addressed the issue, and will have numerous negative impacts on TCPA litigation.

First, the statutory interpretation is wrong: VOIP service is not a cellular telephone service. The TCPA itself distinguishes IP-enabled services as a distinct form of communication service. If Congress intended VOIP to be treated like cellular telephone service in the ATDS-prohibition, it could have easily included it among the directly regulated services in Section 227(b)(1)(A)(iii). It did not.

For that matter, the Telecommunications Act and FCC regulations and orders also routinely distinguish VOIP from other forms of telecommunications. Further, whether interconnected VOIP is a telecommunications service subject to the FCC (and thus subject to the TCPA) is an issue for the FCC to decide, not the courts. The FCC has not held that interconnected VOIP is a telecommunications service.

But the VOIP, cellular, and hybrid-VOIP distinction, while not to be disregarded, is still of secondary importance.

Second, and more importantly, *Breda* undermines a caller’s ability to investigate a number’s classification: Even if hybrid VOIP were a cellular telephone service, the telephone number itself was assigned, and identified as being assigned, to a wireline service. Callers routinely rely upon third-party databases like Neustar in evaluating the confidence level of whether a telephone number is assigned to a cellular service of wireline service. The court’s decision in *Breda* essentially means callers cannot rely on a telephone number’s classification when employing customer contact strategies.

So, what’s a contact center to do? The First Circuit clearly has no idea. Instead, all callers must essentially treat calls to wireline numbers as cell numbers, or else they face liability under *Breda*. The First Circuit’s decision is appalling both in its disregard of the statutory language of the TCPA and the onerous obstacle it creates for compliance efforts.

Finally, did the First Circuit tip its hand on the ATDS issue? Tucked away in a footnote, the First Circuit noted the ongoing conflict over the statutory definition of an ATDS. While the court observed that the definition of an ATDS was “not a contested issue on appeal,” for “present purposes” it adopted the broader “human intervention” test despite the outcome of *ACA Int’l v. FCC*

. Perhaps it's reading too much between the lines, but between that footnote and the First Circuit's decision to cavalierly disregard the TCPA's plain language with the issue at hand in *Breda*, that could be an ominous sign of things to come if the ATDS definition ever gets up to the First Circuit.

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