

TCPA Claims Still Uncertain (Although Death and Taxes Remain So)

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We [previously discussed](#) *Hannabury v. Hilton Grand Vacation Co., LLC*, a 2016 decision from the Western District of New York that held that TCPA claims do not survive a consumer's death because penal claims extinguish at the party's death and the TCPA is penal in nature.

Another judge in the Western District of New York recently reached the opposite conclusion in *Sharp v. Ally Financial, Inc.*, — F. Supp. 3d —, 2018 WL 4300018 (W.D.N.Y. Sept. 10, 2018). Although the *Sharp* court conducted the same analysis as the *Hannabury* court—*i.e.*, considering whether the statute was meant to redress individual or public wrongs, whether the recovery is individual or public, and whether the recovery is disproportional to the harm suffered—it found that the TCPA is remedial rather than punitive in nature.

First, the *Sharp* court looked to legislative history and concluded the purpose of the TCPA was to provide a private right of action to recover damages, *i.e.*, to recover for individual harms. Although it acknowledged that the hefty statutory damages serve a public purpose by deterring violations, it noted that they also incentivize individual consumers to file suit. Second, the court reasoned that the damages are paid to the recipient of the offensive phone call and not to the public. Finally, the *Sharp* court agreed with *Hannabury* that an award of “up to \$1,500 per violation” is “wholly disproportionate” to any harm suffered by “a single telephone call,” which is “generally expected to be minimal.” *Id.* at *10.

Although the court acknowledged that the third factor “suggests that the private right-to-action claim is ‘penal’ in nature,” *id.*, it found that the statute was remedial because the first two factors did not. But that suggests that the analysis turns on a counting rather than weighing of factors. Although the statute does enable individual consumers to file suit, it provides for monetary relief that is untethered to any actual damages they may have suffered, and a trebling of that relief in order to punish willful conduct. On balance, the statute’s private rights of action certainly seem more punitive than remedial.

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