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Fourth Circuit Court of Appeal Affirms $61,000,000 TCPA Judgement Against Dish Network

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Yesterday, the Fourth Circuit affirmed a $61,000,000 classwide judgment against Dish Network based on violations of the TCPA's National Do Not Call Registry ("DNC") rules committed by Dish's outside agent Satellite Systems Network ("SSN"). *Krakauer v. Dish Network*, No. 18-1518, 2019 WL 2292196 (4th Cir. May 30, 2019). The Fourth Circuit's often-times strongly worded opinion covers a gamut of TCPA issues including Article III standing, the suitability of TCPA claims for class treatment, agency issues, and the willfulness standard.

Initially, what's important to note is that the TCPA claims at issue involved telemarketing—which is precisely what Congress intended to curb and regulate when passing the TCPA in 1991. Thus, many of the Court's findings don't exactly come as a surprise, particularly given the current attention to unwanted "robocalling" in the public sphere, and prevailing attitudes towards telemarketing.

In *Krakauer*, Dish appealed a jury verdict finding Dish liable for the DNC violations

committed by SSN, and the District Court's subsequent order trebling damages based upon a willfulness finding. Dish's appeal focused on four issues: (1) the Court's finding that Plaintiff had Article III standing to sue; (2) the Court's class certification ruling; (3) the jury's finding that SSN was acting as Dish's agent; and (4) the lower court's exercise of discretion in trebling damages against Dish.

Article III

While the Supreme Court's opinion in *Spokeo v. Robins*, 136 S.Ct. 1540 (2016) originally provided an avenue for challenging Article III standing to sue for a TCPA violation—and still might with respect to some specific situations involving serial litigants—it is not an exaggeration to say that a finding of Article III standing in a TCPA case is virtually a foregone conclusion at this point.

Consistent with opinions of other circuit courts, including the Third and Ninth, the Fourth Circuit held that a violation of the TCPA's DNC rules under 47 U.S.C. § 227(c) results in the concrete injury necessary to confer Article III Standing to sue. The court reasoned that receipt of a call on a residential line that the called party "previously took steps to avoid," (i.e. by listing it on the DNC) imposes a "concrete burden on his privacy," that is sufficient to confer standing.

Notably, however, the court observed that other violations of the TCPA might not result in sufficient harm to confer standing, including "a procedural shortcoming, such as the defendant's failure to keep accurate Do-Not-Call records." While there is some question over whether there is a private right of action to sue for violation of those procedural requirements under 47 C.F.R. § 64.1200(d) to begin with, the court's opinion highlights some pockets of the TCPA where an Article III challenge might still be viable.

Class Certification

In examining the appropriateness of the trial court's order granting class certification, the court started with a general examination of why—in the abstract—TCPA violations involving violations of the DNC rules are suitable for class treatment. The primary reasons cited by the court were the fact that the elements of the claim are limited to just two: (a) a number was on the Do-Not-Call registry; and (b) at least two calls made to that number in a year. The court also pointed to the fact that damages are fixed at a statutory amount, and do not require proof of loss or individualized evidence.

However, and notably, TCPA claims in other contexts are not quite as clean. For instance, individualized inquiries over the existence of consent and/or the revocation of consent are routinely found to predominate in TCPA class actions involving debt collection calls. So while telemarketing cases under the TCPA might better lend themselves to class certification, the same cannot be said for other types of TCPA claims.

In challenging the lower court's certification order, Dish argued that the court certified an overbroad class because it included individuals who were not the subscribers of the telephone lines that received the calls in question. The court

rejected the argument holding that the right of action for a violation of Section 227(c)(5) "is not limited to telephone subscribers," and may be asserted by any "person" who "received" a call in violation of Section 227(c)(5). The court reasoned that a "non-subscriber who receives a call can suffer a privacy intrusion just as easily as a subscriber can." While this may be true to some degree—for example, the FCC has in other contexts ruled that the TCPA applies to calls to both the subscriber and customary user of a cell phone line—the court seems to go too far in holding that *any* person (which might include a visiting relative, or friend who happens to pick up the phone) would have the right to sue for a violation of Section 227(c)(5).

In fact, while the court read the applicability of the private right of action quite broadly, the language of the Section 227(c)(5) itself is clearly targeted toward telephone subscribers. Its title is: "[p]rotection of subscriber privacy rights". Additionally, the stated purpose of Section 227(c)(5)(1) to "protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object."

Outside of this issue, the court did not have much trouble concluding that a class was properly certified. It reasoned that the core requirements of class certification were met because "all of the major issues in the case could be shown through aggregate records," including "when calls were made, whether they went through to the residence, and to which numbers they were directed."

Even so, the court did seem to give short shrift to the issue of whether the existence of individualized inquiries over the Established Business Relationship ("EBR") exception to the DNC rules should have precluded certification. Under the EBR exception, businesses may call consumers who have either made an inquiry with the business regarding its products or services within the preceding three months, or have completed a transaction with the business within the preceding eighteen months. 47 C.F.R. § 64.1200(f)(6); 47 C.F.R. § 64.1200(14)(ii). Given the nature and scope of the exception, there could be a number of ways a consumer could make an inquiry that would create an EBR – i.e. over the phone, online, in person at a retail location, etc. Consequently, determining the existence of an EBR on a classwide basis could theoretically entail highly individualized inquiries over the existence of an EBR, including when and how the relationship was formed. The one thing the court did express was that it would expect Dish to have records that would permit adjudication of this issue in the aggregate. However, it's unclear from the opinion what the record was with respect to this issue in the underlying certification proceedings.

Agency

Dish also challenged the jury's finding that SSN was acting as Dish's agent in making the telemarketing calls at issue. The challenge had a high bar which required Dish to persuade the court that the jury's conclusion "lacks any meaningful support." The court found the opposite, however, and concluded there was "considerable" evidence supporting the jury's finding. That evidence included Dish's "broad authority" over SSN's business, SSN's authorization to use Dish's name and logo, and Dish's 2009 agreement with 46 state attorneys general wherein

Dish stated its authority over SSN with regard to TCPA compliance.

The court was unpersuaded by Dish's arguments that its relationship with SSN was exclusively delineated by the contract between the parties—which just so happened to disclaim an agency relationship. The court found that the jury was entitled to look beyond the contract to evidence of the "actual relationship" between the two entities in determining whether an agency existed.

Willfulness

The final issue taken up on appeal was the whether the court had exceeded the bounds of its discretion in trebling damages against Dish based upon its finding that Dish had willfully violated the TCPA. The court found it did not.

Initially, the court articulated a fairly robust standard for willfulness as follows: "indifference to ongoing violations and a conscious disregard for compliance with the law." Under this standard, "mere negligence would not be enough to support trebling the award."

Despite this relatively high bar, the court concluded there was "ample support" for a willfulness finding. The jury was presented with a catalogue of prior lawsuits and enforcement actions against Dish for telemarketing activities, "none of which prompted the companies to seriously improve its business practices." The court also pointed to "the half-hearted way in which Dish responded to consumer complaints."

Unfortunately, the court's opinion on this issue puts prior consumer complaints, including the handling of those complaints, in the spotlight, which may consequently bolster potential arguments in other arenas that this sort of evidence is relevant to a willfulness finding. Although unproven hearsay statements made by third parties not before the court (or subject to cross examination) are of questionable evidentiary value, particularly when used in the determination of whether to triple damages that are already disproportionate to the harm they are intended to redress.

Takeaways

At the risk of stating the obvious, *Krakauer* shows that compliance with the TCPA must be taken very seriously, especially when it comes to telemarketing. None of this should come as much of a surprise given prevailing attitudes towards this business practice. And the opinion shows that telemarketing claims have a very real potential of evoking strong reactions from courts and juries. Importantly, the court's findings regarding the suitability of DNC claims for classwide resolution, and the eight-figure award it affirmed illustrate the serious exposure that could result from a failure to follow the law.

Notably, the DNC provisions under the TCPA are the one aspect of the statute that has avoided any serious legal challenge over the years. For instance, the TCPA's separate rules concerning autodialed calls have been subject to constitutional challenges, and the very definition of the term ATDS is currently in flux. In contrast, the DNC rules are here to stay and *Krakauer* highlights the critical importance of ensuring that calls or texts made for telemarketing purposes comply with those

rules.

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