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Three Strikes: Are Ringless Voicemail Users Now "Out" Under the TCPA?

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It has happened again.

Yet again a Defendant using a ringless voicemail product to send messages to potential contacts has argued—at the pleadings stage—that such ringless voicemails are not subject to the TCPA because voicemail services are information services under the Communications Act of 1934. And, once again, that curious argument was rejected by a district court lending yet more—potentially unsubstantiated—credibility to the notion that ringless voicemails are, *per se*, covered by the TCPA.

In *Picton v. Greenway Chrysler-Jeep-Dodge*, Case No: 6:19-cv-196-Orl-31DCI, 2019 U.S. Dist. LEXIS 103796 (M.D. Fl. June 21, 2019) the Defendant allegedly used a ringless voicemail product to contact consumers. Rather than wait until the Rule 56 stage when a well-supported summary judgment motion defending the propriety of ringless voicemails might have been possible, the Defendant lobbed a pleading challenge at the court. Specifically, the Defendant argued that the case should be dismissed because ringless voicemails are not subject to the TCPA. The argument is one that I have puzzled over for years—that a ringless voicemail is not a "call" under the TCPA because voicemail services are information services and not telecommunications under the Communications Act.

The first white paper I ever read defending ringless voicemails—which I reviewed nearly a decade ago now—made the same argument. At the time I shrugged and asked the not-so-rhetorical question—so what? Text messages have long been considered information services and yet a text message is also plainly a "call" for TCPA purposes. Just because a voicemail provider is deemed to provide an information service doesn't mean that a message left for a consumer isn't similarly a "call" for TCPA purposes.

To this date no one has ever connected those dots, and the defendant in *Picton* came no closer than any others. It presented that same argument to the Court and were greeted with a unsurprising response: so what? As the court puts it: "[T]he issue is not whether voicemail services are subject to common carrier regulations under the Communications Act (or any other act, for that matter). The issue is whether the act of inserting a message into someone's voicemail box without their permission might run afoul of the TCPA. None of the authority cited by Greenway sheds any light on this question." This outcome was particularly unsurprising in light of a virtually identical ruling issued a few months back in another case where the Defendant raised the Communications Act challenges at the pleadings stage.

Now I am not saying this argument is wholly meritless. What I'm saying is that until Defendants connect the dots on this argument, the result is going to be the same. Query: *why* is it that a message left using an information service cannot be "call" under the TCPA? Is the argument that it would be inconsistent with the statutory scheme? Contrary to chosen policy? Merely pointing out that voicemail service isn't a telecommunication service just isn't the same as articulating a compelling reason why the TCPA cannot apply to it, *especially* considering that the TCPA has long applied to text messages, another form of information service.

For those fighting the ringless voicemail battle—give me a call. I have some ideas. For now, however, those fighting to defend ringless voicemail in TCPA cases just saw their hill get a little bit steeper. Hang in there TCPAWorld.