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COURT FINDS DEBT COLLECTOR VIOLATED TCPA'S "CALL CHARGED" PROVISION

The United States District Court for the District of Maryland recently held that a debt collector violated the federal Telephone Consumer Protection Act (TCPA) when it used an automatic telephone dialing system (ATDS) to call a residential line that had been converted to a Voice over Internet Protocol (VoIP) service for which the debtor was charged a monthly rate, along with a fee for incoming calls and for transmission of caller ID information of incoming calls. *Lynn v. Monarch Recovery Management, Inc.,* 2013 WL 1247815 (D. Md. March 25, 2013).

In *Lynn,* Monarch placed 37 calls to Lynn's number (a number that Lynn alleged was obtained from Monarch's skip trace company). The calls were made using an ATDS as defined by the TCPA. Lynn's number originally was a residential line, but prior to Monarch's calls, had been changed to a VoIP service. Lynn was charged a monthly rate by the VoIP service provider, and separately for incoming calls and for the transmission of caller ID information on incoming calls. Lynn did not give permission to Monarch to call him or his number. Also, he called Monarch twice to advise Monarch that calling his number cost him on a per-minute basis. Monarch called Lynn three more times after that notice.

Lynn filed suit against Monarch in Maryland state court for violating the TCPA, the Maryland Telephone Consumer Protection Act and the federal Fair Debt Collection Practices Act. The case was removed to federal court and both parties moved for summary judgment. With respect to the TCPA, Lynn alleged violation of Section 227(b)(1)(A)(iii) (the "call charged" provision), which prohibits persons from making any call (other than a call made for an emergency purpose or with the prior express consent of the called party) using any ATDS or an artificial or prerecorded voice, to any telephone number assigned to, among others, "any service for which the called party is charge for the call."

As to Monarch's motion for summary judgment, Monarch argued that its calls to Lynn were exempt from the TCPA under the "residential line" provision of the TCPA (*i.e.,* Section 227(b)(1)(B), which prohibits persons from initiating any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is exempted by rule or order under paragraph (2)(B); the FCC's rule at Section 64.1200(a)(2)(iii) exempts from TCPA liability any call made for a commercial purpose but that does not include or introduce an unsolicited advertisement or constitute a telephone solicitation).

The court assumed that the residential line provision applied to Monarch's calls and that the calls were within the provision's regulatory exemption for commercial calls that are not advertisements or solicitations. The court found, however, that the fact that Monarch would be entitled to summary judgment for an alleged violation of the residential telephone line provision was irrelevant, as no such allegation was made by Lynn. Instead, Lynn's TCPA claims alleged a violation of the "call charged" provision.

The court found that there was no evidence that Monarch's calls to Lynn were made for an emergency purpose or with Lynn's prior express consent. Also, the court found that Lynn's VoIP service provider charged him for each of the calls. The court rejected Monarch's arguments urging the court to reject application of the call charged provision. In particular, the court dismissed Monarch's argument that Lynn had not shown and could not show that his use of VoIP service or technology fundamentally changed the nature of his residential line because Lynn had established that the service charged him for the calls. Lynn's TCPA claim, the court concluded, fits squarely within the prohibition of the call charged provision. Thus, the court denied Monarch's motion for summary judgment on Lynn's TCPA claims. And, for the same reasons, granted Lynn's cross motions for summary judgment on those claims.

The *Lynn* case raises some troubling questions regarding the types of calls that may be considered to fit within the "call charged" provision as residential (or other) service arguably does not come "free." How is a caller to know how a called party pays for their phone service and/or what kind of service the called party has? Of course, several aggravating factors may have played a role in the court's decision, such as the lack of prior consent, the fact that Lynn asked not to be called because of the expense incurred and the fact that the three debts that were the subject of Monarch's calls did not belong to Lynn (the plaintiff) but to others.

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