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## **AUTO-DIALED CALLS INADVERTENTLY RECEIVED BY AN UNINTENDED RECIPIENT (WITHOUT CONSENT) VIOLATE THE TCPA**

The United States Court of Appeals for the Eleventh Circuit has held that auto-dialed calls inadvertently placed to a non-customer cell phone subscriber without consent violate the 1991 Telephone Consumer Protection Act ("TCPA"), affirming the lower court's order of partial summary judgment to the plaintiff. *Breslow v. Wells Fargo Bank*, 2014 WL 2565984 (11th Cir. June 9, 2014). The TCPA bans any call using an automatic telephone dialing system to a cell phone without the prior express consent of the "called party." 47 U.S.C. § 227(b)(1)(A)(iii)(2006); see our February 11, 2013, Alert on prior express consent. The *Breslow* court once again considered the proper interpretation of "called party" under the TCPA because the FCC has not issued its own interpretation of the phrase.

In *Breslow*, the bank attempted to collect debt by initiating phone calls to a former customer. The former customer had provided his express consent to contact by providing his phone number on his account application. The former customer's number was subsequently transferred to another subscriber. The bank was unaware that the number had been transferred when it made several calls to the cell phone of the plaintiff. The former customer never revoked his consent and the plaintiff never consented to the calls. Rejecting the bank's argument that the "called party" should be the intended recipient of the call, the *Breslow* panel held that "called party" for purposes of 47 U.S.C. § 227(b)(1)(A)(iii) means the subscriber to the cell phone service.

While the *Breslow* appeal was pending, another panel of the Eleventh Circuit encountered the same issue in *Osorio v. State Farm Bank*, 746 F.3d 1242 (11th Cir. 2014). The *Osorio* panel rejected the defendant's argument that "called party" could mean intended recipient, holding instead that "called party" under the TCPA means the current subscriber to the cell phone service. The *Osorio* court relied heavily on the Seventh Circuit's interpretation of "called party" in *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637 (7th Cir. 2012).

In *Soppet*, Judge Easterbrook focused on the use of "called party" throughout Section 227, stating:

Section 227 uses the phrase "called party" seven times all told. Four unmistakably denote the current subscriber (the person who pays the bills or needs the line in order to receive other calls); one denotes whoever answers the call (usually the subscriber); and the others (the two that deal with consent) have a referent that cannot be pinned down by context.

*Id.* at 640. The Seventh Circuit held that the use of the single phrase "called party" consistently over the short span implies that consent is required to come from the current subscriber. The *Osorio* panel agreed and the *Breslow* panel followed.

This string of decisions evidences the heightened risks for businesses relying on communication by phone, particularly in light of the transitory nature of cell phone numbers and the difficulty involved in determining whether or not a number has been reassigned. □

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