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TCPA Class Actions – Ninth Circuit Finds Businesses Have TCPA Standing

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Takeaway: In *Chennette v. Porch.com, Inc.*, -- F.4th ----, No. 20-35962, 2022 WL 6884084 (9th Cir. Oct. 12, 2022), the Ninth Circuit expanded the scope of standing under the Telephone Consumer Protection Act ("TCPA"), finding that businesses fall within the "zone of interests" the TCPA was intended to protect, and that cell phones used for both residential and business purposes are presumptively "residential" for purposes of the TCPA.

Facts and District Court Ruling

Plaintiffs Nathan Channette and fifty other home improvement contractors filed TCPA claims against Porch.com. Porch.com – which sells client leads to home improvement contractors – had scraped the contractors' telephone numbers from Yelp.com and other web pages and sent over 7,500 text messages to the plaintiffs' cellular telephones using an automatic telephone dialing system ("ATDS"). A number of the plaintiffs had also registered their cellular telephone numbers on the national do-not-call registry ("DNC").

The district court dismissed the plaintiffs' claims for lack of statutory standing. *Chennette v. Porch.com, Inc*., 484 F. Supp. 3d 912, 914 (D. Idaho 2020). The court found businesses like the contractors' home improvement businesses fell outside of the TCPA's "zone of interests." *Id*. It reasoned that the TCPA was intended "to apply to consumers, not business numbers like cell phones used by contractors." *Id*.

Ninth Circuit Opinion

The plaintiffs appealed. In addition to challenging the district court's "zone of interests" ruling, plaintiffs alternatively argued they had standing under Section 227(c), which prohibits solicitation calls to "residential subscribers" who have their numbers listed on the DNC. The Ninth Circuit reversed the district court, finding that business are within the TCPA's "zone of interests" and that the contractors had standing as "residential subscribers" under Section 227(c). 2022 WL 6884084, at *4-7.

The panel quickly dispatched the district court's "zone of interest" ruling. Although the panel was interpreting the Telephone *Consumer* Protection Act, and despite legislative history suggesting the TCPA was not intended to apply to business communications, the panel found the contractors fit within the TCPA's "zone of interests," based on a textual analysis. Section 227(b) prohibits making "any call . . . using any automatic telephone dialing system . . . to any number assigned to a cellular telephone." Section 227(b) further provides that it may be enforced by a "person or *entity*." *Id*. at *4. Based on this statutory text, the panel found that the plaintiffs, as business entities, had standing to sue under the TCPA.

It then addressed the subset of plaintiffs who also alleged standing under Section 227(c). Section 227(c) prohibits telephone solicitations to a "residential telephone subscriber" registered on the DNC. Plaintiffs alleged that their cell phones were used for both business and residential purposes. The Ninth Circuit

reviewed district court decisions from across the country. While some courts had found a cell phone used for both personal and business purposes was not residential, the majority concluded the issue depends on the context. But the panel went beyond the majority of district courts and – citing language from a 2003 FCC Order – found that cell phones used for business and residential purposes and registered on the DNC are *presumptively* residential within the meaning of Section 227(c). *Id*. at *6-7. The panel remanded the case to the district court to assess the relevant factors, including

> (1) how plaintiffs hold their phone numbers out to the public; (2) whether plaintiffs' phones are registered with the telephone company as residential or business lines; (3) how much plaintiffs use their phones for business or employment; (4) who pays for the phone bills; and (5) other factors bearing on how a reasonable observer would view the phone line.

Id. at *7.

Judge Sandra Ikuta issued a scathing dissent, accusing the majority of "usurp[ing] the role of the [FCC] and creat[ing] its own regulatory framework for determining when a cell phone is actually a 'residential phone:'" 2022 WL 6884084, at *12 (Ikuta, J., dissenting). Judge Ikuta asserted that the legislative history of the TCPA "confirm[s] the common understanding that residential telephones are distinct from cell phones." *Id*. at *14.

Conclusion

The "zone of interest" holding will be a difficult one for TCPA defendants to swallow. In addition to expanding the TCPA to cover business calls, the textualist analysis would seem to cut off any standing argument based on the TCPA's "zone of interests." Such arguments had been gaining traction. In *Stoops v. Wells Fargo Bank, N.A*., 197 F. Supp. 3d 782, 804 (W.D. Pa. 2016), for example, the court found that a serial plaintiff who had purchased multiple cell phones in the hopes of receiving illegal solicitation calls fell outside the TCPA's zone of interests. Because even serial TCPA plaintiffs are technically "person[s]," that argument would appear to be a dead letter in the Ninth Circuit.

While *Chennette* is largely bad news for TCPA defendants, there is a silver lining for class defendants. The Ninth Circuit's ruling establishes that determining whether a cell phone is "business" or "residential" requires application of a multi-factor "facts and circumstances" test for each putative plaintiff. While the plaintiffs did not file *Chennette* as a class action, application of that test would seem to make certification of a class involving alleged residential cell phone users difficult, if not impossible.