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N.C. district court makes clear that cell phone may constitute a residential phone in denying motion to dismiss TCPA class action

by Destiny D. Williams

A North Carolina federal district court recently denied a motion to dismiss a putative class action alleging violations of the Telephone Consumer Protection Act ("TCPA") based on the receipt of text message solicitations. *Hudson v. Palm Beach Tan, Inc*., No. 1:23CV486(WO)(JEP), 2024 WL 4190513 (M.D.N.C. Aug. 12, 2024), *report and recommendation adopted,* No. 1:23-cv-486, 2024 WL 4188310 (M.D.N.C. Sept. 13, 2024).

Alex Hudson alleged that Palm Beach Tan violated the TCPA by repeatedly sending him and other putative class members text message solicitations, even though he had added his cell phone number to the national Do-Not-Call registry in 2009 and repeatedly requested that Palm Beach Tan stop sending him messages. 2024 WL 4190513, at *1.

Palm Beach Tan moved to dismiss Hudson's claims for three reasons: (1) Subsection 227(c) of the TCPA only applies to residential telephones only and excludes cell phones; (2) this same TCPA subsection only applies to voice calls and excludes text messages; and (3) internal do-not-call lists do not grant a private right of action. *Id.* at *3.

The North Carolina court denied the motion to dismiss on all three grounds.

First, the court found that the vast majority of case law in North Carolina and elsewhere supported treating cell phones as residential phones for purposes of Subsection 227(c) of the TCPA. *Id.* at *3-4 (citing to *Krakauer v. Dish Network, LLC,* 311 F.R.D. 384 (M.D.N.C. 2015), *aff'd* , 925 F.3d 643 (4th Cir. 2019) (certifying a TCPA class that included landline and cell phone numbers)). *Id.* The court also found that treating cell phones as residential phones was supported by subsections 227(c)(2) and 227(d) of the TCPA and the applicable FCC regulations. *Id.* at *4-5.

Second, the court found that the TCPA statutory text, FCC regulations and guidance, and prior precedent supported the conclusion that the receipt of text messages, as compared to voice calls, is still actionable under the TCPA because the TCPA recognizes "text calls as a type of call," so "a text message would presumably be a form of telephone call under § 227(c)(5)." *Id.* at *8.

Third, the court found that based on the *Krakauer* case and other relevant Fourth Circuit authority, there was "clear authority" to grant private rights of action for violation of internal do-not-call lists under the TCPA and FCC regulations. *Id.* at *9.

Takeaway: The *Hudson* case reemphasizes that for purposes of the TCPA, a cell phone may constitute a residential phone, a text message may constitute a telephone call, and a plaintiff may bring a private right of action for violations of internal do-not-call lists.