No. 11-3819

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

TERESA SOPPET and LOIDY TANG,	)	Appeal from the United States District Court for the Northern District of Illinois
Plaintiffs-Appellees,	)	
vs.	)	No. 10-cv-5469
ENHANCED RECOVERY COMPANY, LLC, as successor to ENHANCED RECOVERY CORPORATION,	)	The Honorable **Matthew F. Kennelly,** Judge Presiding.
Defendants-Appellants.	)	

CORRECTED BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF THE DEFENDANTS-APPELLANTS SUPPORTING REVERSAL

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No.: 11-3819

Short Caption: Soppet and Tang v. Enhanced Recovery Co.

1. The full name of every party that the attorney represents in the case: ACA International

2. The names of all law firms who partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court: Hinshaw & Culbertson LLP

3. If the party or amicus is a corporation:

   a. Identify all its parent corporations, if any; and N/A

   b. List any publicly held company that owns 10% or more of the party's or amicus' stock: N/A

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INTEREST OF THE *AMICUS CURIAE*, ACA INTERNATIONAL

This brief is filed with the consent of all parties.

ACA International ("ACA") is a non-profit corporation founded in 1939 and based in Minneapolis, Minnesota. ACA is an association of credit, collection, and debt purchasing professionals who provide a wide variety of accounts receivable management services.[1] ACA's interests in this matter are both public and private.

ACA represents more than 5,000 third-party collection agencies, asset buyers, attorneys, credit grantors, and vendor affiliates. ACA's members include sole proprietorships, partnerships, and corporations ranging from small businesses to firms employing thousands of workers. Together, ACA members employ close to 150,000 people. ACA helps its members serve their communities and meet the challenges created by changing markets through leadership, education, and service.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, or its counsel made a monetary contribution to the preparation or submission of this brief.

ACA serves as the voice of its members before legislatures and regulatory authorities and in court as *amicus curiae*.[2] It also provides a variety of services that help its members comply with the laws that regulate debt collection.

ACA members assist businesses of all sizes in collecting payment for goods and services that they provide to their customers. Each year ACA members recover billions of dollars that are returned to businesses and reinvested in local communities. To collect debts efficiently, ACA members may use predictive dialers to contact consumers.[3] According to the Federal Communications Commission ("FCC"), these devices fall within the definition of an "automatic telephone dialing system" under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(a)(1). The TCPA prohibits using automatic telephone dialing systems ("autodialers") to make calls to numbers that are assigned to wireless

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[2] ACA has filed briefs *amicus curiae* in several recent cases of interest to its members that have been decided by or are pending in the United States Supreme Court, including *Jerman v. Carlisle, McNellie, Rini, Kramer & UlrichLPA*, 130 S.Ct. 1605 (2010); *Mims v. Arrow Financial Servs., LLC*, 132 S.Ct. 740 (2012); and *First American Fin. Corp. v. Edwards*, No. 10-708 (U.S.S.Ct.).

[3] A predictive dialer has the capacity to dial specified telephone numbers from a database or list and time the calls so that a live representative is likely to be available when a call is answered. *See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 18 FCC Rcd. 14014, 14090-91, ¶¶ 130-31 (July 3, 2003). 2003 WL 21517853.

telephones without the prior express consent of the called party. 47 U.S.C. § 227(b)(1)(A)(iii).

As the use of mobile phones has risen in recent years, consumers have filed hundreds of TCPA actions against debt collectors, typically alleging that the debt collector violated the TCPA by using a predictive dialer to call the consumer on a mobile phone. This litigation threatens to render the collections process ineffective, which in turn would threaten the viability of the businesses that ACA members serve and ultimately raise the prices that consumers pay. Because many ACA members are defendants in TCPA litigation, they have an interest in this litigation.

SUMMARY OF THE ARGUMENT

The ruling below should be reversed because, as ERC correctly argues, the District Court's construction of the term "called party" is not compelled by the language or history of the TCPA. The more natural reading of the term "called party" is to refer to the person that the defendant intended to call—in this case, the consumers who had consented to being called at the numbers that they provided to their creditors. Plaintiffs were not "called parties" under the TCPA simply because they answered the phone when defendant Enhanced Recovery

Company, LLC ("ERC") attempted to contact the consumers regarding their debts.

By this brief ACA hopes to show the Court that the District Court's reading of the statute also does not reflect the realities of modern life, particularly as regards cell phones and the numbers assigned to them. At the time the TCPA was passed, cell phones were a relative rarity, but today there are more cell phones in America than there are Americans. This explosion in the use of cell phones has also changed the way telephone numbers are used. While the assignment of a number to a land line may be expected to last for at least some period of time (given the fact that land lines are often tied to home ownership), cell phone users are more likely to change their numbers at their whim. Additionally, adults may purchase cell phones in their own names but provide the phones to their children or spouses. And there are no directories for cell phone numbers. These changes present substantial obstacles for companies like ERC in determining whether the "called party"—that is, the person they intend to call, the person who consented to being called—is still using the cellular number they had provided.

The District Court's interpretation of the phrase "called party" was not compelled by the TCPA; indeed, as the court itself noted, the phrase is not defined in the TCPA, and that the statute elsewhere uses

the word "recipient" to refer to persons who receive calls. Appellant's Appendix at A-2. In the absence of clear guidance, the District Court should have considered the difficulties posed by the mutability of cell phone number assignments. It also should have given weight to the FCC's construction of the TCPA, which recognized that "persons who knowingly release *their phone numbers* have, in effect, given their invitation or permission to be called *at the number which they have given*." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559, 561-62, ¶ 9 (2008 WL 65485 (F.C.C.) ("2008 FCC Order") (emphasis supplied). That construction properly focused on what a caller can be expected to know, that is, the consent given by the holder of a number to calling *that number*, rather than resting its holding on the absence of consent from someone else who, entirely by chance, ends up with the same number after a period of time that, in today's world, could be relatively short.

As is often the case, the availability of statutory damages remedies based on an error a defendant is hard put to avoid has led to the usual absurd results and attracted the usual serial litigants. The exponential growth of cell phone use, coupled with rulings like the one challenged in this appeal, has prompted a proliferation of plaintiffs bent on cashing in on their lucky inheritance of a cell phone number formerly assigned to a

consenting consumer. ACA is hard put to imagine what defendants like ERC could have done to avoid being sued by the likes of these plaintiffs other than giving up the central efficiencies of their legitimate and productive businesses.

The Court should reject the District Court's interpretation of "called party" in favor of one that is both consistent with the language and aims of the TCPA and that reflects reality. Under the District Court's erroneous interpretation, the exception created by Congress in § 227(b)(1)(A) for calls made with "the prior express consent of the called party" is rendered meaningless when, as is often the case these days, the called party is not the person who answers the phone. Accordingly, this court should hold that under the TCPA's plain meaning, an unintended recipient of a call made to a number that has been the subject of consent cannot assert a cause of action for a violation of § 227(b)(1)(A) (iii).

ARGUMENT

The district court correctly assumed that the two consumers, Dupree Riley and Sherita Morgan, consented to being called by ERC because they listed their cellular telephone numbers on credit applications as their home numbers. Appellant's Appendix at A-2. By the time ERC attempted to contact them, though, their cellular numbers had been assigned to the plaintiffs, Teresa Soppet and Loidy Tang. The

District court rejected ERC's argument that it had consent to call the cell phone numbers that had been provided by the two consumers, and held instead that the plaintiffs (who were unknown to ERC), and not the people ERC had tried to call, were the "called part[ies]" under the TCPA.

The District Court's ruling has the effect of elevating what is essentially a wrong number to a class action lawsuit. The consumers that ERC was trying to call had consented to being called on the cell phones they provided. Just as the terms of the TCPA do not provide a right to revoke consent once given, consent is not somehow automatically extinguished if someone other than the debtor subsequently answers the subject phone. Under the District Court's misinterpretation of § 227(b)(A)(iii), regardless of the passage of time, if another person answers the phone that person can assert a claim under the TCPA. That result is not consistent with authoritative FCC guidance and leads to absurd results.

I. The District Court's Interpretation of "Called Party" Leads to Absurd Results Given the Proliferation of Cell Phone Ownership, the Ease at Which Cell Phone Numbers Are Recycled and the Decline of Land Lines

When the TCPA was first enacted in 1991, only 7 million Americans had cell phones.[4] Recent statistics put the figure at 350

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[4] http://hypertextbook.com/facts/2002/BogusiaGrzywac.shtml (last visited 2/1/12).

million—more than one per American.[5] As ERC correctly points out at page 3 of its Brief, a high percentage of persons utilize their cell phone as their sole means of communication. The Centers for Disease Control found that the percentage of house-holds that had wireless phones but no landlines rose to 29.7% at the end of December 2010, up from 7.3% in 2005. The percentage of adults who have landlines but who nonetheless receive all or nearly all calls on wireless phones ("wireless-mostly households") rose to 17.4% at the end of 2010. [6]

The explosion of cell phone use in the years since the TCPA was passed presents additional challenges to businesses trying to contact persons using cell phone numbers they have provided. Unlike traditional land line numbers, cell phone numbers may change with great frequency. Users may change their cell phone service provider, and may or may not "port" their numbers with them. In addition, there

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[5] C. Kang, *Number of Cellphones Exceeds U.S. Population: Trade Group*, Washington Post, October 11, 2011, available at http://www.washingtonpost.com/blogs/post-tech/post/number-of-cell-phones-exceeds-us-population-ctia-trade-group/2011/10/11/gIQARNcEcL_blog.html (last visited 2/1/12).

[6] *Compare* Division of Health Interview Statistics, National Center for Health Statistics, Centers for Disease Control, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2008,* Table 1, (available at http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200905.pdf) (last visited on October 18, 2011) *with Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July–December 2010,* Table 1 (available at http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201106.pdf) (last visited 2/1/12).

has been a recent proliferation of "temporary" or "pass as you go" cell phones that allow a person to use a cell phone (and its assigned number) for a short period of time, after which the user returns or discards the phone and the number is reassigned to another user. Indeed, regardless of the reason the number is reassigned, cell phone numbers may be "recycled" in this way in as little as 30 days.[7] And, unfortunately, there is no national directory of cell phones. Given the fact that more and more Americans are solely utilizing cells phones, creditors are often left with no other number to call other than the one the consumer provided—the number that consumer consented to have called.

The increased difficulties facing creditors trying to use cell phone numbers they were provided to contact consumers has contributed to an overall expansion of TCPA litigation. According to WebRecon, LLC, 28 TCPA suits were filed in federal courts in 2009. The number grew to 234 in

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[7] D. Lazarus, *Service Providers Recycling Cell Phone Numbers is a Dirty Little Secret*, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/02/03/BUGA7GTHKM91.DTL (last visited 2/1/12) ("In a little-known industry practice, wireless service providers routinely recycle former customers' phone numbers and give them to new customers without informing them of the number's history. Cell phone companies say they need to do this because there just aren't enough new numbers to go around. A number can be reused within as little as 30 days.").

2010 and 310 in the first nine months of 2011 alone.[8] The dramatic growth in private TCPA litigation is a least in part a consequence of the collision between the TCPA's cell phone call protections and the increasing number of consumers who use cellular phones to make and receive all or most of their calls. Moreover, until cell phone prices and rate plans dropped, it was rare for a child to use a cell phone. It is now common for parents to purchase cell phones under a family account for their children. More often than not, the cell phone is purchased in the name of the parent (making the identification of the user of the phone highly problematic if the child or young adult provides that number to a creditor).

The District Court's ruling allows the recipient of any automated call to sue under the TCPA, even where the caller had received consent from the number's assigned user—in theory as recently as 30 days beforehand. This ruling will have the necessary effect of punishing actions taken in good faith. As one court has correctly observed:

> Under the [TCPA], a business is permitted to send a fax or phone call . . . to persons who have given prior express consent or with whom the business has an existing

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[8] *See* Collections Recon Press Release, *FDCPA and Other Consumer Lawsuit Statistics, December 16-31, 2010* (available at http://www.collectionsrecon.com/press-releases/fdcpa-and-other- consumer-lawsuit-statistics-december-16-31-2010/) (last visited on October 17, 2011); Collections Recon Press Release, *FDCPA and Other Consumer Lawsuit Statistics, September 16-30, 2011* (available at http://www.collectionsrecon.com/press-releases/fdcpa -and-other-consumer-lawsuit-statistics-september-16-30-2011/) (last visited 2/1/12).

> business relationship. . . . If the business is liable to whomever happens to answer the phone or retrieve the fax, a business could face liability even when it intends in good faith to comply with the provisions of the TCPA.

Leyse v. Bank of America, N.A., 2010 WL 2382400, at *4 (S.D.N.Y. June 14, 2010) (citations omitted).

The district court's overly expansive ruling will contribute to the proliferation of TCPA litigation. The following sampling of cases illustrate a disturbing trend in TCPA litigation where claims are being filed by parties who are the unintended recipients of alleged autodialed debt collection calls. Plaintiff Loidy Tang and her minor son D.G. are prolific TCPA plaintiffs who have filed several lawsuits alleging violations of the TCPA through the use of so-called "predictive dialers." In three of these cases, all filed in the Northern District of Illinois, D.G. alleged that he received calls on his cell phone that were expressly intended for other consumers who apparently at one time had phones with the number that was assigned to his phone at the time of the calls. See *D.G., by and through Loidy Tang v. William Siegel & Associates, Attorneys at Law*, Case no. 11-cv-0599 (N.D. Ill.); *D.G., by and through Loidy Tang v. Collecto Inc.*, Case no. 11-cv-0601 (N.D. Ill.); *D.G., by and through Loidy Tang v. Diversified Adjustment Service, Inc.*, Case no. 11-cv-2062 (N.D. Ill.). In the fist of these cases, the District Court denied the defendant's motion to dismiss, ruling that D.G. was the "called party"

because he was the user of the called phone, despite the fact that he was not the "party" that the defendant intended to call. *D.G. ex rel. Tang v. William Siegel & Associates*, 791 F.Supp.2d 622, 625 (2011). *Tang v. Diversified* was stayed pending the outcome of this appeal.

D.G.'s mother, Loidy Tang, filed her first suit in the case of *Loidy Tang v. Stellar Recovery, Inc.*, Case no. 11-cv-600 (N.D. Ill.). Mrs. Tang alleged that the defendant collector left an automated message on her cellular phone for a woman named "Florence Mussat." Case No. 11-cv-600, ECF Doc. # 1, ¶¶ 7-10, 14-17. This case was voluntarily dismissed shortly after the suit was filed. And in *Loidy Tang. v. Medical Recovery Specialists LLC,* Case no. 11-cv-2109 (N.D. Ill.), Mrs. Tang complained that the defendant debt collector left a prerecorded message for another person on her cellular phone. Case no. 11-cv-2109, ECF Doc. # 60, ¶¶ 8, 17, 20. She alleged that the defendant "obtained the telephone number XXX-XXX-8483 from a medical provider." *Id*. at ¶ 10. The District Court denied the defendant's motion to dismiss, citing the earlier *D.G.* opinion. *Tang v. Medical Recovery Specialists LLC*, 2011 WL 6019221, at *2 (N.D. Ill. July 7, 2011). This case has been stayed pending the outcome of the present appeal.

More recently, in *Linda Todd v. State Collection Service, Inc.*, Case No, 11-cv-7334 (N.D. Ill.), the plaintiff (represented by one of the

attorneys who represents Mrs. Tang) alleged that a debt collector had called her without her consent at a cellular phone number it had obtained from a hospital intake form that had been filled out by her daughter, who had listed the number as her own. Case No, 11-cv-7334, ECF Doc. # 1, ¶¶ 12-13. This case, too, has been stayed pending the outcome of the present appeal. Dkt. 38.

These cases demonstrate that ability of debt collectors to contact debtors is being severely limited by the increasing number of third-parties who are filing TCPA suits when they are inadvertently called by debt collectors in circumstances where the debt collectors were attempting to contact specific consumers using a number that had been provided to them by the consumer they were trying to contact.

The District Court's construction of the term "called party" will encourage this trend by holding these businesses responsible for the unintended results of their attempts to contact consenting "called parties," a result they find increasingly difficult to avoid given the proliferation and mutability of cell phone numbers. This is especially true given the proliferation of temporary, "pay as you go" cell phone number that have a limited shelf file, or cell phones that are rented out to vacationers. If one of these temporary users provided that cell phone number as a contact number, a debt collector may call dozens of "called

parties" and be subjected to TCPA claims by each "called party." The District Court's opinion may also open the door to litigation if a family member uses a "family plan" phone as a contact number with a creditor and a parent or sibling answers the phone and claims to be a "called party."

II. The FCC Has Recognized That Debt Collectors May Call the Cellular Numbers Provided by a Debtor Without Violating the "Privacy Rights" of a Third-Party Who Subsequently Obtains the Debtor's Cellular Number

When Congress enacted the TCPA in 1991, it intended the statute to restrict unsolicited calls to residential, governmental and cellular telephones. The TCPA did not directly address whether automated messages or prerecorded messages by debt collectors are prohibited by the TCPA. Rather, debt collectors' communications are primarily governed by the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692. 2008 FCC Order, ¶ 1. For example, the FDCPA places certain restrictions on the time, place and frequency of calls. 15 U.S.C. § 1692c(a) and § 1692d(5). It also allows consumers the right to instruct debt collectors to cease further communications. § 1692c(c).

In 1992 the FCC "concluded that an express exemption to debt collection calls to residences was unnecessary as such calls fall within the exception adopted for commercial calls which do not transmit an unsolicited advertisement and for established business relationships."

Id. at ¶ 4 (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, ¶ 39 (1992) ("1992 TCPA Order")).

In 2005 ACA petitioned the FCC to clarify whether the TCPA prohibitions against autodialed calls to cellular phones applied to debt collection calls. 2008 FCC Order, ¶ 8. On January 4, 2008, the FCC declared that automated debt collection calls to cellular phones would not violate the TCPA if the calls were placed with the express consent of the "called party," *i.e.*, the consumer in question. 2008 FCC Order ¶ 9 ("autodialed and prerecorded message calls to [cellular] number provided by the called party in connection with an existing debt are made with the 'prior express consent' of the called party."). Given the context of the question before the FCC, the term "called party" meant the debtor that the debt collector was trying to call, not any person who happened to answer the phone.

The FCC has properly recognized that the TCPA was in part intended to protect the "legitimate business interests of telemarketers." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, 8754, ¶ 3 (1992 WL 690928) ("1992 FCC Ruling"). In the 1992 FCC Ruling, the FCC explained its desire "to implement the TCPA in a way that reasonably accommodates

individuals' rights to privacy as well as the legitimate business interests of telemarketers." In the 2008 FCC Order, the FCC found that "calls regarding debt collection or to recover payments are not subject to the TCPA's separate restrictions on "telephone solicitations." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559, 561-62, ¶ 11 (2008 WL 65485 (F.C.C.) (the "2008 Order") (emphasis supplied). The 2008 FCC Order also addressed autodialed calls, noting that "[a]lthough the TCPA generally prohibits autodialed calls to wireless phones, it also provides an exception for autodialed and prerecorded message calls for emergency purposes, or made with the prior express consent of the called party." 2008 FCC Order ¶ 9.

The 2008 FCC Order also addressed the nature of the consent given by consumers who give their cell phone numbers in the course of a business transaction Significantly, the FCC order did not require that creditors or debt collectors to obtain consent from a possible (but likely unknown) new user or owner of the number every time they call the subject number. Rather, the FCC read the term "called party" to refer to a person, and not a phone number:

> Because we find that autodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt are made with the "prior express consent" of the called party, we clarify that such calls are permissible.

2008 FCC Order, at ¶ 9. Indeed, nothing in the Order suggests that consent to call a particular number given by an authorized user of that number precludes a creditor from to try to reach that person at that number after the number has been "recycled" to a new user:

> We conclude that the provision of a cell phone number to a creditor . . . reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt. In the 1992 TCPA Order, the Commission determined that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary. The legislative history in the TCPA provides support for this interpretation. Specifically, the House report on what ultimately became section 227 states that:
>
> > [t]he restriction on calls . . . does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications.

2008 FCC Order, ¶ 9 (footnotes omitted).

If fact, the 2008 FCC Order concluded that consent applies to the number in question, not the particular debtor: "creditors and debt collectors may use predictive dialers to call wireless phones, provided the wireless phone number was provided by the subscriber in connection with the existing debt." 2008 FCC Order, ¶ 14 (footnote omitted).

The District Court's holding that consent must be obtained anew from anyone who is called by a debtor failed to properly defer to the FCC's 2008 Order that consent follows the number. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (express congressional

authorization to engage in rulemaking or adjudication is a "very good indicator" of delegation warranting judicial deference) (citing *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) (setting forth two-step procedure for evaluating whether an agency's interpretation of a statute is entitled to deference); *see also Leyse v. Clear Channel Broadcasting, Inc.* 2006 WL 23480, at *3 (S.D.N.Y. Jan. 5, 2006) (applying *Chevron* deference to FCC's determination of scope of exemption set forth at 47 C.F.R. § 64.1200(a)(2)(iii), notwithstanding "serious questions as to whether this is the type of phone call Congress intended to exempt when it granted such authority to the FCC"), *aff'd*, 301 Fed. Appx. 20 (2d Cir. 2008).

In a case that dealt with a call to a residential line, the Eleventh Circuit reached a similar conclusion, relying in part on guidance from the FCC. In *Meadows vs. Franklin Collection Service Inc.*, 2011 WL 479997 (11th Cir. Feb. 11, 2011), the telephone number to which the prerecorded calls were made had been assigned to one of the actual consumers before it was transferred to the plaintiff. The second consumer, who was the plaintiff's daughter, had previously lived with the plaintiff. In finding no liability the Eleventh Circuit invoked two exceptions to the applicable TCPA provision: one for an established pre-existing business relationship with the intended recipients of the calls and one for calls

that were made for a commercial, non-solicitation purpose. 2011 WL 479997, *4-*5. In so holding, the court focused on who the creditor was trying to call, rather than on what number was dialed:

> [B]ecause [the defendant] had an existing business relationship with the intended recipient of its prerecorded calls, and the calls were made for a commercial, non-solicitation purpose, . . . those calls are exempt from the TCPA's prohibitions of prerecorded calls to residences. . . .
>
> [T]he FCC has determined that all debt-collection circumstances are excluded from the TCPA's coverage, and thus the exemptions apply when a debt collector contacts a non-debtor in an effort to collect a debt. *Otherwise, a debt collector that used a prerecorded message would violate the TCPA if it called the debtor's number and another member of the debtor's family answered.*

2011 WL 479997, at *4 (emphasis supplied).

Significantly, *Meadows* did not hold that the pre-existing business relationship was extinguished when the cell phone number changed hands. Nor did it hold that the so-called "debt-collection circumstances" extinguished when the cell phone number changed hands. Instead, the court held that the defendant was allowed to call the number regardless of the fact that the number(s) changed hands. While the calls in *Meadows* were placed to land lines and not cell phones, *Meadows* supports the notion that consent is not summarily extinguished where a new person obtains the telephone number in question.

Other courts have come to similar conclusions where debt collection calls are received by persons other than the intended

recipients. *See, e.g., Leyse,* 2010 WL 2382400 at*4 ("[Plaintiff] is not a 'called party' within the meaning of § 227(b)(1)(B). The uncontroverted evidence shows that DialAmerica, the entity that placed the call on behalf of Bank of America, placed the call to Dutriaux, [the plaintiff's] roommate and the telephone subscriber. DialAmerica's records demonstrate that it associated the phone number with Dutriaux, not with [the plaintiff]. To the extent that [the plaintiff] picked up the phone, he was an unintended and incidental recipient of the call."); *Cellco Partnership v. Dealers Warranty, LLC,* 2010 WL 3946713, at *10 (D.N.J. October 5, 2010) ("The statutory scheme simply cannot support an interpretation that would permit any 'person or entity' to bring the claim for a violation, regardless of whether that person or entity was the called party (*i.e.,* the intended recipient of the call"). More recently, the district court in *Santino v. NCO Financial Systems, Inc.*, 09-cv-00982, 2011 WL 754874 (W.D.N.Y. Feb. 24, 2011) granted judgment on the pleadings in favor of a debt collector who had placed autodialed calls to a residential number that has once been the contact number for a debtor. 2011 WL 754874 at *4-*5. *See also*, *McBride v. Affiliated Credit Services, Inc.*, 2011 WL 841176, *38 (D. Or. Mar. 7, 2011) (same); *Franasiak v. Palisades Collection, LLC,* --- F.Supp.2d – 2011 WL 4572148, *3-*4 (W.D. N.Y. Sept. 30, 2011). These decisions all recognized

that the unintended recipients of an automated cell phone calls were not "called parties" under the TCPA.

Here, the consumers in question provided their cell phone numbers to their creditors. As the District Court correctly held, this constitutes consent under the TCPA. Accordingly, ACA urges the Court to read "called party" to mean the consumer that debt collector intended to call —and not the unintended recipient who happens to answer the call after the number is recycled or otherwise used by a different person. That reading is fully supported by the aims and text of the TCPA, and is in keeping with both the FCC's understanding and the realities of cellular phone use.

CONCLUSION

For the above reasons, the decision of the district court should be reversed.

Respectfully submitted,

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RULE 32(a)(7)(B) CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the type-volume limitation of Seventh Circuit Rule 32(a)(7)(B) in that it contains no more than 7,000 words. According to the word count of the word processing program used to prepare the brief, not counting the cover, the corporate disclosure statement, the table of contents, the table of authorities, and the certificate of compliance, the brief contains 4,890 words.

s/Timothy G. Shelton

CERTIFICATE OF SERVICE

Certificate of Service When All Case Participants Are CM/ECF Participants

I certify that on February 3, 2012, I electronically filed the Corrected Brief of ACA International as *Amicus Curiae* in Support of the Defendants-Appellants Supporting Reversal with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Timothy G. Shelton