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Appeals Courts Further Muddy Phone-Call Privacy Laws

By **Allison Grande**

Law360, New York (April 01, 2014, 9:31 PM ET) -- Two recent appeals court decisions reviving lawsuits against State Farm Bank FSB and Hilton Worldwide Inc. over the placement and recording of cellphone calls have left companies confused as to how to comply with clearly outdated privacy statutes, as well as vulnerable to consumer class actions, attorneys say.

The Eleventh and Ninth circuits dealt blows to the defense bar in separate decisions issued eight days apart that rejected the lower courts' interpretation of "called party" under the Telephone Consumer Protection Act and the provision of California Penal Code Section 632.7 that prohibits eavesdropping on calls made from cellphones.

In the TCPA case, the Eleventh Circuit **ruled on March 28** that, even though a debtor had provided State Farm with the cellphone number of her housemate, the company could not dodge claims that it had unlawfully pestered the housemate with debt collection calls without his consent. On March 20, the Ninth Circuit **held in a split decision** that Hilton must face a call recording action because the lower court had failed to consider the added legal protection calls from cellphones are afforded under the California statute.

"Both of these decisions continue the uncertainty under their respective statutes and do so by completely reversing the trial court," Bingham McCutchen LLP's privacy and security group co-chairman Jim Snell told Law360.

While the cases involve separate protections for telephone communications, they both highlight the landmines that decades-old statues create for companies that could be subjected to class actions from an increasingly active plaintiffs' bar if they interpret their obligations incorrectly, attorneys say.

"These decisions provide a grim reminder of the difficulty of complying with the tangle of statues governing telephone contact between businesses and consumer," Jenner & Block LLP partner Amy Gallegos said. The defendants' liability hinged on facts that neither company could be expected to know about who has the legal authority to consent to calls at a particular number and whether a consumer was using a cellphone or landline to place a call, according to Gallegos.

Both appeals courts confronted a pair of laws that treat cellphone calls with a higher degree of protection than landline calls, and both reached conclusions that defense attorneys argue went against the original legislative intent of the protections.

In weighing the definition of "called party" under the TCPA, the Eleventh Circuit determined that the case should be remanded to the lower court because factual disputes remained regarding whether State Farm had obtained lawful consent for placing 327 autodialed debt collection calls to Fredy Osorio, the housemate of a woman who had a credit card debt and had provided the company with Osorio's number.

"The most troubling aspect of State Farm is that it leaves very unclear the rules that businesses are supposed to follow, suggesting that businesses can't rely on the representations of consumers regarding the phone number that can be called," Snell said. "Given that the person gave the phone number as part of an application, and the TCPA centers on unwanted telemarketing calls, the conclusion seems to apply the statute in a way that Congress didn't intend."

Foley & Lardner LLP consumer financial services practice co-chair Michael Lueder characterized the decision as an "unmitigated disaster" for debt collectors.

"It holds that a collector can be liable under the TCPA if it calls the number the debtor provides, even where the debtor intentionally gives a number which is not hers," he said.

The holding is likely to open the door for the plaintiffs' bar, which has been steadily increasing its activity under the TCPA in an effort to capitalize on unclear statutory language and uncapped statutory damages of between $500 and $1,500 per violation.

"Certainly, it is possible for debt collectors to win these cases ... but this will be very difficult to do in the absence of a clear written consent [from the person to whom a debtor's telephone number is registered]," Vinson & Elkins LLP partner Jason Levine said. "So Osorio seems destined to encourage more litigation, and more settlements, of 'wrong number' TCPA cases."

Attorneys had a similar forecast for litigation brought under the California call-recording statute, which has also been seized upon by attorneys enticed by statutory damages of $5,000 per violation or treble damages.

"It seems to me that recently the number of cases under Section 632.7 has exploded, and that this decision is going to continue that trend," Olshan Frome Wolosky LLP partner Scott Shaffer said.

The case before the Ninth Circuit hinged on the distinction between the statute's treatment of landline calls, which companies can be held liable for recording if the communication contains confidential information that the caller expects to remain private, and of cellphone calls, which contains no such caveat.

"In cases involving the recording of landline cases, it turns into a dispute about whether the communications are confidential or not, but the Ninth Circuit's decision removed that barrier for cellphone conversations," Shaffer said. "The fact that the court stated that there is no requirement for the communications to be confidential is only going to encourage plaintiffs."

Attorneys expressed frustration that the panel's 2-1 decision conflicted with the legislative intent of the statute, which they believe should not be read to prohibit the recording of calls for quality assurance or service observing purposes or to create such a wide divide between cellphones and landlines.

"The legislative history of the statute makes it clear that the statute was never intended to apply to service observing," DLA Piper managing partner and securities litigation global co-chairman Perrie Weiner said, adding that it was also likely that the "confidential communication" requirement was intended to cover both types of technology.

While attorneys expressed hope that the appeals courts' conclusions would be adjusted on remand, they cautioned that companies in the business of placing and recording companies' calls should for now be extremely cautious about ensuring that they are giving callers notice if a call is being recorded, that they are using telephone numbers only registered to a debtor, and that they have air-tight consent to call a provided number.

"This may impose serious burdens on debt collectors, but it appears to be their only means of avoiding protracted litigation over whether debt-collection calls were in fact properly authorized at

the time they were made," Levine said.

The plaintiff in the State Farm case is represented by Gregory A. Beck of Gupta Beck PLLC, Roy D. Wasson of Wasson & Associates Chtd., and Donald A. Yarbrough. The plaintiff in the Hilton case is represented by Ellyn Moscowitz of the Law Offices of Ellyn Moscowitz PC, Daniel F. Gaines of Gaines & Gaines PLC and Eric A. Grover of Keller Grover LLP.

State Farm is represented by Paul L. Nettleton, Alina A. Rodriguez and Aaron S. Weiss of Carlton Fields Jorden Burt PA. Hilton is represented by Angela C. Agrusa, Allen P. Lohse and Randall J. Sunshine of Liner LLP.

The cases are Osorio v. State Farm Bank FSB, case number 13-10951, in the U.S. Court of Appeals for the Eleventh Circuit; and Young v. Hilton Worldwide Inc. et al., case number 12-56189, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Elizabeth Bowen and Philip Shea.