

# WALLBERG & RENZY, P.A.

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13 August 2012

Nugehalli N. Gopal, Manager  
MindWav, LLC  
5215 N.W. 51<sup>st</sup> Street  
Coconut Creek, Florida 33073

Re: Summary Opinion  
TCPA and Collection Agencies

Dear Mr. Gopal:

As our client, you have asked us to provide a brief summary regarding the current state of the TCPA as it pertains to your customers, collection agencies and related entities. The following is a brief overview and not a substantive analysis.

The Telephone Consumer Protection Act ("TCPA") of 1991, 47 U.S.C. §227 and its implementing regulations pose an important factor in the compliance arena. The TCPA impacts auto-dialed calls to cellular phones, prerecorded messages to cellular and residential phones and the display on caller ID. Your focus herein is the impact upon your customers of compliance specifically related to auto-dialed calls to mobile/cellular telephones. The potential penalties for TCPA violations can be very significant as a look into the area reveals.

Generally, the TCPA prohibits calls to cellular phones placed with an auto-dialer without the consumer's prior express consent. Currently, the prior consent is not required to be in writing, but what constitutes "consent" regarding cellular number not cut and dry. In addition, the TCPA prohibits leaving a prerecorded message for a consumer on either a cellular or residential line without consent.

Penalties for certain TCPA violations begin at \$500 *per call* violation and can be tripled to \$1500 *per call* for willful violation. In a purported class action lawsuit, such penalties could subject collection agencies to millions of dollars of potential liability. It is our understanding that insurance companies may be excluding TCPA class action coverage from liability policies.

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There has been some confusion over compliance regarding a cellular telephone number as it relates to collection efforts. This is partially due to the easily transfer of telephone numbers among individuals, which happens on a frequent basis regarding cellular telephones, as well as to the fact that the use of these numbers as a person's only telephone contact number has significantly increased as of late. May people now no longer use "land lines".

The United States Court of Appeals for the Seventh Circuit has recently issues an opinion that may have a great impact upon collection agencies as far as TCPA compliance. On May 11, 2012, the Seventh Circuit in *Soppet v. Enhanced Recovery Company, LLC*, 679 F.3d 637 (7<sup>th</sup> Cir. 2012), issued an opinion illustrating the significant risks of using an automated dialer to place calls to a "stale" or out-dated cellular telephone phone number.

In *Soppet*, the defendant/appellant in the case was accused of making a call to a cellular telephone number using an automated dialer regulated by the TCPA, and that it had not received consent from the consumer who had been assigned the number. As noted, such consent is required prior to making a lawful call to a cell phone using an auto-dialer regulated by the TCPA. The defendant, who had received consent from a prior consumer assigned the number, said it did not know that the telephone number had been reassigned.

The Seventh Circuit ruled that a consumer who owned the telephone number previously used by another consumer could bring a cause of action under the TCPA because that person did not consent to the calls. Simply put, this means that a consumer call sue a collection agency if they did not have that cellular telephone number at the time that the debt was incurred, because another person, the debtor, previously possessed that number.

The Seventh Circuit considered at length the definition of a "called party," a phrase used seven times, all told, in the language of the TCPA, 47 U.S.C. § 227, *et seq.* The court found that because four of these times unmistakably "denote the current subscriber ... [and] one denotes whoever answers the call (usually the subscriber)[,]" a called party must refer to the current subscriber. *Soppet* at 640-641 "Consent to call a given number must come from its current subscriber" *Soppet* at 641.

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The defendant/appellant in the case essentially argued that because people are moving from landlines to cell service, it makes it riskier to use predictive dialers, which in the long run will lead to higher prices across the board. The court did not find this argument persuasive. The Seventh Circuit, however, listed three options to ensure that auto-dialers can still be used even with the risk that the subscriber had changed for a given number:

- A. “Have a person make the first call, then switch to a predictive dialer after verifying that Cell Number still is assigned to Customer.”
- B. “Use a reverse lookup to identify the current subscriber to Cell Number.”** (emphasis added)
- C. “Ask Creditor, who obtained Customer’s consent, whether Customer still is associated with Cell Number – and get an indemnity from Creditor in case a mistake has been made (Indemnity may be automatic under ¶10 of the *2008 TCPA Order*, which states that calls placed by a third-party collector on behalf of a creditor are treated as having been made by the creditor itself.)”

*Soppet* at 642

It is obvious that option “B” is exactly the service that MindWav LLC provided to its customers. The Seventh Circuit’s opinion in *Soppet* emphasizes an important point – businesses, such as collection agencies, must recognize that auto-dialing old cell phone numbers is risky. Further, *Soppet* counsels that businesses should use due diligence to ensure that they are contacting the intended consumer. One can argue that MindWav, LLC provides the type of due diligence talked about in *Soppet*, especially considering the companies proprietary methods of obtaining real time research with high accuracy, that is not the subject of this summary opinion.

Since *Soppet* appears to be the only definitive ruling by a federal appellate court in this area, there is reason to believe that its logic and decision will be applied by federal and state courts around the country. The opinion should be studied by any business operating in this area.

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This summary opinion is deemed to be current and accurate as of the date of writing and only intended for the use of MindWav, LLC, as our client, and is not intended to be relied upon by any third-party. Please contact our office with any questions that you may have.

Respectfully,

WALLBERG & RENZY, P.A.



Ron Renzy  
For The Firm

RR/grm