IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PATRICIA TOLLEFSON and
SHERRI KAPHING, on behalf of themselves
and all others similarly situated,

OPINION and ORDER

Plaintiffs,

10-cv-594-bbc

v.

SRA ASSOCIATES, INC.,

Defendant.

- -

In this proposed class action brought under the Telephone Consumer Protection Act, 47 U.S.C. § 227(b), and the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, plaintiffs Patrician Tollefson and Sherri Kaphing contend that defendant SRA Associates, Inc. harassed them by using an automated system to call their residential telephones repeatedly regarding debts that plaintiffs did not owe. Now before the court is defendant's motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(6).

After reviewing the complaint, I conclude that plaintiffs cannot state a claim under the Telephone Consumer Protection Act because the debt collection phone calls at issue in this case are exempt from the Act. Therefore, I will dismiss that claim. However, I conclude

that plaintiffs' allegations are sufficient to state a claim under § 1692d of the Fair Debt Collection Practices Act.

I draw the following facts from plaintiffs' amended complaint.

ALLEGATIONS OF FACT

Sometime before April 1, 2010, plaintiff Patricia Tollefson's son and plaintiff Sherri Kaphing's sister-in-law incurred consumer debts. Beginning in about April 2010, defendant SRA Associates, Inc., a debt collector, attempted to collect these debts by calling plaintiffs at their respective residential telephone numbers using an automated voice recording. Defendant called plaintiffs for approximately 45 days straight, up to three times each day. On several occasions, defendant left automated prerecorded voice messages instructing plaintiffs not to listen to the voice message unless they were the intended recipients, namely Tollefson's son and Kaphing's sister-in-law. For several weeks, plaintiffs followed the instructions, did not listen to the messages and deleted the voice messages from defendant. On other occasions, plaintiffs answered calls from defendant and heard an automatic prerecorded voice repeat the same instruction that if the person answering the telephone was not the debtor, then he or she should hang up the phone immediately.

Plaintiffs attempted to contact defendant by calling the 800 number that appeared on their caller identification systems, but plaintiffs could not reach defendant. At some

point, plaintiffs listened to an entire message from defendant and obtained a name and telephone number by which they could contact defendant and ask defendant to stop calling. Plaintiff Tollefson called defendant to complain about the volume of calls and an agent told her to "hang on to [her] drawers." The high number of calls and messages caused plaintiffs anxiety, frustration and unpleasant discord between themselves and their family members.

OPINION

Defendant has moved to dismiss plaintiff's claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. Defendant contends that plaintiffs' claims under the Telephone Consumer Protection Act should be dismissed because (1) phone calls like the ones at issue are exempted from the Act; and (2) plaintiffs are not proper parties to assert a claim under the Act. Defendant contends that plaintiffs' claims under the Fair Debt Collection Practices Act should be dismissed because plaintiffs were not debtors, were not the intended recipients of the calls and because plaintiffs' allegations do not state a plausible claim under the Act.

A claim should be dismissed under Rule 12(b)(6) when the allegations in the complaint, however true, could not raise a claim of entitlement to relief. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558 (2007). In ruling on a motion to dismiss, courts must construe all of the plaintiffs' factual allegations

as true and draw all reasonable inferences in their favor. Savory v. Lyons, 469 F.3d 667, 670 (7th Cir. 2006).

A. Telephone Consumer Protection Act

Under the Telephone Consumer Protection Act, it is unlawful "to initiate a telephone call to a residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order of the [Federal Communications] Commission under paragraph (2)(B)." 47 U.S.C. § 227(b)(1)(B). The Commission "may, by rule or order, exempt . . . (i) calls that are not made for a commercial purpose; and (ii) such classes or categories of calls made for commercial purposes as the Commission determines will not adversely affect the privacy rights that this section is intended to protect; and do not include the transmission of any unsolicited advertisement." 47 U.S.C. § 227(b)(2)(B).

In the exercise of its express authority to create exemptions from the Act's requirements, the Commission has created regulatory exemptions and issued periodic rulings to clarify the scope of the Act's coverage. Relevant to the issues in this case, the Commission's rules exempt from the Act's statutory prohibition against prerecorded calls any call "made to any person with whom the caller has an established business relationship at the time the call is made," 47 C.F.R. § 64.1200(a)(2)(iv), and any call "made for a commercial

purpose but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation," 47 C.F.R. § 64.1200(a)(2)(iii).

In a 1992 order regarding implementation of the Act, the Commission stated that prerecorded debt collection calls, whether "placed by or on behalf of the creditor" "are adequately covered by exemptions . . . for commercial calls which do not transmit an unsolicited advertisement and for established business relationships." In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 71 Rad. Reg. 2d (P & F) 445, ¶ 39 (October 16, 1992) (explaining why separate exemptions for debt collectors were unnecessary).

In two subsequent rulings, the Commission reaffirmed its determination that prerecorded debt collection calls were covered by the exemption set forth at 47 C.F.R. § 64.1200(a)(2)(iii). In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 10 FCC Rcd. 12391, 12400, ¶ 17 (Aug. 7, 1995) ("[P]rerecorded debt collection calls are adequately covered by exemptions adopted in our rules [because] prerecorded debt collection calls are exempt from the prohibitions on prerecorded calls to residences as commercial calls which do not transmit an unsolicited advertisement.") (internal quotations omitted); In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 23 FCC Rcd. 559, 561-62, ¶¶ 4, 5 (Jan. 4, 2008) ("[P]rerecorded debt collection calls are exempted from Section 227(b)

(1)(B) of the [Act] which prohibits prerecorded or artificial voice messages to residences . . . .")

Plaintiffs contend that defendant violated the Telephone Consumer Protection Act by "impermissibly using automated telephone equipment to repeatedly call plaintiffs in regards to debts allegedly owed by their family members." Plts.' Br., dkt. #16, at 1. Plaintiffs admit that the prerecorded calls at issue were made for the commercial purpose of collecting a debt and that none of these calls involved an "unsolicited advertisement" or "telephone solicitation." However, plaintiffs contend that the exemptions from the Act's requirements created by the Commission and codified at 47 C.F.R. § 64.1200(a)(2) were not intended to protect debt collectors like defendant who repeatedly place *erroneous* automated debt collection calls to *non-debtors*.

Plaintiffs rely on the holding in Watson v. NCO Group, Inc., 462 F. Supp. 2d 641 (E.D. Pa. 2006), in which the plaintiff contended that a debt collection agency violated the Telephone Consumer Protection Act by making more than 200 calls to the plaintiff's residential telephone in a five-month period, attempting to collect a debt the plaintiff did not owe. Id. at 643. The collection agency moved to dismiss the claim, contending (as defendant does in this case) that all debt collection calls, "including those erroneously made to non-debtors," are exempt from the requirements of the Act under the Commission's regulations and explanatory rulings. Id. at 664. The court rejected this argument, noting

initially that the Commission has not addressed directly the issue of erroneous debt collection calls in its rulemaking and explanatory orders. The court noted that the Commission's 1992 and 1995 Rulings reflect the Commission's view that debt collection calls fall under either of two exemptions: (1) the exemption for established business relationships, 47 C.F.R. § 64.1200(a)(2) (iv); or (2) the exemption for commercial calls that do not adversely affect privacy interests and do not transmit an unsolicited advertisement, 47 C.F.R. § 64.1200(a)(2)(iii). Id.

According to the court in Watson, because an erroneously called non-debtor has no prior or existing business relationship with the creditor, the calls at issue did not fall into the first exemption. Id. With respect to the second exemption, the court stated that the Commission had not considered the privacy rights of non-debtors, who have "vastly greater privacy rights than someone who has fallen into debt." Id. The court concluded that although the Commission "has declared that a debtor's privacy rights are not adversely affected when he receives debt collection calls, the Court is convinced that a non-debtor's rights are in fact violated when he is subjected to repeated annoying and abusive debt collection calls that he remains powerless to stop." Id. at 644-45 (citation omitted). Thus, the court found that the exemption set forth in 47 C.F.R. § 64 .1200(a)(2)(iii) did not apply to the automated debt collection calls at issue, and denied the collection agency's motion to dismiss the claim. Id. at 645.

I agree with plaintiffs and the court in Watson that non-debtors lack a prior business relationship with a debt collector; thus, the debt collection calls at issue in this case do not fall under the business relationship exemption. However, I do not agree with plaintiffs' argument or the court's reasoning in Watson regarding application of the exemption for commercial calls that are not solicitations or advertisements.

In enacting the Telephone Consumer Protection Act, Congress granted the Commission authority to determine "by rule or order" whether exempting certain categories or commercial telephone calls from the statute's requirements will "adversely affect the privacy rights that [the Act] was intended to protect . . . ." 47 U.S.C. § 227(b)(2)(B)(ii)(I). The Commission was acting within the bounds of this authority when it issued a succession of orders and rulings setting forth the grounds for its conclusion "that debt collection calls are exempt from the [Act's] prohibitions against prerecorded message calls because they are commercial calls which do not convey an unsolicited advertisement and do not adversely affect residential subscriber rights." 7 FCC Rcd. at 8772, ¶ 36. There is no basis for concluding that the Commission considered only the rights of debtors when determining whether "residential subscriber's" privacy rights were violated by debt collection calls. The district court's holding in Watson that the Commission reached its conclusion without considering the privacy rights of non-debtors fails to accord appropriate judicial deference to agency rules and orders made in accordance with clear congressional authorization.

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., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (setting forth two-step procedure for evaluating whether an agency's interpretation of a statute is entitled to deference)).

In addition, although one other court has agreed with the reasoning in Watson, Jenkins v. Allied Interstate, Inc., 2009 WL 3157399, *3 (W.D.N.C. Sept. 28, 2009), several other decisions subsequent to Watson provide support for defendant's position that prerecorded calls intended solely for the collection of debt are specifically exempted from the Telephone Consumer Protection Act's coverage by rule and order of the Commission. Meadows v. Franklin Collection Service, Inc., 2010 WL 2605048, at *6 (N.D. Ala. June 25, 2010) (Commission's determination that all debt collection circumstances are excluded from Telephone Consumer Protection Act's coverage is broad enough to cover debt collection calls to non-debtor), aff'd in relevant part, 2011 WL 479997 (11th Cir. Feb. 11, 2011); McBride v. Affiliated Credit Services, Inc., 2011 WL 841176 (D. Or. Mar. 7, 2011) ("[A]ccording to the Commission debt collection calls are not solicitations or advertisements and thus fall within a recognized exemption."); Santino v. NCO Financial Systems, Inc., 2011 WL 754874, *5-6 (W.D.N.Y. Feb. 24, 2011) (same); Garo v. Global Credit & Collection Corp., 2010 WL 5108605, *2 (D. Ariz. Dec. 9, 2010) (automated debt collection calls made to

plaintiffs' residential telephone line exempt from Act's requirements); Pugliese v. Professional Recovery Service, Inc., 2010 WL 2632562, *7 (E.D. Mich. June 29, 2010) (same) (citing Bates v. I.C. Systems, Inc., 2009 WL 3459740, *1 (W.D.N.Y. Oct. 19, 2009) ("[D]ebt collection calls made to a residential line are exempt from the TCPA.")). In the Meadows case, both the district court and circuit court rejected the argument that the exemptions established by the Commission for debt collection calls do not apply to non-debtors. According to the Court of Appeals for the Eleventh Circuit,

> [T]he [Commission] 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.

Meadows, 2011 WL 479997, at *4; see also Santino, 2011 WL 754874, at *5-6 (applying exemption to non-debtor).

In sum, I conclude that the calls about which plaintiffs complain in this case fall within the exemption provided in 47 C.F.R. § 64.1200(a)(2)(iii), as interpreted by the Federal Communications Commission in the 1992, 1995 and 2008 Rulings described above. Accordingly, I will grant defendant's motion to dismiss plaintiffs' claim under the Telephone Consumer Protection Act. (Because I am dismissing plaintiffs' claim for failure to state a claim upon which relief may be granted, I need not address defendant's argument that

plaintiffs do not qualify as "called parties" under the Act.)

B. Fair Debt Collection Practices Act

Under the Fair Debt Collection Practices Act, "[a] debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of the debt." 15 U.S.C. § 1692d. Section 1692d provides a non-exhaustive list of prohibited conduct, including "[c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number," id. § 1692d(5), and "placement of telephone calls without meaningful disclosure of the caller's identity," id. § 1692d(6). In enacting the Fair Debt Collection Practices Act, Congress meant to insure that "every individual, whether or not he owes the debt, has a right to be treated in a reasonable or civil manner." Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1178 (11th Cir. 1985) (internal quotation marks and citation omitted). "Ordinarily, whether conduct harasses, oppresses, or abuses will be a question for the jury." Id.

Defendant contends that plaintiffs' claims under the Fair Debt Collection Practices Act should be dismissed for two reasons. First, defendant contends that because plaintiffs were not the intended recipient of the calls and did not owe any debt to defendant, they cannot assert a claim under the Act. However, the Act is not limited to debtors, but covers

"any person." Id. § 1692k(a) (authorizing claims against "any debt collector who fails to comply with any provision of this subchapter with respect to *any person*"); § 1692d (debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse *any person*").

Second, defendant contends that plaintiffs' allegations in support of their § 1692d claims fail to meet the pleading requirements of Iqbal, 129 S. Ct. 1937, and Twombly, 550 U.S. 544. I disagree. Plaintiffs have alleged that defendant contacted them repeatedly in an attempt to collect on a debt that they did not owe. Plaintiffs allege that the phone calls continued for approximately 45 days, with multiple calls being placed in a day. The caller used an automated message that made it difficult for plaintiffs to determine how to make the telephone calls stop. Given the volume and frequency of the calls, as well as their automated nature, plaintiffs have stated a claim that is plausible on its face.

Although defendant has cited a few decisions in which courts have dismissed § 1692d claims, those cases are distinguishable either because the plaintiffs made only conclusory allegations, alleged infrequent phone calls or because the court was analyzing the claim in the context of summary judgment. E.g., Clemente v. IC Systems, Inc., 2010 WL 3855522, at *1-2 (E.D. Cal. Sept. 29, 2010) (granting defendant's motion to dismiss where plaintiff alleged that defendant "caus[ed] a telephone to ring repeatedly and continuously with intent to annoy, abuse and harass plaintiff" and "constantly and continuously places collection calls

to [p]laintiff seeking and demanding payment for an alleged debt"); Sclafani v. BC Services, Inc., 2010 WL 4116471, *4-5 (S.D. Fla. Oct. 18, 2010) (granting defendant's motion for judgment on pleadings where plaintiff alleged that defendant had left seven voice messages over course of six months); Tucker v. CBE Group, Inc., 710 F. Supp. 2d 1301, 1305 (M.D. Fla. 2010) (analyzing § 1692d claim on summary judgment).

In this case, plaintiffs have alleged concrete facts in support of their claims and do not merely recite the elements of § 1692d. Depending on the circumstances, the frequency of defendant's calls to plaintiffs' telephones and the automated manner in which defendant called plaintiffs could cause a person to feel harassed, oppressed or abused. Therefore, I will deny defendant's motion to dismiss plaintiffs' claims under the Fair Debt Collection Practices Act.

ORDER

IT IS ORDERED that defendant SRA Associates, Inc.'s motion to dismiss, dkt. #14, is GRANTED IN PART and DENIED IN PART. Defendant's motion to dismiss plaintiff Patricia Tollefson's and Sherri Kaphing's claims under the Telephone Consumer Protection Act, 47 U.S.C. § 227, is GRANTED. Defendant's motion to dismiss plaintiffs' claims under

the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, is DENIED.

Entered this 26th day of April, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge