No. 13-90017

In the United States Court of Appeals for the Eleventh Circuit

GULF COAST COLLECTION BUREAU, INC.,
Defendant-Petitioner,

v.

MARK S. MAIS, on behalf of himself and all others similarly situated,
Plaintiffs-Respondents.

On Petition for Permission to Appeal from the
United States District Court for the Southern District of Florida

ANSWER IN OPPOSITION TO PETITION FOR PERMISSION FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b)

Donald A. Yarbrough
P.O. Box 11842
Fort Lauderdale, FL 33339
(954) 537-2000

O. Randolph Bragg
Horwitz, Horwitz & Associates
25 E. Washington Street
Chicago, IL 60602
(312) 372-8822

Deepak Gupta
Jonathan E. Taylor
GUPTA BECK PLLC
1625 Massachusetts Avenue, NW
Washington, DC 20036
(202) 470-3826

Counsel for Plaintiffs-Respondents

July 17, 2013

CERTIFICATE OF INTERESTED PERSONS

Eleventh Circuit Rule 26.1-1 states that the certificate of interested persons contained in an answer to a petition must include only persons and entities that were omitted from the certificate contained in the petition. Counsel hereby certify that the certificate of interested persons contained in the defendant's petition is complete, with the exception of the additional counsel for the respondents, Deepak Gupta and Jonathan E. Taylor, both of Gupta Beck PLLC in Washington, DC.

/s/ Deepak Gupta
Deepak Gupta

ANSWER IN OPPOSITION TO PETITION FOR PERMISSION FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b)

"Interlocutory appeals are frowned on in the federal judicial system," so the party requesting appeal bears the burden of showing why it is necessary. *Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 536 (7th Cir. 2012) (Posner, J.). The defendant in this case, Gulf Coast Collection Company, has not met that burden.

Gulf Coast's petition focuses on two questions addressed in the order below: (1) whether the district court had jurisdiction to determine the applicability of a federal agency interpretation of the Telephone Consumer Protection Act (TCPA), and (2) whether the court should have created an exception to the TCPA in this case because Gulf Coast apparently complied with a different statute—the Health Insurance Portability and Accountability Act (HIPAA). The first issue is unlikely to be "controlling," as required by 28 U.S.C. § 1292(b), because the court made two alternative holdings supporting the same conclusion, both of which this Court would have to reverse to make the question controlling. And the second issue is not one "as to which there is substantial ground for difference of opinion," which § 1292(b) also requires. Indeed, the only case Gulf Coast cites on the issue is an unreported district court decision that "does not decide" the question.

In addition, Gulf Coast has not shown that interlocutory review would substantially reduce the amount of litigation left in the case. The plaintiff intends to

waive the sole remaining issue on the merits (whether the violations were willful), thereby eliminating the need for a trial. So even if Gulf Coast were able to run the gauntlet on appeal, that would save only the resolution of the plaintiff's class-certification motion, which raises similar questions to the motion that has already been granted by the court in the "companion" case to this one. Pet. 19. This Court should deny the petition.

BACKGROUND

1. The facts. In 2009, Mark Mais went to the emergency room at Westside Regional Hospital for medical treatment. His wife Laura provided his cell-phone number to hospital staff upon his admission. She signed forms consenting to release his "healthcare information" to other parties consistent with HIPAA, but did not otherwise consent to her husband's being called on his cell phone.

After being admitted, Mr. Mais received treatment from Florida United Radiology, a clinical-services provider. He incurred an alleged debt of $49.03 for the treatment. Neither he nor his wife provided Florida United with his cell-phone number.

At the time, Florida United used the billing company McKesson to access patient information and send out bills on its behalf. McKesson obtained Mr. Mais's cell-phone number from the hospital and eventually forwarded the number to Gulf

Coast, a debt collector. Gulf Coast proceeded to call his cell phone dozens of times using its automated system, and left several messages concerning his debt.

2. This litigation. Mr. Mais brought this action against Gulf Coast for violating the TCPA, which prohibits automated calls to cell phones without "prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). Because consent is an affirmative defense, the burden is on the party asserting it to show that it obtained prior express consent before calling the consumer. Federal Communications Commission, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 F.C.C.R. 559, 565 (2008) (2008 FCC Ruling). The question in this litigation is whether Gulf Coast has made that showing.

3. The district court's decision. The district court below held that Gulf Coast had not done so. The court noted that the 2008 FCC Ruling interpreted "prior express consent" under the TCPA as follows:

> We conclude that the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt. . . . We emphasize that prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed.

Id. at 564-65. The court held that there was no "prior express consent" here, however, for three independent reasons: *First*, the 2008 FCC Ruling applies to consumer-credit transactions; it "does not apply to the medical care setting, at least

under the facts of this case." Dist. Ct. Order 13. *Second*, even if the Ruling did apply to the provision of medical care, it would not cover the facts of this case because—as the Ruling itself makes clear—"prior express consent is deemed to be granted *only if* the wireless number was provided by the consumer to the *creditor*." *Id.* at 15 (second emphasis added). And here, Mr. Mais's number was provided to the *hospital*, not the creditor.

Finally, the court held that, even if the 2008 FCC Ruling were applicable, there was no "prior express consent" under the TCPA. To find express consent on the facts of this case—where Mr. Mais's wife provided his cell-phone number "to the Hospital admissions clerk" and authorized that his "healthcare information" may be shared for certain purposes—would be to reach a conclusion "inconsistent with the statute's plain language." *Id.* at 12. The court therefore declined, in the alternative, to apply the Ruling in this particular case.

The district court also rejected Gulf Coast's argument that it could not have violated the TCPA because it complied with HIPAA. "The TCPA is a separate statute," the court explained, and it "imposes separate requirements." *Id.* at 6.

The district court granted partial summary judgment to Mr. Mais, leaving only the issues whether the TCPA violations were willful (which he now plans to waive) and whether a class action should be certified (which has been thoroughly briefed by the parties, and will be complete after a final round of briefing). The

court certified an interlocutory appeal of its summary-judgment ruling, and Gulf Coast filed its petition for interlocutory review in this Court.

INTERLOCUTORY-REVIEW STANDARD

The appellate jurisdiction of federal courts is based upon "the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009); 28 U.S.C. § 1291. This rule—known as the final-judgment rule—"prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

Gulf Coast asks the Court to cast aside that general rule in this case. It invokes the "narrow exception" set forth in 28 U.S.C. § 1292(b), *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010), under which review is "granted sparingly," *In re City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002).[1] This Court, too, has stressed § 1292(b)'s "limited scope"—that it is to be "used only in exceptional cases

[1] Section 1292(b) states: "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order."

where a decision of the appeal may avoid protracted and expensive litigation, as in antitrust and similar protracted cases," and, even then, "the court of appeals has discretion to turn down a § 1292(b) appeal." *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1256 & 1259 (11th Cir. 2004) (internal quotation marks omitted).

Further, this Court has emphasized that it will exercise its discretion to grant review under § 1292(b) only in very "rare" cases. *Id.* at 1264. The party seeking review has the "burden" of showing that "exceptional circumstances justify a departure from the basic policy postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978); *see also McFarlin*, 381 F.3d at 1264 (11th Cir. 2004). This burden is a heavy one: "[T]oo expansive use of the § 1292(b) exception," this Court has cautioned, "threatens" the "proper division of labor between the district courts and the court of appeals and the efficiency of judicial resolution of cases," both of which "are protected by the final judgment rule."

ARGUMENT

Gulf Coast has not met its burden in this case. It has not shown that "the order involves a controlling question of law" on which a "substantial ground for difference of opinion exists," 28 U.S.C. § 1292(b), or that an immediate appeal would "substantially reduce the amount of litigation left in the case," *McFarlin*, 381 F.3d at 1259.

I. Gulf Coast Has Not Shown That the Order Involves a Controlling Question of Law On Which a Substantial Ground For Difference of Opinion Exists.

Gulf Coast devotes nearly its entire petition to two questions: (1) whether the district court had jurisdiction under the Hobbs Act, and (2) whether HIPAA displaces the need for prior express consent under the TCPA. Neither demands a departure from this Court's general rule against interlocutory review. The first question is unlikely to be controlling—it comes into play only if this Court were to reverse *both* of the district court's alternative holdings. And the second question is not one on which a substantial ground for difference of opinion exists.

1. The Hobbs Act grants federal courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342. Gulf Coast argues that this Act "vest[s] courts of appeals with exclusive jurisdiction to review the validity of FCC rulings," and so the district court lacked jurisdiction to hold that there was no express consent in this case. Pet. 9 (internal quotation marks omitted).

But the court held that the 2008 FCC Ruling, *by its own terms*, applies "'only if the wireless number was provided by the consumer to the creditor,'" and that is not what happened here. Dist. Ct. Order 15 (quoting 23 F.C.C.R. at 565). "Here, Plaintiff's wife provided his phone number to the *Hospital*, not to Florida United,

which is the creditor in this case." *Id.* That independent holding—that the 2008 FCC Ruling is inapplicable, not invalid—does not in any way implicate jurisdiction under the Hobbs Act. To the contrary, it makes the question irrelevant.

Moreover, the district court held that the 2008 FCC Ruling was inapplicable for an additional reason: "The FCC opined on consent in the context of consumer credit transactions, when a cell phone number is provided to a creditor 'as part of a credit transaction,' for example," and there is simply "no indication that the FCC intended its ruling to apply to medical care transactions." *Id.* at 13. That holding, like the other one, does not depend on how the Hobbs Act is interpreted.

In its petition, Gulf Coast gives no reason why these two independent holdings—both of which this Court would have to reverse before considering the applicability of the Hobbs Act—require immediate appellate review. As to the first holding, Gulf Coast does not cite one case in support of its view, even though the FCC's Ruling has been on the books for more than five years. That is insufficient to carry its burden of establishing that "substantial ground for difference of opinion exists." 28 U.S.C. § 1292(b.); *see Couch*, 611 F.3d at 633-34 (denying interlocutory review where the petitioners had "not provided a single case that conflicts with the district court's" holding); *Union County, Iowa v. Piper Jaffray & Co.*, 525 F.3d 643, 647 (8th Cir. 2008) ("While identification of a sufficient number of conflicting and contradictory opinions would provide substantial ground for disagreement, the

County offered no such Iowa opinions, statutes or rules, and a dearth of cases does not constitute substantial ground for difference of opinion." (citation omitted)).

As to the second holding, Gulf Coast "contends that the district court erred in creating a distinction between the reasonable expectations of 'medical consumers' and retail consumers' as it related to the conveyance of biographical contact information." Pet. 11. But "contends" is all Gulf Coast does—it cites no authority for why the 2008 FCC Ruling applies to medical transactions, instead embarking on an extended HIPAA argument (discussed below) that the district court rejected because HIPAA and the TCPA are "separate statute[s] that impose separate requirements," and Gulf Coast was "not free to just ignore the TCPA's separate strictures" because it might have complied with HIPAA. Dist. Ct. Order 6-7.

2. Gulf Coast argues that "HIPAA controls the issue of consent in healthcare-related transactions, such as the one at issue here." Pet. 16. Yet for all its discussion on that point, Gulf Coast cites just a single case as support. *See id.* at 12-18. In that case, the plaintiff argued that consent under the TCPA "is provided by HIPAA when the debt is for medical services." *Mitchem v. Ill. Collection Serv., Inc.*, 2012 WL 170968, at *2 (N.D. Ill. Jan. 20, 2012). The court found it unnecessary to resolve that issue, and proceeded to *distinguish* HIPAA from the TCPA: "*Unlike the TCPA*, HIPAA does not require a medical provider to have *any* consent, express or

implied, from a consumer to use his cell phone number to obtain payment for its services." *Id.* (first emphasis added). An unreported district court decision that, by its own admission, "does not decide" the question is hardly evidence of "substantial ground for difference of opinion" under § 1292(b). *Id.*

Nor could Gulf Coast possibly provide such evidence here. The only other authority it relies on (at 15-17) is a 2012 FCC Ruling in which the agency, exercising its authority under the TCPA to "establish exemptions from the prohibitions of prerecorded voice calls to *residential lines*," reached this conclusion: "In view of the privacy protections afforded under HIPAA, we exempt from [the TCPA's] consent . . . requirements all prerecorded heath care-related calls to *residential lines* that are subject to HIPPA." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 F.C.C.R. 1830, 1852 (2012) (emphasis added). That exemption, as the district court pointed out, "does not address debt collection calls to cell phones." Dist. Ct. Order 7 n.3. And that alone is fatal to Gulf Coast's argument, for courts do not have the authority to create policy-based exemptions from the TCPA that neither the statute nor the FCC has recognized.

II. Gulf Coast Has Not Shown that an Immediate Appeal Would Substantially Reduce the Amount of Litigation Left in the Case.

Gulf Coast has also failed to show (as it "must") that interlocutory review would "substantially reduce the amount of litigation left in the case." *McFarlin*, 381

F.3d at 1259. All that remains here is a decision on class certification—which has already been decided in what Gulf Coast calls (at 19) the "companion" case to this one, *Manno v. Healthcare Revenue Recovery Group, et al.*, Case No. 0:11-cv-61357, and is thus unlikely to take long to issue. That is it. The question of willfulness will not require any litigation because the plaintiff intends to waive that question, just as the plaintiff in *Manno* already has. There is thus no good reason for this Court to interrupt the normal course of the litigation (particularly when a settlement might do away with the case). Rather, this Court should do what it does in the "great bulk" of cases: await a final judgment. *McFarlin*, 381 F.3d at 1264.

CONCLUSION

The petition for an interlocutory appeal should be denied.

Respectfully submitted,

/s/ Deepak Gupta
Deepak Gupta
Jonathan E. Taylor
GUPTA BECK PLLC
1625 Massachusetts Avenue, NW
Washington, DC 20036
(202) 470-3826
deepak@guptabeck.com

Donald A. Yarbrough
P.O. Box 11842
Fort Lauderdale, FL 33339
(954) 537-2000

O. Randolph Bragg
Horwitz, Horwitz & Associates
25 E. Washington Street
Chicago, IL 60602
(312) 372-8822

Counsel for Plaintiffs-Respondents

July 17, 2013

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2013, I electronically filed the foregoing answer with the Clerk of the Court for the U.S. Court of Appeals for the Eleventh Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: July 17, 2013

/s/ Deepak Gupta
Deepak Gupta