

## FCC's Reassigned Numbers Data Won't Help TCPA Class Cert.

By **Debra Aron** (September 16, 2021, 4:18 PM EDT)

On Nov. 1, the Federal Communications Commission's reassigned numbers database, or RND, will go live.[1] Use of the database can provide safe haven protection from Telephone Consumer Protection Act liability if used according to FCC guidelines.

Specifically, a caller that can demonstrate that it checked a number against the database before calling is shielded from TCPA liability if the database returns an inaccurate result.[2]

On Dec. 12, 2018, the FCC adopted an order establishing a database whose purpose is to allow callers to verify, before placing a call, whether a telephone number has been reassigned to a different subscriber.[3] The FCC instituted the RND as one means of reducing unwanted robocalls and improving the ability of companies and other institutions to reach their customers, patients, students and others.

The problem addressed by the RND may arise when, for example, a school seeks to reach a parent to deliver an automated message about a school closing.

The school dials the most recent number it has on file, but at some point after the parent provided the number to the school, the parent may have disconnected the number. A disconnected number can be reassigned by the telephone carrier to someone else. When the school makes the call to a now-reassigned number, the parent misses an important message about the school day, the actual recipient receives a nuisance call and the school is frustrated in its attempt to reach a student's family.

With the availability of the RND, the school could check the number before calling it and determine that the number had been permanently disconnected since the date that the parent provided it, thereby preempting the call and avoiding a nuisance to an unrelated consumer.

What are the implications of the reassigned numbers database for class action TCPA cases and, in particular, for class certification in those cases?

There are many types of nuisance calls that may give rise to TCPA liability, including calls that attempt to deceive call recipients into providing personal information or into sending money. In contrast, TCPA cases for which the RND is relevant are those that pertain to wrong-number calls.



Debra Aron

In wrong-number cases, the plaintiff generally alleges that she received a call or calls via an autodialer or artificial or prerecorded voice that was intended for a specific, named person other than her.

Often these calls are made by health care providers, utilities or vendors attempting to collect on their customers' debts, but may also pertain to appointment reminders, service follow-ups, account verifications, or a variety of other scenarios in which organizations attempt to reach their customers or former customers.

At least two interrelated challenges routinely arise in wrong-number TCPA cases for certifying a class of plaintiffs.

The first is whether it is possible to determine, from a data set of call records supplied from the calling agency and without individualized discovery such as sworn testimony from call recipients, which phone calls were in fact wrong-number calls.

The second is whether it is possible to determine, for a wrong-number call, who the call recipient was.[4]

Of interest is whether the RND might be used to overcome or mitigate some of these challenges of class certification in wrong-number TCPA cases. The answer is that while it appears that the RND is well-designed for its stated purpose, the RND is not well suited to overcome the challenges of class certification endemic to wrong-number cases. This is due to four characteristics of the RND:

- The RND is not expected to contain data from before early 2020;
- The RND does not indicate whether a number was reassigned but only whether it was disconnected;
- The RND is not designed for retroactive queries — queries of whether a number had been disconnected between two specific points in the past, rather than between a specific point in the past and the time of the query; and
- The RND does not include names or other information identifying the subscriber to or user of a number.

Voice service providers began reporting permanently disconnected numbers on April 15, 2020, to the RND and small service providers will begin reporting disconnected numbers by Oct. 15.[5]

Carriers are required to identify permanently disconnected numbers monthly going forward as of those dates but are not required to provide retroactive data about disconnections before those dates.[6]

Hence, for TCPA litigation currently in process related to alleged wrong-number calls that occurred before approximately the second quarter of 2020, the RND will likely contain no useful data.

Even for future litigation, other limitations of the RND will impede its usefulness for identifying classes in wrong-number TCPA cases. Notably, contrary to its name, the RND does not in fact identify which numbers were reassigned, but only whether a number was permanently disconnected from its previous subscriber as of a certain date.[7]

In addition, by the design of the RND, a query informs the user only of whether the phone number was or was not disconnected at any time between the date input by the user — presumably, the last date at which the number was known by the calling party to belong to intended call recipient — and the time of the query.[8]

When a telephone number is permanently disconnected, it is no longer associated with its former subscriber. A disconnected number will be held out of circulation for a period of time and, at some point, may be assigned by the phone company responsible for that number to a new customer.[9] Phone numbers can be recirculated in this way multiple times, conserving phone numbers, which are a scarce resource.

A number having been disconnected — at least once — since it had been provided to the caller is sufficient for a caller to know at the time it queries the RND that it cannot reach its intended party at that number.

Hence, knowing that a number was disconnected since the last time the number was known to be associated with the intended recipient is sufficient for the purpose of the RND — to alert the caller that it should not use that number to reach that individual.

This information is not generally sufficient, however, for purposes of identifying wrong numbers in future class action litigation for calls that were, at the time of the litigation, already made.

For example, consider a company that receives a confirmed phone number from a customer in January 2022 and, failing to consult the RND in real time, calls the number on June 2, 2022.

Suppose a class action is brought pertaining to that and other calls and, in June 2024, the parties desire to determine, for each call in suit, whether the number that was called had been disconnected between the time the customer provided the number to the defendant and the time of the call.

As currently designed and as contemplated by the FCC,[10] a query made in, say, June 2024 of the RND regarding a phone number provided to the defendant in, say, January 2022 will indicate only whether the most recent — if any — permanent disconnect of the number had occurred at some time since January 2022.

If the query response is no, indicating that a disconnect did not occur between January 2022 and the most recent update of the RND at the time of the query in June 2024, it can be inferred that the number belonged to the same subscriber at the time of the call as it did when the number was provided to the defendant in January 2022.[11]

If the query response is yes, however, indicating that a disconnect occurred between January 2022 and the most recent update of the RND in June 2024, the response will not suffice to determine whether a disconnect occurred before or after the June 2022 call in suit.[12]

If the query response is yes because it so happens that all disconnects of that number — and therefore, the most recent disconnect — occurred before the date of the call, this could be determined with further inquiries of the database.[13]

But if the response is yes because one or more disconnects occurred between the time of the call and the time of the query, it will not be possible to determine even with additional queries of the RND if a

disconnect also occurred between the time the number was provided to the defendant and the time the call was made.

Hence, the design of the RND — and the prescribed means of querying it — do not permit retroactive determination of whether a number was disconnected before a call was made except in some circumstances.

Further, determining that a number was disconnected before a call was made is not sufficient to determine whether the number was reassigned to someone at the time of the call.

In particular, determining that a number was disconnected before a call was made is not sufficient to determine whether the call went to a bad number, such as a number that the telephone network signaled as disconnected; or whether it went to a wrong number, meaning a number that someone answered who claimed not to be the intended recipient.

Some calling agencies' call records purport to distinguish between bad numbers and wrong numbers in this sense, some do not purport to do so, and in some instances it is not known whether the data do or do not attempt to make this distinction. In cases where call records data cannot distinguish between bad numbers and wrong numbers, the RND will offer no additional guidance.

An interrelated challenge for class certification — and class notice — is determining, if a number was a purported wrong-number call, who the actual call recipient was.[14] Identifying who the user of a telephone number was at the time of a call in the past is a surprisingly challenging problem for reasons of data deficiencies that are outside the scope of this article and unrelated to the RND.

To the extent that data deficiencies do preclude the identification of the user of a phone number at a point in time in the past, the RND will offer no amelioration of those hurdles. The RND does not include data on subscriber identities,[15] let alone information on the user of telephone lines.[16]

It is to be hoped that the RND serves its purpose and reduces nuisance wrong-number calls, to the benefit of consumers and businesses.

To the extent it does its job, the RND may reduce TCPA wrong-number litigation in the future, both because it should reduce the volume of wrong-number calls made once the RND is up and running, and because it will provide a safe harbor to callers who use it properly.

But the RND was not designed to assist in the task of identifying wrong-number calls after the fact, nor to identify who the call recipients were, and is not well suited to that purpose.

---

*Debra J. Aron, Ph.D., is a vice president at Charles River Associates.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] Reassigned Numbers Database, at <https://www.fcc.gov/reassigned-numbers-database>.

[2] FCC RND Order, ¶ 55.

[3] In the Matter of Advanced Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17-59, FCC Second Report and Order, Released Dec. 13, 2018 (hereafter, FCC RND Order).

[4] Other challenges arise as well, including whether it is possible to determine whether the dialed number was wireless at the time of the call, whether the person who received the call was an acquaintance or family member of the intended recipient (and if so, whether consent was provided to call that number by the caller's customer), and others that are outside the scope of this article.

[5] Reassigned Numbers Database, at <https://www.fcc.gov/reassigned-numbers-database>.

[6] FCC RND Order, ¶ 42.

[7] See, for example, FCC RND Order, ¶ 35.

[8] RND Query User Guide For the Reassigned Numbers Database, available at [https://www.reassigned.us/sites/default/files/resources/userguides/Query%20User%20Guide\\_0.pdf](https://www.reassigned.us/sites/default/files/resources/userguides/Query%20User%20Guide_0.pdf) User's Guide, p. 11; FCC RND Order, ¶ 24.

[9] The FCC RND Order also established a minimum period of time of 45 days that the phone company must wait after disconnecting a number to reassign it to a new customer. FCC RND Order, ¶15.

[10] FCC RND Order, ¶¶ 18-19.

[11] The response of "no" thereby indicates that if the number was a wrong number it was not due to a reassignment; the response does not rule out other reasons for wrong numbers, such as human error by the customer providing the number or the recipient in recording it, the customer intentionally providing a fraudulent number, error by the calling company in the dialing process, or other scenarios.

[12] FCC RND Order FCC ¶ 35; RND User Guide, at [https://www.reassigned.us/sites/default/files/resources/userguides/Query%20User%20Guide\\_0.pdf](https://www.reassigned.us/sites/default/files/resources/userguides/Query%20User%20Guide_0.pdf). The RND is to be updated monthly on the 17th of every month. See, Webinar: Callers/Caller Agents & the Reassigned Numbers Database (RND), viewable at: <https://www.reassigned.us/resources/videos/webinar-callerscaller-agents-reassigned-numbers-database-rnd>.

[13] Specifically, in that circumstance, a query whether a disconnect occurred between the date of the call and the date of the query will return a "no."

[14] These are interrelated problems because if one could definitively determine who was the user of a telephone number at a particular point in time in the past, one would know whether the number had been reassigned or not.

[15] The FCC declined to require telephone providers to report subscriber identity information to the RND because not only would such information be unnecessary to meet the FCC's goal of enabling callers to determine whether a number had been disconnected prior to placing a call to that number, but it would have created security and privacy risks that the FCC considered unnecessary. FCC RND Order FCC ¶ 37.

[16] The subscriber to a telephone number may or may not be the user of the line (and, therefore, the recipient of a call to that line on any given day) because, at least, (1) many wireless telephone numbers are part of group plans, in which the subscriber is the same for all lines in the plan, but the users are distinct individuals; (2) the person that normally uses a line may or may not be the person using that line on any given day if, for example, several members of a family share a cell phone; and/or (3) wireline phones are often shared by multiple users in a household beyond the subscriber or subscribers.