

FCC ISSUES LONG AWAITED DECLARATORY RULING INTERPRETING THE TELEPHONE CONSUMER PROTECTION ACT (TCPA)

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The FCC finally ruled on 21 petitions and letters seeking clarifications of the Telephone Consumer Protection Act (“TCPA”). While the FCC ruled on the petitions last month, it was not until July 10, 2015, that the FCC finally issued the long awaited written omnibus Declaratory Ruling. The below highlights portions of this Ruling, which affect businesses who use an autodialer to contact consumers or customers.

Expanded Applicability

One of the most controversial aspects of the Ruling is the FCC’s definition of an “autodialer”. Under the FCC’s Ruling, technology meets the definition of an “autodialer” if the dialing equipment has the capacity to store or produce, and dial random or sequential numbers. In coming to this decision, the FCC has expanded the definition of “autodialer” and thus increased the number of systems that are capable of violating the TCPA. In ruling this way, the FCC has rejected the view of many in the collections industry that the “present capacity” of the technology is what matters, not the possibility that in the future the technology could be converted to be used as an autodialer.

Within days of the Ruling, several parties have filed challenges to the FCC’s Order claiming that expansion of the TCPA’s applicability and definition of prior express consent concerning recycled cellphone numbers was improper. Petitions are now pending in the United States Court of Appeals for the D.C. and Seventh Circuits.

Call recipients can revoke consent by “any reasonable means”

The FCC also, not surprisingly, broadened the manner in which a consumer can revoke consent to receive non-telemarketing, non-advertising calls (i.e. calls from a debt collector). This decision echoes the trend that has been percolating throughout the federal courts. Pursuant to the FCC Ruling, consent can be revoked through “any reasonable means” and a caller is not permitted to limit the manner in which a consumer can revoke consent. As a result of this ruling, even where a consumer has provided prior consent in writing, this same consumer can later revoke consent orally to the caller.

There is no safe harbor for callers dialing a recycled cell phone number

The FCC’s Ruling rejected a number of petitions requesting a “safe harbor” from liability when the caller placed a call to a number it has previously received consent to call but, which has now been reassigned to a new consumer. In coming to this Ruling, the FCC determined that the TCPA requires the consent of the party who receives the call, not the intended recipient of the call. The FCC’s Ruling provides a caller one free call to determine that the number

has been reassigned. After this one free call, the caller is deemed to have knowledge of the reassignment and must cease use of an autodialer or be held strictly liable for a TCPA violation. Unfortunately, in coming to this decision, the FCC rejected requests that this one free call actually connect to a consumer, so as to provide actual notice to the caller that the number has been reassigned. Accordingly, this one free call will offer no help to many debt collectors who unknowingly placed a call to a reassigned number where the recipient does not actually answer the phone or otherwise inform the caller of the reassignment.

Further regarding consent, the FCC also ruled that the transferring of a telephone number from a landline to a wireless service does not revoke consent. In this regard, a caller can simply rely on the previous express consent to the landline when contacting the same number now transferred to a wireless service.

While this ruling increases the number of potential TCPA violations, some observers have noted that the new one-call exception will make it more difficult for plaintiffs to obtain class certification in TCPA cases. This new defense to class certification has, of course, yet to be ruled on will be an interesting development to continue to monitor.

Definition of prior “express consent”

The FCC additionally attempted to clarify how a caller can demonstrate that a consumer has provided consent to be contacted via an autodialer. Pursuant to the FCC’s Ruling, express consent can be demonstrated where the called party provides oral or written consent or, “in the absence of instructions to the contrary, by giving his or her wireless number to the person initiating the autodialed or prerecorded call.” While this language has yet to be interpreted by a Federal District Court, in the context of debt collectors, this ruling will provide a strong defense to plaintiff’s attorneys who have argued that the FCC’s prior rulings provided that consent can only be given to the original creditor, not a later debt collector.