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Robocalling and Wireless Numbers: Understanding the Regulatory Landscape

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Key provisions of the Federal Communications Commission's (FCC) Telephone Consumer Protection Act (TCPA) rule are scheduled to take effect in October of this year. These changes will require written consent for autodialed and prerecorded telemarketing calls and text messages to cell phones, and will require written consent for prerecorded telemarketing calls to landlines.

The TCPA has a private right of action, and recent class actions alleging violations of the law's autodialer provisions have settled for tens of millions of dollars. The filing of TCPA complaints is on the rise, and recent court decisions have complicated the TCPA litigation landscape.

In this article, we discuss the TCPA and the FCC rules, the amendments to the FCC rules under the TCPA, and new litigation developments under the TCPA.

Background to the TCPA

Under the TCPA, it is "unlawful . . . to make any call (other than a call . . . made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service." This law was passed in 1991 and reflects the now-obsolete notion that some cell phone users must pay for incoming calls, and "automated" calls should therefore be limited.

The TCPA defines the term "automatic telephone dialing system" or "ATDS" as

"equipment which has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." It seems clear that Congress intended the law to apply to random sequential dialers and similar devices that dial numbers continuously until they obtain an answer. For example, the legislative history indicates that "automatic dialers will dial numbers in sequence, thereby tying up all the lines of a business and preventing any outgoing calls."

In 2003, the FCC interpreted the term ATDS to include a predictive dialer, where the dialer has the capacity to randomly generate and dial sequential telephone numbers, even if that capacity has not been enabled: "A predictive dialer is equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls. The hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers." Many businesses use telephone systems to contact their customers that, if paired with certain software, are capable of generating and dialing sequential numbers at random.

The FCC's TCPA Rule

The FCC has made a rule under the TCPA (TCPA Rule or Rule), which generally pro-

hibits making telephone calls to cellular telephones using an ATDS or a prerecorded message without the prior express consent of the called party. These prohibitions apply to telemarketing calls as well as to purely informational or transactional calls such as flight updates, debt collection calls, surveys, and bank account fraud alerts.

The TCPA Rule also prohibits making a telemarketing call to a residential landline telephone using a prerecorded message without the prior express consent of the called party, unless the caller has an established business relationship with the called party.

Revisions to the TCPA Rule

The FCC has revised its TCPA Rule to require an automated, interactive opt-out mechanism for prerecorded telemarketing messages to both cell phones and landlines. The revision took effect on January 14, 2013.

In addition, effective October 16, 2013, the Rule will be revised to:

- Require *prior express written consent* requirement for telemarketing calls made to cell phones using an ATDS or a prerecorded message, but will maintain the *prior express consent* requirement for non-telemarketing calls to cell phones;
- Require *prior express written consent* for telemarketing calls made to residential landlines using a prerecorded message; and

- Eliminate the established business relationship exception to the obligation to obtain consent for telemarketing calls made to residential landlines using a pre-recorded message.

These revisions are intended to maximize consistency with the Federal Trade Commission's (FTC) Telemarketing Sales Rule (TSR).

Automated, Interactive Opt-Out Mechanism

As of January 14, 2013, the TCPA Rule now requires that every prerecorded telemarketing message, whether delivered to a cell phone or a residential landline, provide an automated, interactive voice- and/or key press-activated mechanism for the consumer to request no further telemarketing calls from the seller. The mechanism must be presented, together with instructions on how to use it, within two seconds of the caller's statement of identity at the beginning of the message. When a consumer uses the opt-out mechanism, his or her number must be automatically added to the seller's do-not-call list, and the call must immediately terminate. When the message is left on an answering machine, it must also provide a toll-free number that the consumer may use to connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism. These new FCC requirements are consistent with those already imposed by the FTC's TSR.

Prior Express Written Consent

Effective October 16, 2013, the TCPA Rule will require *prior express written consent* to deliver an autodialed or prerecorded telemarketing call to a cell phone, and will require *prior express written consent* to deliver a prerecorded telemarketing message to a residential landline. The Rule defines "prior express written consent" as a signed written agreement that clearly and conspicuously discloses to the consumer that:

- By signing the agreement, he or she authorizes the seller to deliver, to a desig-

nated phone number, telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and

- The consumer is not required to sign the agreement or agree to enter into it as a condition of purchasing any property, goods, or services.

The required signature may be "obtained in compliance with the E-SIGN Act," including via an e-mail, website form, text message, telephone key press, or voice recording.

Although these provisions do not apply to purely informational or transactional calls or messages, such as flight updates, debt collection calls, surveys, or bank account fraud alerts, an informational call that includes an upsell – such as a flight update followed by an offer inviting the consumer to upgrade to first class – would require written consent. The FCC has stated that "if the call, notwithstanding its free offer or other information, is intended to offer property, goods, or services for sale either during the call, or in the future, that call is an advertisement."

It is also important to note that because both the FCC and courts consider a text message to be a "call" for purposes of the rules promulgated pursuant to the TCPA, the written consent requirement will apply to the delivery of telemarketing text message campaigns. It is already industry practice for companies to obtain prior express consent to the receipt of such messages; however, the signature requirement and disclosure obligations (described above) are new.

Litigation and Regulatory Actions

The TCPA allows private actions and provides for between \$500 and \$1,500 in statutory damages for each violation, with treble damages available for willful or knowing violations, as well as injunctive relief. The TCPA also can be enforced by the FCC and state attorneys general.

TCPA litigation has trended upward in recent years, with TCPA suits rising by 63% between 2011 and 2012. Several fac-

tors appear to be fueling this trend:

- **Increased consumer use of cell phones as primary phones:** According to a recent Centers for Disease Control and Prevention Semi-Annual National Health Interview Survey, nearly 36% of American households used cell phones only and nearly 16% received all or nearly all of their calls on cell phones even if they also use landline telephones. Additionally, 60.1% of adults between the ages of 25 and 29 live in households that use cell phones only. Companies that rely on autodialers to contact consumers, therefore, are increasingly at risk of dialing numbers in violation of the TCPA's autodialing prohibitions.
- **Increased ease of filing TCPA class action suits:** In *Mims v. Arrow Fin. Servs., LLC*, the Supreme Court ruled that federal and state courts exercise concurrent jurisdiction over TCPA claims, thus weakening arguments that state law governs whether claims may be brought as class actions.
- **Defects in consent:** For calls where only prior express consent is required to use an autodialer, a 1992 TCPA order by the FCC states that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." This view of what reasonably evidences prior express consent is reinforced by the TCPA's legislative history. Nevertheless, a lack of robust controls around ensuring, for example, that prior express consent has been obtained to call a number with an autodialer may result in difficulty overcoming individual claims of a lack of consent.

Several recent court decisions have also complicated the TCPA litigation landscape, one of the most notable being the Seventh Circuit Court of Appeals decision in *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637 (7th Cir. 2012). In *Soppet*, a debt collector used an autodialer to call two cell phone numbers on behalf of AT&T to col-

lect debts owed. The numbers had been provided to AT&T by the debtors, but at the time of debt collection calls they had been reassigned to new subscribers who had not consented to receive autodialed calls. The new subscribers sued the debt collector for violating the TCPA's prohibition on using an autodialer to call a cell phone number without the prior express consent of the "called party." The debt collector argued that the term "called party" meant "intended recipient of the call." The Seventh Circuit rejected this argument, holding that "called party" means the current cell phone subscriber at the time the call is made. The import of the holding is that consent to autodial a cell phone number can no longer be presumed valid day-to-day unless a reliable mechanism is in place for confirming ownership of the number prior to dialing it. At a minimum, the *Soppet* decision should prompt businesses to consider whether to alter their dialing strategies for consumers resident in Seventh Circuit states (Illinois, Indiana, and Wisconsin).

Chesbro v. Best Buy Stores, LP, 697 F. 3d 1230 (9th Cir. 2012), serves as a cautionary tale for businesses seeking to leverage artificial or prerecorded voice robocalls to deliver messages thought to be purely informational. After purchasing a computer from Best Buy, the plaintiff in *Chesbro* began receiving prerecorded phone messages about Best Buy's rewards program. The plaintiff complained to Best Buy on several occasions about the calls and was eventually placed on its internal Do Not Call (DNC) list. Several months later, however, the plaintiff received another prerecorded phone message from Best Buy about its rewards program, which prompted the filing of a class action complaint in Washington State against Best Buy alleging violation of the TCPA's ban on prerecorded message calls that include or introduce unsolicited advertisements or constitute telephone solicitations. The district court granted summary judgment in Best Buy's favor, finding that the calls were purely informational courtesy calls about its rewards program. On appeal, the Ninth Circuit determined that because the calls encouraged the plain-

tiff to redeem rewards points, the calls were telephone solicitations, reasoning that redemption of rewards points "required going to a Best Buy store and making further purchases of Best Buy's goods . . . [t]hus, the calls encouraged the listener to make future purchases at Best Buy." Perhaps most significantly, the Ninth Circuit found that the TCPA did not require that telephone solicitations explicitly mention a good, product, or service "where the implication is clear from the context" and that "[a]ny additional information provided in the calls does not inoculate them." The upshot of the ruling is that businesses should carefully review any outgoing prerecorded voice messages that are purported to be informational.

Text messaging is another area in which there has been active litigation. As previously noted, the issue of whether text messages constitute "calls" under the TCPA is well-settled, *see, e.g., Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d 999 (N.D. Ill. 2010); *Abbas v. Selling Source, LLC*, N.D. Ill. 2009; *Satterfield v. Simon & Schuster, Inc.*, 569 F. 3d 946 (9th Cir. 2009). Recent cases have tested whether confirmatory texts – i.e., text messages sent to called party confirming the party's choice to opt out of text messaging – violate the TCPA. Here, however, plaintiffs have not had success. As the court in *Ryabyshchuck v. Citibank*, 11-CV-1236 – IEG (WVG) (S.D. Ca. Oct. 30, 2012) noted, "a simple, confirmatory [text message] response to plaintiff-initiated contact can hardly be termed an invasion of plaintiff's privacy under the TCPA. A finding to the contrary would stretch an inflexible interpretation beyond the realm of reason." The FCC, in a declaratory ruling issued in November of 2012, generally agreed with the idea that confirmatory texts do not violate the TCPA, but included some important caveats in its ruling, including that (1) prior express consent to receive texts messages is required; (2) confirmatory texts must "merely confirm the consumer's opt-out request and do not include any marketing or promotional information"; (3) confirmatory texts are to be the only additional mes-

sages sent to customers after they opt out; and (4) confirmatory texts should be sent within five minutes of the opt out request, as "the longer [the] delay [in sending confirmatory texts], the more difficult it will be to demonstrate that such messages fall within the original prior consent." Significantly, the FCC did not entertain the petitioner's argument that confirmatory texts do not violate the TCPA if an autodialer is not used to send them. Rather, the FCC implied in its order that obtaining prior express consent to receive text messages means confirmatory texts may be sent with or without an autodialer.

Given the perilous and quickly changing litigation landscape and the new FCC rules regarding consent, businesses are advised to examine their calling and text messaging practices to determine whether any changes to how they operate and obtain consent are necessary.

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