CARLTON FIELDS

The FCC's TCPA Regulatory Ruling Imposes Tighter Call Restrictions

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Last month, the Federal Communications Commission (FCC) released a long awaited declaratory ruling and order, FCC 15-72, addressing several petitions which sought clarification of or exemptions from Telephone Consumer Protection Act (TCPA) provisions concerning automatic telephone dialing systems, consent to call, reaching wrong numbers, telemarketing calls and call blocking technology. But for allowing a safe harbor for a single call to a reassigned number, and limited exemptions for certain messages about time sensitive financial and health care issues, the ruling tightens TCPA restrictions. Originally enacted in 1991 for the purpose of curbing annoying telemarketing calls, the Telephone Consumer Protection Act, 47 U.S.C. §227, authorizes the FCC to issue implementing regulations and interpret the law. While originally targeted at telemarketing calls to residences, the TCPA and FCC regulations also strictly regulate non-telemarketing calls to cell phones and faxed advertisements. For example, the TCPA prohibits calls to cell phones using automatic telephone dialing systems (ATDS) or prerecorded voice messages (PVM) absent the called party's "prior express consent," in addition to restricting telemarketing calls.[1] The TCPA imposes strict liability for violations, and provides for statutory damages of between $500 and $1500 per violation, i.e. per call, text, or fax. As the technology employed to place calls is typically uniform and used to communicate on multiple

occasions and/or to large groups, violations lend themselves to class actions and substantial exposure for multiple calls. The scope of exposure has also expanded with systems that interface ATDS, PVM or fax telecommunications technology with readily available "big data," for marketing and other communications to outsized groups of recipients. As a result, the last few years have seen an increase in multimillion dollar settlements against an expanding group of industries targeted by TCPA plaintiff attorneys. The FCC has issued several interpretative declaratory rulings since the TCPA was enacted. But as technology has evolved, so have questions concerning the interpretation and effect of TCPA provisions. These include questions as to the definition of an ATDS subject to the law, "calls" vs texts to cell phones, establishment and revocation of "prior express consent" from the called party, consequences of inadvertently reaching an unintended party after reassignment of a telephone number previously assigned to a party who gave consent, call blocking technology, and the need for prior consent under "exigent" circumstances. These issues were raised in 21 separate petitions for rulemaking, declaratory rulings and clarification filed by industry members and trade associations including the consumer banking, retail, wireless, restaurant, health care, marketing and debt collection industries, as well as the National Association of Attorneys General, addressed in FCC 15-72. The FCC's key rulings on the petitions were as follows: **Autodialers**

The TCPA defines "automatic telephone dialing system" as "equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and, to dial such numbers." Some industries have sought to avoid using equipment that meets the statutory definition, but the FCC has defined an ATDS (or "autodialer") as inclusively as possible. In 2003, the FCC ruled that "predictive dialers," i.e., equipment that dials numbers, and when attached to certain software, assists callers in predicting when an agent will be available to take the calls, is an autodialer subject to the TCPA because it "had the capacity to dial numbers without human intervention". In the latest ruling, the FCC addressed requests that it rule that the word "capacity" in the statutory definition means "present" capacity, a seemingly common sense argument. However, the FCC ruled that "dialing equipment that generally has the capacity to store or produce, and dial, random or sequential numbers, *even if not presently used for that purpose*, is an autodialer, broadly interpreting the term "capacity" to include "*potential ability."* According to the FCC, even if equipment requires added software to perform the functions described in the definition it will be included in the definition of "autodialer" subject to the TCPA, and will not be exempted because it lacks a "present ability" to dial randomly or sequentially. Thus, "capacity," according to the FCC, includes "future ability" and is not limited to "present ability," although it does not include " theoretical potential." The FCC also refused to define the specifications for an autodialer or how to measure "theoretical potential" vs. future ability. In fact, the only example given by the FCC of equipment that would *not* be subject to the definition of an autodialer was a rotary dial phone – as not having the potential capacity to store or dial random or sequential numbers. The FCC's response to comments that this approach could sweep in smart phones, which may be able store and dial numbers through use of an app or software, was that there was "no evidence that individual consumers had sued" based on smartphone calls, and that the commenters had not provided scenarios under which unwanted calls were likely to result from typical cellphone use. In light of this

ruling, consumers may now decide to sue based on smartphone calls. **Text Messages Are Considered "Calls"**

Many courts had already reasoned that the TCPA prohibition on initiating autodialed calls to cell phones encompassed text messages. The FCC ruling expressly states that the TCPA's consent requirement applies to short message service text messages (SMS) to wireless phones in addition to voice calls, and applies to text messages sent by computer. **Revocation of Prior Express Consent**

The TCPA prohibits autodialed and prerecorded message calls to cell phones absent "prior express consent." In 2008, the FCC ruled that autodialed and prerecorded message calls to wireless numbers provided by the called party to a creditor in connection with an existing debt were permissible as calls made with the "prior express consent" of the called party. In 2012, the FCC ruled that prior express consent can be established by the called party giving prior express *oral or written* consent. But until now, the FCC had not addressed whether consent could be revoked and how, leaving courts to grapple with those issues on a case-by-basis. The FCC ruled against a petition asking it to confirm consumers did not have right to revoke prior express consent, or if they could, that the business could have procedure for revoking consent. Rather, the ruling states that consumers can revoke consent "at any time and through any reasonable means," and, that callers "may not limit the manner in which revocation may occur." Thus, if "reasonable," a called party may orally revoke consent. Because "reasonableness" normally requires a factual determination, this will make it more difficult for businesses to obtain summary judgment based on prior express consent, even if documented in writing, since the consumer can claim to have orally revoked that consent. Moreover, denying industry the ability to set standards for revocation of consent may present insurmountable challenges for large retail organizations. For example, will it be sufficient for a department store cardholder to revoke consent given with his card application by so advising any store sales clerk? **Reassigned Numbers, Clarification of "Called Party"**

Certain petitioners asked whether there was liability for violating the TCPA when a caller to a number provided by a party who gave prior express consent was reassigned to a new consumer who had not given consent, such that calls to the number did not reach the intended recipient. They pointed out that individuals may change their numbers without notifying the caller, and that "good faith errors," such as incorrect entry of a number in a database, may occur. The FCC ruled that "called party" for purposes of the TCPA, does not mean the "intended recipient" of the call, but rather the current subscriber to the telephone service or nonsubscriber customary user of the phone (for example, a close relative), and that the TCPA requires consent from either the actual subscriber or a customary user. Thus, it said, the intent of the caller to reach someone else is irrelevant in determining liability for violations of the TCPA. The FCC also stated that "caller best practices" can facilitate detection of reassignments before calls and that businesses "should institute better safeguards to avoid calling reassigned wireless numbers." One example of a practice mentioned to avoid making such calls was to make a manual call first to ascertain a number is correct. Yet, if a manual call is made from a system that also "has the capacity" to make autodialed calls under the FCC's expansive definition, that call itself could be deemed as having been made by an "autodialer." The ruling also states that "callers who make calls without knowledge of reassignment and with a

reasonable basis to believe they have valid consent to make the call should be able to initiate *one* call after reassignment… to gain actual or constructive knowledge of the reassignment and cease future calls to the new subscriber." Thus, a "safe harbor" for a single call or text to a reassigned number is provided, in order to "gain actual or constructive knowledge of reassignment." The provision of a safe harbor for only one call makes it difficult for industry reliant on autodialer technology to depend on prior express consent, knowing that numbers may be reassigned. While calls can be made to a number for which the caller has prior express consent until it has "actual" or "constructive" knowledge that the number has been reassigned, this could lead to unfair results. For example, the ruling states that a name given on a voice mail greeting different than the intended recipient's gives constructive knowledge that number has been reassigned, as does "hearing a tone indicating the number is no longer in service." But a name on a voice mail greeting may be a nickname not used in the formal consent document. In addition, a consenting subscriber's phone could be temporarily disconnected for nonpayment, and subsequently reconnected. Thus, it would seem that reaching a different name by voice mail or a "not in service" recording should not automatically be deemed as giving "constructive notice" to the caller that the number is not associated with the consenting subscriber. Once a caller makes one call that gives it "constructive knowledge," further calls violate the TCPA. A caller reaching an unintended recipient after reassignment then has the burden of establishing it did not have actual or constructive knowledge when it made that call. The FCC also denied a request that it rule that consumers have a duty to notify callers to whom prior consent was given of a change in their number, although it did say that companies could contractually require consumers to so notify them. Still, the burden is on callers to repeatedly take steps to determine that a number for which consent has been given has not been reassigned, and the fact that a consumer does not comply with a contractual duty to advise of a new number will not be a defense to violating the TCPA by calling a reassigned number. Additionally, the FCC denied a request to add an affirmative bad faith defense that vitiates liability upon a showing that the called party purposefully and unreasonably waited to notify the caller of reassignment of the number in order to accrue statutory violations. This greenlights the practice of savvy but unscrupulous and litigious consumers allowing calls they know are reaching the wrong number to continue without notifying the caller, for the purpose of accruing numerous calls and $500 per call damages. **Wrong Number Calls**
No safe harbor was given with respect to calling wrong numbers, for example, as a result of incorrectly inputting or dialing a number. Liability for violating the TCPA will accrue for a single call to a wrong number as a result of such a mistake. **Call Blocking Technology**
The ruling grants the National Association of Attorneys General's petition for clarification that there are no legal prohibitions to stop carriers and providers of VOIP services from implementing and offering consumers call blocking technology to block categories of calls, or calls from a specific source at a consumer's request. **Limited Exemptions for Banking institutions and Health Care Providers**
The FCC's ruling exempts from the TCPA's consent requirements, with conditions, certain "pro-consumer messages about time sensitive financial and health care issues. Specifically: - The ruling grants a petition filed by the American Bankers' Association on behalf of its member banks and

financial institutions with regard to calls from such institutions concerning potential fraudulent activity or identity theft on a consumer's account, possible breaches of a consumer's personal information, steps that may be taken by the consumer to prevent or remedy harm caused by data breaches, and relating to money transfers. The FCC exempted such calls from prior express consent requirements as beneficial to consumers; however, it imposed conditions including limiting the exemption to no more than three calls over a three day period per event, and a requirement that an opt out mechanism be provided. - The FCC also ruled that provision of a phone number to a health care provider constitutes prior express consent for *health care* calls subject to HIPAA by a HIPAA covered entity. Non-marketing health care calls not charged to the called party, including information relating to appointments, exam and checkup reminders, hospital pre-registration, discharge follow up and prescription information also fall within the range of calls covered by prior express consent implied in giving a phone number to a health care provider. However, the ruling specifies that calls from health care providers regarding patient accounts and billing are not covered. Thus health care providers will no longer be able to deem the consumer's provision of a telephone number to them as prior express consent to call them regarding their accounts or unpaid bills, contrary to existing case law. **Court Challenges**

ACA International (ACA), a trade association of credit and collection professionals and one or the petitioners addressed in the FCC ruling, filed suit seeking judicial review of the ruling by the U.S. Court of Appeals for the D.C. Circuit on the day it was released. Other organizations that have also filed legal challenges to the FCC's interpretations including petitioner, Professional Association for Customer Engagement, Inc. (PACE), a non-profit trade organization for companies that use multiple channels for customer communication with respect to marketing, customer service and compliance, and Sirius XM Radio, Inc. The organizations seek review of the FCC's ruling with respect to its interpretation of "capacity" within the TCPA definition of an automatic telephone dialing system, its treatment of predictive dialers, and of prior express consent, including consent in the context of reassigned numbers. In its challenge, ACA has also asked the court to compel the FCC to either establish a safe harbor for autodialed wrong number non-telemarketing calls, or define the called party as "the intended recipient." These challenges have been consolidated for review in the D.C. Circuit Court of Appeal. ___ [1] The TCPA prohibits faxing unsolicited advertisements outside of established business relationships, and absent clear and conspicuous opt out notices, however, issues related to unsolicited faxed advertisements are not addressed in FCC 15-72.

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