CARLTON FIELDS

Courts Consider Definition of Autodialer and Standing under the Telephone Consumer Protection Act after FCC Ruling

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In July, the FCC issued its omnibus ruling responding to 21 petitions seeking exemptions or clarification of certain provisions of the Telephone Consumer Protection Act (TCPA). The ruling addresses the statutory definition of an autodialer and "called party," consent and revocation of consent, and the consequences of inadvertently reaching an unintended party after reassignment of a number, among other issues. While these provisions in the ruling are being challenged by a number of industry constituents, decisions issued in California and the Third Circuit have already cited the ruling. This article will discuss highlights of the ruling, related decisions since it was issued, and how it may affect future TCPA litigation. The TCPA, 47 U.S.C. §227, was originally enacted in 1991 when cell phones were a luxury, to curb annoying telemarketing robo-calls to residences. In addition to regulating telemarketing calls, the TCPA also prohibits using automated dialing systems ("autodialers") or prerecorded voice messages to make any call to a wireless phone, absent prior express consent of the called party. The FCC is authorized to issue implementing regulations and interpret the TCPA,

and has issued several rulings over the years. For example, the agency previously ruled that prior express consent can generally be given orally or in writing, but consent must be in writing for telemarketing calls to residences (FCC 12-21). The statute provides for damages of up to $1,500 per violation and as use of mass communications technology as well as wireless phones have increased, so have TCPA class actions and multimillion dollar settlements. **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." The statutory definition may appear specific on its face, but the FCC interprets it broadly. In 2003, it ruled that "predictive dialers," i.e., equipment that can dial numbers, and when attached to certain software, assists callers in connecting an available agent to the calls, are autodialers under the TCPA because such equipment "had the capacity to dial numbers without human intervention." In the ruling, the FCC denied industry requests that it interpret the word "capacity," used in the statutory definition, to mean "present" capacity. Instead, in part relying on its 2003 predictive dialer ruling, it 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*, may be an autodialer. Thus, if equipment has the *potential* ability to perform the functions in the definition by, for example, the addition of software, it may be an autodialer because, according to the FCC, "capacity" includes "future potential ability." In two Northern District of California decisions since the ruling, the courts found "human intervention" involved in sending text messages meant they were not sent by "autodialers" under the TCPA. In *Luna v. Shac, LLC*, summary judgment was entered for the defendant based on employee involvement in sending marketing texts, i.e., inputting numbers into the database, drafting the messages, and clicking Send to transmit them. Similarly, in *McKenna v. WhisperText*, the court dismissed a complaint based on text messages because user action was required for the WhisperText app to send the text. On the other hand, in *Dominguez v. Yahoo*, the Third Circuit reversed a summary judgment in favor of the defendant, finding triable issues of fact as to whether the equipment used to send text messages to the plaintiff was an autodialer under the FCC ruling. **Revocation of Prior Express Consent**

The TCPA prohibits autodialed and prerecorded message calls to cell phones absent "prior express consent" of "the called party" the FCC previously ruled that calls to wireless numbers provided by the called party to a creditor in connection with an existing debt were permissible as made with the "prior express consent" of the called party, but it never before addressed whether and how consent could be revoked. The FCC denied industry petitions asking it to confirm consumers do not have right to revoke prior express consent, or that businesses could set a 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," under the circumstances, a party that previously gave express consent in writing may orally revoke that consent, creating a triable issue of fact. **Reassigned Numbers, "Called Party"**

Certain petitioners asked for a safe harbor from TCPA liability when a number provided by a party who had given prior express consent was reassigned to a new user, i.e., an "unintended recipient" who had not given consent. 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, may occur. They also asked the FCC to define "called party" as the intended recipient of the call. The FCC ruled that "called party" under the TCPA, does not mean the "intended recipient" of the call, but rather the current telephone service subscriber or nonsubscriber customary user (for example, a family member), and that the TCPA requires consent from either the actual subscriber or a customary user. Thus, the intent of the caller to reach someone else is irrelevant in determining liability for violations. In *Leyse v. Bank of America* the Third Circuit reversed a district court decision denying liability for a telemarketing call intended for the roommate of the plaintiff, holding that the plaintiff, a regular user of the phone, had standing to sue as "called party," in reliance, in part, on the FCC ruling. The FCC provided a single call "safe harbor" for "callers who make calls without knowledge of reassignment and with a reasonable basis to believe they have valid consent," in order to "gain actual or constructive knowledge of reassignment," without incurring liability. A determination of whether facts in a given case are sufficient to give the caller "constructive knowledge" again means more triable issues. **Requests for Stay**

In *Gensel v. Performant Technologies, Inc.*, a Wisconsin court recently granted a motion to stay a TCPA case pending the outcome of industry challenges to the FCC ruling related to issues in the case. But in *Hooker v. Sirius XM Radio*, a Virginia court reached the opposition result, despite the ruling's relationship to issues in the case. As the ruling "capacity" and "called party" definitions extend the reach of the TCPA and its zone of protected persons, expect to see an increase in TCPA litigation, even as the challenge litigation works its way to conclusion.

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