CARLTON FIELDS

6th Circuit Rules Prior Express Consent Defeats Mortgagor TCPA Claim Against Lender

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On August 21, the Cincinnati-based United States Court of Appeal for the Sixth Circuit issued its ruling in *Hill v. Homeward Residential, Inc.*, 2015 WL 4978464 (6th Cir. August 21, 2015), and affirmed a jury verdict determining that a person gives "prior express consent" under the TCPA when he gives a creditor his cellphone number in connection with a debt. The case concerns a very common set of circumstances in TCPA litigation: a borrower provided a cellphone number to a lender and the lender called the borrower many times after the borrower fell behind on his payments. Like many—or perhaps even most—TCPA cases, the contested issue of the case turned on whether the borrower had given “express consent” to be called on his cellphone by the lender about the debt and whether he ever revoked that consent. The underlying facts involve the following scenario:

- The borrower provided his home phone number to a lender when he obtained his loan in 2003.
- In 2006, the borrower canceled his home phone line and provided the lender with his cellphone number as his primary phone number.
- At some point, the borrower also provided the lender with a work number.

- After the borrower fell behind on the loan, the lender called him on the various numbers that had been provided, including the work number. The borrower told the lender not to call him at work, and instead to call his cellphone.

These facts required the court to resolve the following key issue: *The transaction giving rise to the debt—the loan—was made in 2003. The borrower didn't provide the cellphone number until at least 2006. Under those circumstances, was it sufficient for the lender to proceed with the understanding that it has been furnished with the cellphone number in connection with the transaction giving rise to the debt?* The court answered this question in favor of the lender. This is perhaps the most important takeaway from the case. This ruling is consistent with the FCC's recently issued 2015 TCPA order and should give lenders comfort that they can call a number on which consent has been given as long as it is not revoked prior to the call. Contrary to the argument that the borrower advanced in this case, it is not necessary for the number at issue to have been provided at the time the loan was made. In reaching this conclusion, the court also affirmed the propriety of a broad jury instruction regarding the meaning of prior express consent. Specifically, the trial court crafted a jury instruction based on the FCC's interpretation of the term "prior express consent. The instruction was:

> "'Prior express consent' means that before Defendant made a call to Plaintiff's cellular telephone number, Plaintiff had given an invitation or permission to receive calls to that number. Autodialed and prerecorded message calls to wireless numbers that are provided by the called party to a creditor in connection with an existing debt are permissible as calls made with the 'prior express consent' of the called party."

In approving the instruction, the appellate court noted that the "language adequately reflects the legal definition of prior express consent promulgated by the Federal Communications Commission (FCC). It was taken directly from the FCC's rulings—which shape the law in this area, *see* 47 U.S.C. § 227(b)(2) (charging the FCC with prescribing rules and regulations under the Act). This is the first federal appellate court decision on jury instructions in TCPA cases and likely will be viewed as an important precedent for trial court's dealing with such issues. One last interesting note: while the decision was unanimous, Circuit Judge Eric Clay wrote a separate concurring opinion questioning FCC's interpretation of the term "prior express consent." Judge Clay stated that he believed, "The notion that a debtor gives his prior *express* consent to receiving calls from a creditor using an auto-dialer or prerecorded voice message simply by giving his cellphone number to the creditor strikes me as contrary to both the plain language of the statute and the underlying legislative intent." He noted, though, that "because the plaintiff in this case does not challenge the FCC regulation itself, we do not have occasion to pass judgment on it." He added, though, "that such a challenge is not foreclosed in a future case." Judge Clay's concurring opinion raises the exact issue that was decided by the Eleventh Circuit in *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F. 3d 1110 (11th Cir. 2014), where that court held that the FCC's interpretation of the term was indeed binding based on the Hobbs Act.

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