

Ninth Circuit Relaxes Standard for "Prior Consent" to Call Cell Phones

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January 18, 2013 -- The Telephone Consumer Protection Act 47 U.S.C. §227 ("TCPA") prohibits the making of non-emergency calls to cell phones using automatic telephone dialing systems or prerecorded voice messages unless the called party has given "prior express consent" to call the number. 47 U.S.C. §227 (b)(1). Violations are subject to strict liability and imposition of penalties of between \$500 and \$1500 per call. Moreover, principals may be held liable for violations by agents acting on their behalf, for example, marketing call centers, or collection agencies calling on behalf of creditors. "Prior express consent" requires that the consent be given in relation to an existing debt or transaction, for example, providing the number on a credit application. In an FCC declaratory ruling issued in January 2008^[1], the agency stated, "we find that autodialed and prerecorded message numbers to wireless numbers provided by the called party in connection with an existing debt are made with the "prior express consent" of the called party". However, the FCC further stated, "we emphasize that the express consent is deemed to be granted only if the number was provided by the consumer to the creditor, and such number was provided *during the transaction* that resulted in the debt owed," noting that "typically the telephone number is provided by the customer for purposes of receiving calls, for example, as part of a credit application" (emphasis added). The FCC ruling was thus usually interpreted to mean that prior express consent had to be given before or during the transaction resulting in the debt (or other reason for placement of the call). However, in *Meyer v. Portfolio Recovery Associates*, the Ninth Circuit recently issued an opinion appearing to relax this standard, holding that "Pursuant to the FCC ruling, prior express consent is consent to call a particular telephone number in connection with a particular debt that is given *before the call in question is placed*." This opinion amended an earlier opinion issued by the Court in October, in which it had interpreted the FCC ruling to mean "prior express consent is deemed granted only if the wireless telephone number was provided by the consumer to the creditor, and only if it was provided at the time of the transaction that resulted in the debt at issue," and further stated, "...consumers who provided their cellular telephone numbers to creditors after the time of the original transaction are not deemed to have consented to be contacted at those numbers for purposes of the TCPA".

The relaxed standard set forth in the amended decision made no practical difference for the defendant in *Meyer*, as the court nevertheless affirmed the district court's order granting the plaintiff's motion for a preliminary injunction enjoining the placement of calls to cell phone numbers obtained by skip tracing and provisional class certification. Nevertheless, the Court's more recent interpretation of "prior express consent" means that, at least in the 9th Circuit, debt collectors and other businesses which use auto dialer technology or prerecorded voice messages to contact individuals will have to show only that consent to be called at that number was given before the call was placed, rather than having to show that the number was provided in the original credit application or otherwise in connection with the underlying transaction or debt.

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