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TCPA 'clarifications' likely lead to flood of lawsuits

By: admin November 24, 2015 0

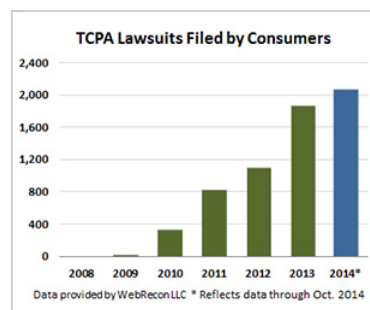
By Michael A. Klutho and Jessica L. Klander

On June 18, 2015, the Federal Communications Commission (FCC) considered a proposal initiated by Chairman Tom Wheeler "to provide clarity" as to the scope of the Telephone Consumer Protection Act, 47 U.S.C. § 227. In a 3-2 vote, the FCC adopted Wheeler's proposal, with the majority emphasizing that the ruling would "protect consumers against unwanted robocalls and spam texts." The ruling included a long-awaited definition of an "autodialer" under the TCPA and also addressed the issues surrounding revocation of consent and reassigned cell phone numbers.

Overall, the ruling is very consumer-oriented. Commissioners Michael O'Rielly and Ajit Pai voted against the proposal, providing strong dissents. Pai summarized the ruling as "target[ing] useful communications between legitimate businesses and their customers" and O'Rielly agreed, noting it "penalizes businesses and institutions acting in good faith to reach their customers using modern technologies." While the future of TCPA law remains cloudy (see below), the most likely outcome of the FCC's ruling will be further litigation seeking guidance from the courts. But most assuredly, consumer litigation alleging TCPA claims will continue to increase.

History of TCPA litigation.

In 1991, in an effort to address automated telephone marketing calls particularly to cell phones, Congress enacted the TCPA. The TCPA includes a private right of action and \$500 statutory penalty per call (\$1,500 per call if the calls were intentional) to incentivize consumers to go after illegal telemarketers, scam artists, and fraudsters. Because of these incentives, claims under the TCPA have exploded. WebRecon LLC reports that the number of TCPA claims filed per year has increased from 354 in 2010 to 2,363 in 2014. Pai noted that "trial lawyers have found legitimate, domestic businesses a much more profitable target [than scam artists]. ... [A] trial lawyer can collect about \$2.4 million per suit by targeting American companies. So it's no surprise the TCPA has become the poster child for lawsuit abuse[.]" The FCC's recent ruling which expanded the scope of the TCPA now serves as a springboard for further consumer litigation under the TCPA.



Definition of autodialer

The TCPA itself defines "autodialer" as equipment that has the "capacity" to "store or produce telephone numbers to be called, using a random or sequential number generator" and "to dial such numbers." This language has led to a split in authority among the courts; some interpreting "capacity" to mean the *present* capacity to generate such numbers while others have interpreted it to mean the *present or future* capacity to generate such numbers.

The recent order (a hard copy of the order has yet to be issued so all we have to go on for now is what the FCC Commissioners stated on the record at the June 18, 2015, hearing) resolved this dispute in favor of the more expansive definition. An "autodialer" is any technology that has the "capacity" (with reasonable modification) to dial random or sequential numbers, so as to include (1) technology that may not have the present capacity but could be modified to randomly or sequentially dial numbers and (2) equipment that dials phone numbers from a predetermined list.

Pai concluded that "[a]fter this Order, each and every smartphone, tablet, VoIP phone, calling app, texting app – pretty much any phone that's not a 'rotary-dial phone' – will be an automatic telephone dialing system." Commissioner O'Rielly dismissed the order's modification limit, noting that "the new definition is so expansive that the FCC has to use a rotary phone as an example of a technology that would not be covered because the modifications needed to make it an autodialer would be too extensive."

Reassigned numbers

The order also addressed an issue raised by industry advocates seeking a "safe-harbor" in situations where proper consent was obtained at the outset from a consumer, but that consumer's cell number was thereafter reassigned to a new consumer, without the original customer's creditor's knowledge. Under the current language of the statute, bad faith actors have abused the strict liability nature of the statute, and rather than picking up the phone to let the business know the number had been reassigned, let the phone ring in an attempt to rack up \$500 (or perhaps \$1,500) per call.

For instance, in a case defended by the Bassford Remele Law Firm, an Eastern District of Wisconsin court granted the defendant's motion to stay a TCPA action pending the resolution of the reassigned number "safe harbor" issue then under consideration by the FCC. In the presently stayed case, the court noted that the involved consumer had affirmatively chosen to allow the calls to continue rather than pick up the phone. *Gensel v. Performant Tech., Inc.*, No. 13-cv-1196 2015 U.S. Dist. LEXIS 9736 (E.D. Wis. Jan. 28, 2015). Plaintiff's cell phone provider assigned her a number that previously was assigned to another person – a person who owed money on a student loan. The collection agency defendant called that number originally provided by the now defaulted consumer in an attempt to contact that actual consumer.

Eventually the plaintiff sued, alleging that the calls violated the TCPA. Admittedly, the plaintiff received several call attempts from the collection agency. However, rather than answer the phone and notify the collection agency that the subject phone number was now assigned to her and therefore she was not the consumer they were looking for, the plaintiff simply documented each call on the advice of her attorney. Once the plaintiff finally notified the collection agency that she was the wrong party, the calls immediately stopped. Plaintiff ultimately moved for partial summary judgment while the collection agency moved to stay the lawsuit, pending further guidance from the FCC.

The court granted the collection agency's motion to stay noting that "Instead of simply answering the phone and telling the [collection agency] she was not the person they were trying to reach, [the plaintiff], (on the advice of counsel) documented all the calls she received for a lengthy period of time. This was a transparent attempt to accumulate damages at \$500 per violation. . . .

"Since the TCPA is a strict liability statute, the absence of a safe harbor encourages such opportunistic behavior. Strict liability is particularly inappropriate here because [the collection agency] stopped calling [her] once she finally answered the phone and told them that they had the wrong number."

Unfortunately, the FCC's recent order actually muddied the water on this issue. While the FCC did emphasize that reassigned numbers "aren't loopholes" under the TCPA, the FCC nonetheless did provide a safe harbor of sorts that limits liability for reassigned numbers to calls made "after one call." But this vague limitation provides little real clarity on the issue. The "one call" was not defined in the oral order, begging the question of whether it means a "call-attempt" or a "successful call" in which the consumer is reached and then provides notice of the reassignment.

Logically, the safe harbor should be read to preclude liability until the person now possessing the subject cell number notifies the business the number was reassigned. Unfortunately, Commissioner O'Rielly noted, the FCC "may have provided a new way for consumers acting in bad faith to entrap legitimate companies. A person could take a call, never let on that it's the wrong person, and receive subsequent calls solely to trip the liability trap. The idea that, after one call, a caller would have 'constructive knowledge' that a number has been reassigned – even if there was no response – is absolutely ludicrous. The FCC expects callers to divine from mere silence the current status of the telephone number."

Revocation of consent

Another issue under the TCPA concerns when and how a consumer may revoke consent to be called that the consumer previously provided to a business. In the past, courts have interpreted revocation of consent in three ways: (1) a consumer cannot revoke consent once given; (2) a consumer can revoke consent provided it is revoked in the same manner it was given; and (3) a consumer can revoke consent in "any reasonable way at any time." As with nearly all of its rulings, the FCC once again resolved this dispute in favor of the most liberal approach, expanding a consumer's ability to revoke consent to receive automated calls and texts to "any reasonable way at any time."

Other rulings

The FCC's ruling also (1) gives service providers a "green light" to offer automated call-blocking technologies to consumers pursuant to consumer consent; (2) defines text messages as "calls" under the TCPA; (3) clarifies that equipment used to send internet-to-phone text messages is an "auto dialer" and, therefore, consent must be obtained; and (4) notes consent based on a consumer's name being included in a list of an acquaintance's phone is not valid consent.

Interestingly, the FCC also provided an exemption under the TCPA for certain "urgent circumstances" including: "Free calls or texts to alert consumers to possible fraud on their bank accounts or remind them of important medication refills, among other financial alerts or healthcare messages, are allowed without prior consent[.]" Even here, the FCC noted that a consumer must be given an option to "opt out" of these calls at any time.

Conclusion

Very little, if any, of the FCC's "clarifications" benefit businesses seeking efficient and legitimate access to their customers. Instead, the "clarifications" adopted by the FCC were largely one-sided in favor of consumers and as a result will provide even further bases for expanding the already increasing number of TCPA lawsuits between customers and businesses. It's now up to the courts to interpret and apply the FCC's "clarifications." Several appeals have been filed challenging the FCC's ruling. Because of these appeals, the precedential value of the FCC's ruling is in doubt. Until the courts ultimately weigh in, the floodgates appear wide open.

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