Alert: Recent Developments Concerning the Telephone Consumer Protection Act

February 27, 2012

There are two recent developments concerning the Telephone Consumer Protection Act ("TCPA") that affect calls made using automatic telephone dialing systems or artificial or prerecorded messages. First, the Federal Communications Commission ("FCC") adopted amendments to the TCPA's implementing regulations, the Telephone Consumer Protection Act Rule ("TCPAR"), 47 C.F.R. § 64.1200, *et seq.,* that have a significant impact on telemarketing. Second, the Supreme Court has issued a decision in *Mims v. Arrow Financial Services, LLC*, No. 10-1195, overturning appellate court precedent and holding that federal district courts possess concurrent federal question jurisdiction with state courts over private TCPA claims. Each development is discussed in detail below.

Background of the TCPA

The TCPA was enacted in 1991 to prevent abuses in telephone technology primarily by telemarketers; however, the scope of the TCPA is not limited to telemarketing. Rather, the Act broadly regulates calls using automatic telephone dialing systems or artificial or prerecorded messages, unsolicited advertisements to fax machines and using automatic telephone dialing systems to engage two or more of a business' telephone lines. 47 U.S.C. § 227. The restrictions on calls using automatic telephone dialing systems or artificial or prerecorded messages apply to, and present unique challenges to, creditors, servicers and third party collectors who use this technology to contact borrowers.

The restrictions on calls that involve automatic telephone dialing systems and artificial or prerecorded messages vary depending on whether the call is made to a residential telephone line (also referred to as a "landline") or to a cellular telephone line ("cell phone").

The TCPA defines automatic telephone dialing system as "equipment which has the *capacity* — (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." [1] Courts interpreting this definition have that it is immaterial whether the equipment actually stores or produces telephone numbers using a random or sequential number generator or dials the numbers. [2] As long as the equipment has the *capacity* to perform both functions, it is considered to be an "automatic telephone dialing system" for TCPA purposes. [3]

Current Requirements Under the TCPA and TCPAR

Currently, with respect to calls placed to landlines, the TCPA prohibits "any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the *prior express consent* of the called party, unless the call is initiated for emergency purposes or *is exempted by rule or order by the Commission* [the FCC] under paragraph (2)(B)." [4] By regulation, the FCC provided an exemption for calls made to "any person with whom the caller has an *established business relationship* at the time the call is made." [5] Borrowers fall generally within the definition of "established business relationship." [6] This "established business relationship exception" applies only to calls made to landlines.

Calls made to cell phones are governed by a different set of rules. The TCPA prohibits calls made to cell phone numbers using automatic telephone dialing systems or artificial or prerecorded voices *unless the call is made* for emergency purposes or *with the prior express consent of the called party*. [7] The FCC has provided guidance as to the meaning of "prior express consent." According to a January 4, 2008 Declaratory Ruling, the FCC considers that "the provision of a cell phone number to a creditor, *e.g.,* as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt." [8] The consumer's consent will only be granted "if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed." [9] Thus, under current FCC guidance, the provision of a cell phone number by a consumer to a creditor constitutes consent to receive calls using automatic telephone dialing systems or artificial or prerecorded calls at that number.

Although the FCC currently considers the provision of a cell phone number by the consumer to the creditor as constituting "prior express consent" for purposes of the TCPA, the FCC cautions creditors as follows:

> *To ensure that creditors and debt collectors call only those consumers who have consented to receive autodialed and prerecorded message calls, we conclude that the creditor should be responsible for demonstrating that the consumer provided prior express consent. The creditors are in the best position to have records kept in the usual course of business showing such consent, such as purchase agreements, sales slips, and credit applications. [10]*

Further, the FCC "encourages creditors to include language on credit applications and other documents informing the consumer that, by providing a wireless telephone number, the consumer consents to receiving autodialed and prerecorded voice message calls from the creditor or its third party debt collector at that number." [11]

2010 Proposed Changes to the TCPAR

On March 22, 2010, the FCC published a Notice of Proposed Rulemaking, which sought to amend several provisions of the TCPAR, 47 C.F.R. § 64.1200 *et seq*. [12] There are two key amendments that would affect calls made to customer landlines and cell phones using automatic telephone dialing systems and artificial or prerecorded voice messages. The amendments would have effectively eliminated the distinction between telemarketing and collection calls.

First, the FCC proposed to eliminate the "established business relationship" exemption for calls made to landlines using automatic telephone dialing systems and artificial or prerecorded voice messages. If adopted, callers would be required to obtain the prior express consent of the consumer before placing a call to the consumer's landline using automatic telephone dialing systems or artificial or prerecorded voice messages. This is a significant change from the existing law.

Second, the FCC proposes to change the requirements for obtaining the "prior express consent" of a consumer before any call may be made to that consumer's landline or cell phone using automatic telephone dialing systems or artificial or prerecorded voice messages. The new rule would require a written agreement that: (A) The person or entity obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the delivery of calls to the recipient using an automatic telephone dialing system or an artificial or prerecorded voice; (B) The person or entity obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service; (C) Evidences the willingness of the recipient of the call to receive calls using an automatic telephone dialing system or an artificial or prerecorded voice; and (D) Includes the telephone number to which such calls may be placed in addition to the recipient's signature (the term "signature" includes an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable Federal law or State contract law).

The public comment period ended in mid-2010 and the FCC took no further public action until recently.

FCC Amends TCPAR on February 15, 2012

On January 25, 2012, the FCC announced that it would consider during its February 15, 2012 Open Meeting "a Report and Order that protects consumers from unwanted autodialed or prerecorded calls ('robocalls') by adopting rules that ensure consumers have given prior express consent before receiving robocalls, can easily opt out of further robocalls, and will experience 'abandoned' telemarketing calls only in strictly limited instances." *See* January 25, 2012 tentative agenda for February 15, 2012 FCC open meeting. At that time it was unclear whether the FCC would adopt the amendments as proposed in 2010 or whether it would modify the proposal in light of the comments it received. After much anticipation, the FCC unveiled its final rule on February 15, 2012, to the delight of the collection industry.

The amended regulation contains the same prior express written consent requirements as announced in 2010 with one key exception – the new rules only apply to telephone calls that include an advertisement or constitute telemarketing. The amended TCPAR also eliminates the established business relationship exemption for calls made to landlines; however, calls made for a commercial purpose that do not include an advertisement and do not constitute telemarketing remain exempt from the prior express consent requirements. Accordingly, the amended regulation effectively establishes a dual track system with a new, heightened standard of prior express *written* consent applying to telemarketing calls to landlines and cell phones and the current prior express consent requirement continuing to apply to other cell phone calls, including collection calls. [13] However, collection and servicing calls are not completely beyond the scope of the new prior express *written* consent standard. To the extent that a collection or servicing call also includes an offer or solicitation to refinance or modify the current obligation, it is a dual-purpose call that may constitute telemarketing and may require prior express *written* consent. In addition, if a collection or servicing call includes an advertisement or solicitation for

another product or service, that would also constitute a dual-purpose call and likely would be subject to the new prior express *written* consent requirements.

The new prior express *written* consent requirements for telephone calls that include an advertisement or constitute telemarketing and the elimination of the established business relationship exemption become effective 12 months after publication of OMB approval in the Federal Register.

The amended TCPAR also contains amendments to the opt-out requirements and abandoned call rule for telemarketing calls. The effective date for the new opt-out requirements will be 90 days from publication of OMB approval in the Federal Register. The amended abandoned call rule becomes effective 30 days after publication of OMB approval in the Federal Register.

Private TCPA Claims Are Federal Questions After All

On January 18, 2012, the United States Supreme Court entered a unanimous decision in *Mims v. Arrow Financial Services, LLC*, No. 10-1195, on an issue impacting an area of increasing litigation. The sole issue presented was whether Congress divested federal district courts of federal question jurisdiction over private actions brought under the TCPA. The Supreme Court reversed the Eleventh Circuit and applied "the familiar default rule" that federal district courts have federal question jurisdiction over claims that arise under federal law. The Supreme Court held that federal district courts possess federal question jurisdiction over private TCPA claims and that this jurisdiction is concurrent with state courts.

In *Mims*, the plaintiff allegedly received collection calls on his cell phone from Arrow Financial Services, LLC. Under the TCPA, a collector or servicer may not call a cell phone using automatic telephone dialing systems or artificial or prerecorded calls without the prior express consent of the called party. See 47 U.S.C. § 227(b)(1). Mims alleged the collection calls he received from Arrow Financial Services, LLC were made using this technology and that he did not provide consent to receive such calls. Mims invoked federal question jurisdiction and filed his action in the United States District Court for the Southern District of Florida.

Arrow Financial Services, LLC then filed a motion to dismiss the action for lack of subject matter jurisdiction arguing that state courts have exclusive jurisdiction over TCPA claims. The district court agreed and dismissed the action, holding "federal question jurisdiction under § 1331 is unavailable because Congress vested jurisdiction over the TCPA exclusively in state courts." Mims appealed to the Eleventh Circuit, which affirmed the decision of the lower court. The Eleventh Circuit followed its prior decision in *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287 (11th Cir. 1998), modified, 140 F.3d 898 (11th Cir. 1998), reiterating that "Congress granted state courts exclusive jurisdiction over private actions under the Act," and therefore "federal courts lack subject matter jurisdiction [over] private actions under the Act." Mims then sought certiorari by the United States Supreme Court.

The unanimous decision by the Supreme Court held that federal and state courts have concurrent jurisdiction over private suits arising under the TCPA. The Supreme Court began its analysis of the issue by highlighting that the statute conferring federal question jurisdiction has remained essentially unchanged since 1875. The Court stated that because the TCPA creates the right of action and provides the rules of decision, Mims's TCPA claim clearly arises under the laws of the United States.

The Court continued, stating that where a case arises under federal law, a deeply rooted presumption in favor of concurrent state court jurisdiction exists. The Court stated that either an explicit statutory directive or clear incompatibility between state-court jurisdiction and federal interest must exist to overcome this presumption. The Court acknowledged that the TCPA provides that, if otherwise permitted by the laws or rules of a court of a State, a private action may be maintained in an appropriate court of that State. 47 U.S.C. § 227(b)(3). However, the Court held that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive.

The Court also emphasized that Congress indicated very clearly in other circumstances when federal or state courts were meant to be divested of jurisdiction. The TCPA does not state that a private action may only or exclusively be brought in state court and there is no evidence in the legislative history of the Act that 47 U.S.C. § 227(b)(3) was intended to divest federal courts of authority to hear TCPA claims.

Interestingly, the Court rejected the argument that a finding of federal question jurisdiction would inundate federal courts with $500 TCPA claims. It remains to be seen whether federal courts will see a flood of these claims. However, the Court's holding opens the door for exactly that result – an action alleging a single TCPA violation can now be brought in or removed to federal court. This may prove to be a helpful tool for defendants fighting this new wave of litigation.

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1. 47 U.S.C. § 227(a)(1). "Predictive dialers" fall within the statutory definition of "automatic telephone dialing systems." See FCC Declaratory Ruling, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Docket No. 02-278 (Jan. 4, 2008), at p. 5.The FCC has defined "predictive dialers" as "equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls." *See 2003 TCPA Order,* 18 FCC Red at 14091, ¶ 131.

2. *See, e.g., Satterfield v. Simon & Schuster*, 569 F.3d 946, 951 (9th Cir. 2009); *Griffith v. Consumer Portfolio Services, Inc.*, 2011 WL 3609012 (N.D. Ill. Aug. 16, 2011); *Kazemi v. Payless Shoesource Inc.*, 2010 WL 963225, at *2 (N.D. Cal. Mar. 16, 2010); *Lozano v. Twentieth Century Fox Film Corp.*, 2010 WL 1197884, at *10 (N.D. Ill. Mar. 23, 2010); *Abbas v. Selling Source, LLC*, 2009 WL 4884471, at *3 (N.D. Ill. Dec. 14, 2009).

3. *Id.*

4. 47 U.S.C. § 227(b)(1)(B).

5. TCPAR, 47 C.F.R. § 64.1200(a)(2)(iv).

6. An "established business relationship" is "formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the

date of the call, which relationship has not been previously terminated by either party." 47 C.F.R. § 64.1200(f)(4).

7. *See* 47 U.S.C. § 227(b)(1). "Predictive dialers" fall within the statutory definition of "automatic telephone dialing systems." See FCC Declaratory Ruling, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Docket No. 02-278 (Jan. 4, 2008), at p. 5.The FCC has defined "predictive dialers" as "equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls." *See 2003 TCPA Order*, 18 FCC Red at 14091, ¶ 131.

8. FCC Declaratory Ruling, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Docket No. 02-278 (Jan. 4, 2008), at p. 6.

9. *Id.* at pp. 6-7.

10. *Id.* at p. 7.

11. *Id.* at p. 7, n. 37.

12. 75 Fed. Reg. 54, 13471 (March 22, 2010).

13. We note that there is a new exemption for calls that deliver a "health care" message made by, or on behalf of, a "covered entity" or its "business associate" as those terms are defined in the HIPPA Privacy Rule, 45 C.F.R. § 160.103. *See* 47 C.F.R. § 64.1200(a)(2), (3)(v).