Do I Still Need to Worry About the TCPA? (Short Answer: Yes.) The Bullet Point: Volume 2, Issue 7

March 27, 2018

ACA International v. FCC, D.C. Cir. No. 15-1211, Mar. 16, 2018.

The Bullet Point: Among other things, The Telephone Consumer Protection Act (TCPA) regulates telemarketing calls, auto-dialed calls, prerecorded calls, text messages, and unsolicited faxes. The TCPA has ramifications for almost every consumer-focused industry. As more entities use phone applications to conduct business and contact customers, the scope of the TCPA seems limitless. With recent multimillion-dollar class actions and settlements by companies in almost every industry, combined with unsettled law and guidance, the upward trend of new TCPA lawsuits will continue.

In this seminal decision, the D.C. Court of Appeals vacated parts of the Federal Communications Commission's (FCC) 2015 TCPA interpretations, expelling the FCC's interpretation of an automatic telephone dialing system (ATDS) and its approach to reassigned numbers and upholding the provisions of the 2015 Order regarding revocation of consent and the healthcare exemption, with important caveats. All in all, the opinion is the first step in returning the TCPA to its intended scope and providing meaningful opportunities for businesses to comply without fear of litigation. While the opinion is helpful, many questions remain, including what the FCC may do next.

McGlinchey Stafford recently issued a **more detailed client alert** on the ruling in ACA International, its scope, and what it means for businesses moving forward.

U.S. Home Ownership, LLC v. Young, 2d Dist. Montgomery No. 27382, 2018-Ohio-1059.

This appeal challenged a mortgage lender's compliance with all conditions precedent required by the loan documents prior to foreclosure. In support of its request for judgment, the lender provided affidavits from a managing member who attested that according to its business records, it had sent written notice of default to the borrower and that a "duplicate" of that notice was attached to the affidavit. A second affidavit indicated that the notice was sent via first class mail and in support, referenced an affidavit filed in a different lawsuit. The trial court found this evidence sufficient to establish compliance with conditions precedent, and the defendant appealed.

On appeal, the Second Appellate District reversed, finding that the text of the affidavits called into question that affiant's personal knowledge to attest to the lender's compliance with all conditions precedent. It reversed and remanded the decision as a result.

The Bullet Point: For an affiant to authenticate a business record under Evid.R. 803(6), he "must demonstrate that: (1) the record was prepared by an employee of the business who had a duty to report the information; (2) [he has] personal knowledge of the event or transaction reported; (3) the record was prepared at or near the time of the event or transaction"; and (4) the business created such records as a regular practice. If "particular averments contained in an affidavit suggest that it is unlikely that the affiant has personal knowledge of [the corresponding] facts, then * * * something more than a conclusory averment that the affiant [actually] has [personal] knowledge of the facts [is] required." Not only should an affidavit outline an affiant's duties and job descriptions to establish how he or she has the requisite personal knowledge to attest to a business record, but the actual business record should be attached to the affidavit and attested to as a "true and accurate copy." As so many disputes center on the interpretation of business records, perfecting the evidentiary foundation is critical, especially when seeking a ruling via motion as opposed to the a full trial. The required affidavits provide the Court with necessary confidence to trust that the business records are what the parties say they are.

Green Tree Servicing LLC v. Asterino-Starcher, 10th Dist. Franklin No. 17AP-273, 2018-Ohio-977.

This appeal involved a challenge by a junior lienholder to a senior lienholder's standing to foreclose. In this case, the homeowners did not contest the foreclosure, only a junior lienholder did. It questioned whether the plaintiff was a party entitled to enforce the promissory note and whether it was properly assigned the mortgage. Eventually, the trial court found for the plaintiff on the grounds that a junior lienholder lacks standing to contest the ability of a senior lienholder to foreclose, and the junior lienholder appealed.

On appeal, the Tenth Appellate District affirmed the trial court's decision. In so ruling, however, the court distinguished between a challenge to the note and a challenge to a mortgage, finding that a junior lienholder can challenge the validity of a mortgage.

The Bullet Point: Disputes among lienholders are common. This is because Ohio adheres to the "first in time, first in right" mantra. That is, the lien, mortgage, or interest that is recorded first has priority over subsequent recorded interests. In this case, the court noted that "there is reason to distinguish the action on the note from the ensuing action against the associated collateral. The first claim involves only the maker of the note and the person entitled to enforce it. The second joins all those with an interest in the mortgaged property. Thus, the junior lienholders are truly strangers to the action on a note, which could proceed without them. They have no standing to challenge the plaintiff creditor's standing and, here, cannot assert a defense to the note obligation that the obligor herself has failed to raise.

Conversely, like a borrower, a junior lienholder is also a stranger to an assignment of mortgage, but, like a borrower, a junior lienholder has a right to be sued only by a party with standing to do so.

Inventiv Health Comms, Inc. v. Rodden, 5th Dist. No. 17 CAE 09 0066, 2018-Ohio-945.

This case involved a challenge to a forum selection clause contained in an employment agreement. The defendant, a resident of North Carolina, had worked for a subsidiary of plaintiff as an administrative assistant. Plaintiff is a business is located in Ohio, whereas the subsidiary is in North Carolina. The defendant eventually signed an acknowledgement attached to the company's code of ethics, which contained a forum selection clause indicating that suit must be brought in Ohio. She signed a noncompete clause at the same time. A few years later, defendant and others left their jobs for a competitor. The subsidiary then filed suit in Ohio, alleging this violated the noncompete agreement. Defendant moved to dismiss for improper forum and the trial court granted the motion.

On appeal, the Fifth Appellate District affirmed, finding that the trial court properly found the forum selection clause to be unenforceable because it was overreaching and would inconvenience the parties.

The Bullet Point: A party can consent to personal jurisdiction in a forum, waiving his or her due process rights in the interim. In Ohio, it is well settled law that "[a]bsent evidence of fraud or overreaching, a forum selection clause contained in a commercial contract between business entities is valid and enforceable, unless it can be clearly shown that enforcement of the clause would be unreasonable and unjust."

Forum selection clauses can be very important to the overall contract negotiations as they determine who gets "home court advantage" in any legal proceeding. More often than not, it is the "larger" party to a contract which demands such advantage. In determining whether the selected forum is reasonable, Ohio courts consider the following factors: (1) which law controls the contractual dispute; (2) the residency of the parties; (3) where the contract was executed; (4) where the witnesses and parties to the litigation are located; and (5) whether the forum clause's designated location is inconvenient to the parties. However, rather than attempt these arguments after the fact, if the proposed forum is truly objectionable, parties should attempt to alleviate such concerns through negotiations.

Blain's Folding Service, Inc. v. Cincinnati Ins. Co., 8th Dist. Cuyahoga No. 105913, 2018-Ohio-959.

This lawsuit stemmed from an automobile accident that damaged a building owned by plaintiff. Plaintiff hired a construction company to repair the building. It eventually filed suit against the construction company for breach of contract. The construction company argued that the plaintiff could not recover future profits because the contract violated the statute of frauds. The trial court agreed and plaintiff appealed.

On appeal, the Eighth Appellate District affirmed, but on different grounds, finding that the statute of frauds defense had been waived but that the construction company established that the future lost profits of plaintiff were merely speculative and could not be recovered.

The Bullet Point: As explained in an earlier Bullet Point, the statute of frauds states that no action can be brought upon an agreement that is not to be performed within one year unless the agreement is reduced to writing. "[T]he statute of frauds bars a party from enforcing an oral agreement falling within the statute." Nonetheless, the statute of frauds defense can be waived and, as a result, a non-party to a contract cannot avail itself to the affirmative defense of statute of frauds in that situation.

The Bullet Point is a biweekly update of recent, unique, and impactful cases in Ohio state and federal courts in the area of commercial litigation.

Click here for a PDF with the full text of each decision.