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TCPA, Debt Collection and Ethics
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TWO IMPORTANT DEVELOPMENTS CONCERNING THE TELEPHONE CONSUMER PROTECTION ACT

I. Introduction

There have been two recent and particularly important developments concerning the Telephone Consumer Protection Act of 1991 (TCPA), [1] affecting debt collectors, telemarketing, and calls made using automatic telephone dialing systems (ATDS) or artificial or prerecorded messages. First, on February 15, 2012 the Federal Communications Commission (FCC) adopted amendments to the TCPA's implementing regulations, the Telephone Consumer Protection Act Rule (TCPAR), [2] that have a significant impact on telemarketing. Second, the United States Supreme Court issued a decision in *Mims v. Arrow Financial Services, LLC*, [3] overturning appellate court precedent and holding that federal district courts possess concurrent federal question jurisdiction with state courts over private TCPA claims. These developments, discussed below, will transform the TCPA landscape for years to come and create new risks and opportunities.

*12 II. Background of the TCPA

The TCPA was enacted in 1991 to prevent abuses in the use of telephone technology, primarily by telemarketers; however, the scope of the TCPA is not limited to telemarketing. Rather, the TCPA broadly regulates calls using ATDS or artificial or prerecorded messages, unsolicited advertisements to fax machines, and the use of ATDS to engage two or more of a business' telephone lines. [4] The TCPA restrictions on calls using ATDS or artificial or prerecorded messages apply to, and present unique challenges for, creditors, loan servicers and debt collectors who use this technology to contact borrowers, as well as telemarketers.

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

The TCPA defines ATDS 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." [5] A number of courts interpreting this definition have held that it is immaterial whether the equipment actually stores or produces telephone numbers using a random or sequential number generator, or dials the numbers. [6] In this view, as long as the equipment has the technical *capacity* to perform these functions, it is considered to be an ATDS for TCPA purposes. [7]

III. Prior Requirements under the TCPA and TCPAR

A. Land Lines

With respect to calls placed to land lines, 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)." [8] By regulation, the FCC has 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." [9] Borrowers fall generally within the definition of an "established business relationship." [10] However, this ""established business relationship" exception applies only to calls made to land lines.

B. Cell Phones

Calls made to cell phones are governed by a different set of rules. The TCPA prohibits calls made to cell phone numbers using ATDS or artificial or prerecorded voices unless the call is made for emergency purposes or with the prior express consent of the called party. [11] The FCC has provided guidance as to the meaning of "prior express consent." In its January 4, 2008 Declaratory Ruling, the FCC concluded 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." [12] The consumer's consent will only be recognized "if the wireless number was provided by the consumer to the creditor, and ... such number was provided during the transaction that resulted in the debt owed." [13] Thus, under the FCC's 2008 Ruling, the provision of a cell phone number by a consumer incurring a debt to a creditor constitutes consent to receive calls using ATDS or artificial or prerecorded calls at that number.

Although the FCC's 2008 FCC Ruling 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 also cautioned 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. [14]

Further, the 2008 Ruling "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." [15]

*13 IV. 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. [16] There were two key amendments in the 2010 proposal directed at calls made to customer land lines and cell phones using automatic telephone dialing systems and artificial or prerecorded voice messages. The 2010 proposed amendments to the TCPAR would have effectively eliminated the distinction between telemarketing and debt collection calls.

First, the FCC proposed to eliminate the "established business relationship" exemption for calls made to land lines using ATDS and artificial or prerecorded voice messages. If this were adopted, callers would have been required to obtain

the prior express consent of the consumer before placing a call to the consumer's land line using ATDS or artificial or prerecorded voice messages. This would represent a significant change from the existing law.

Second, the FCC proposed to change the requirements for obtaining the "prior express consent" of a consumer before any call could be made to that consumer's land line or cell phone using ATDS or artificial or prerecorded voice messages. The proposed rule would have required a written agreement that: (1) the person or entity obtained the consumer's consent 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; (2) the person or entity obtained the consumer's consent without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service; (3) evidenced the willingness of the recipient of the call to receive calls using an ATDS or an artificial or prerecorded voice; and (4) included the telephone number to which such calls may be placed in addition to the recipient's signature (the term "signature" could include 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 [17]). The public comment period ended in mid-2010 and the FCC took no further public action until 2012.

V. FCC Final Amendments to the 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." [18] At that time it was unclear whether the FCC would adopt the amendments as proposed in 2010 or whether it would modify the 2010 proposal in light of the comments it received. After much anticipation, the FCC unveiled its final rule on February 15, 2012 (the FCC final rule), [19] to the relief of the collection industry. [20]

The FCC final rule contains the same prior express written consent requirements as announced in the 2010 proposal with one key exception--the new rules apply only to telephone calls that include an advertisement or constitute telemarketing. The FCC final rule eliminates the established business relationship exemption for calls made to land lines; 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 for land lines. Accordingly, the FCC final rule effectively establishes a dual-track system with: a new, heightened standard of prior express *written* consent applying to telemarketing calls to land lines and cell phones; and the old ""prior express consent" rules continuing to apply to other cell phone calls, including collection calls. [21]

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 twelve months after publication of OMB approval in the *Federal Register*. [22] These new rules will significantly affect telemarketing practices.

The FCC final rule also contains amendments to the opt-out requirements and abandoned-call rule for telemarketing calls. The effective date for the new opt-out requirements is ninety days from the publication of OMB approval in the

Federal Register. [23] The new abandoned-call rule became effective ***14** thirty days after publication of OMB approval in the *Federal Register*. [24]

VI. Private TCPA Claims are Federal Questions After All

On January 18, 2012, the United States Supreme Court entered a unanimous decision in *Minis v. Arrow Financial Services, LLC.*, [25] on an issue impacting an area of ever-growing 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 United States Court of Appeals for 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. This holding is expected to result in major changes in the litigation strategies of plaintiffs and defendants.

In *Mims*, the plaintiff allegedly received collection calls on his cell phone from Arrow Financial Services, LLC. As noted above at Part III., under the TCPA, a collector or servicer may not call a cell phone using ATDS or artificial or prerecorded calls without the prior express consent of the called party. [26] Mims alleged that 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 that "federal question jurisdiction under section 1331 is unavailable because Congress vested jurisdiction over the TCPA exclusively in state courts." Mims appealed to the United States Court of Appeals for 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.*, [27] 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." [28] Mims then sought certiorari by the United States Supreme Court.

The unanimous decision by the Supreme Court in *Mims* 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 noting that the statute conferring federal question jurisdiction has remained essentially unchanged since 1875. The Court observed that, because the TCPA created the right of action and provides the rules of decision, Mims's TCPA claim clearly arose under the laws of the United States.

The Court then continued this line of analysis, 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 a 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. [29] 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 TCPA that 47 U.S.C. section 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. Most observors expect that the federal courts will in fact see a large increase in 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. Many TCPA suits may now be filed by plaintiffs directly in federal court, where plaintiffs' counsel prefer a federal forum. Moreover, this new removal option should prove to be a valuable tool for defendants who prefer a federal court resolution of suits commenced in state court. This option will be particularly important in class actions, where generally the standards for class certification are more strict than in most states.

Footnotes

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1 Pub. L. No. 102-243. 105 Slat. 2394 (1991) (codified as amended at 47 U.S.C.A. § 227).

2 Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 (adopted Feb. 15, 2012), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/dh0215/FCC-12-21A1.pdf (amending 47 CFR §§ 64.1200. *el seq*). *See also* Pub. L. No. 104-104, 110 Stat. 56. § 403(b)(2)(B). (C) (codified at 47 U.S.C. §§ 154 & 254(k)). *available at* http:// transition.fcc.gov/cgh/policy/telemarketing.html (amending 47 CFR §§ 64.1200, *el seq*). The TCPA and TCPAR are not to be confused with the Telemarketing and Consumer Fraud and Abuse Prevention Act, Pub. L. No. 103-297. 108 Stat. 1545 (1994) (codified as amended at 15 U.S.C. §§ 6101-08 (2006)). implemented by the Federal Trade Commission Telemarketing Sales Rule, 16 CFR pt. 310. *See, e.g.*, John L. Ropiequet & Jason B. Hirsch, *The 2010 Amendments to the Telemarketing Sales Rule: Expanding FTC Regulatory Oversight to Debt Relief Services*, 64 Consumer Fin. L.Q. Rep. 382(2010).

3 ___ U.S. ___, 132 S.Ct. 740, 181 L.Ed.2d 881(2012). *See infra* Part VI.

4 47 U.S.C. § 227.

5 47 U.S.C. § 227(a)(1) (emphasis supplied). "Predictive dialers" fall within the statutory definition of ATDS. *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 5 [2008 Ruling]. 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.

6 *See. e.g.*: Satterfield v. Simon & Schuster. 569 F.3d 946, 951 (9th Or. 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).

7 *See* authorities cited *supra* at note 6.

8 47 U.S.C. § 227(b)(1)(B) (emphasis supplied).

9 TCPAR. 47 CFR § 64.1200(a)(2)(iv) (emphasis supplied).

10 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 CFR § 64.1200(f)(4).

11 *See* 47 U.S.C. § 227(b)(1). As noted, "predictive dialers" fall within the statutory' definition of an ATDS. *See supra* note 5.

12 *See* 2008 Ruling, *supra* note 5, at 6.

13 *Id.* at 6-7.

14 *Id.* at 7 (emphasis supplied).

15 *Id.* at 7, n. 37.

16 75 Fed. Reg. 13471 (Mar. 22, 2010) (proposing amendments to 47 CFR §§ 64.1200 *et seq.*).

17 The federal ESIGN Act or state UETA.

18 *See* January 25, 2012 tentative agenda for February 15, 2012 FCC open meeting, *available at* http://transition.fcc.gov/Daily_Releases/Daily_ Business/2012/db0127/DOC-312149A1.pdf.

19 Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991. CG Docket No. 02-278 (adopted Feb. 15, 2012), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0215/FCC-12-21A1.pdf (amending 47 CFR pt. 64). *See also supra* note 2.

20 *See* http://transition.fcc.gov/Daily_Releases/Daily_ Business/2012/db0215/FCC-12-21A1.pdf.

21 *See* FCC final rule, *supra* note 19. Note also 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 HIPAA Privacy Rule. 45 CFR § 160.103. *See* 47 CFR § 64.1200(a)(2). (3)(v).

22 *See* FCC final rule, *supra* note 19.

23 *See id.*

24 *Id.*

25 ___ U.S. ___. 132 S.Ct. 740, 181 L.Ed.2d 881 (2012).

26 *See* 47 U.S.C. § 227(b)(1).

27 136 F.3d 1287 (11th Cir. 1998). *modified.* 140 F.3d 898 (11th Cir. 1998).

28 *Id.*

29 47 U.S.C. § 227(b)(3).

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