Bloomberg BNA

Telecommunications Law Resource Center

VOL. 2015, NO. 38 AUGUST 25, 2015

Telemarketing

The FCC's July 10 omnibus Declaratory Ruling and Order on the Telephone Consumer Protection Act [FCC 15-72] was intended to simplify application of the Act. Instead, the authors contend, the order creates new litigation risks for good-faith callers and makes compliance more difficult, while simultaneously expanding the circle of businesses facing potential TCPA litigation risks to encompass calling platforms, apps and even carriers.

FCC's Order for TCPA 'Clarity' May Raise More Questions Than It Answers

BY STEPHEN M. RUCKMAN AND ANDREW W. GRANT

On July 10, 2015, the Federal Communications Commission ("FCC") released an omnibus Declaratory Ruling and Order ("Order") aimed at "clarifying whether conduct violates the [Telephone Consumer Protection Act ("TCPA")] and . . . detailing simple guidance intended to assist callers in avoiding violations and consequent litigation." As the FCC acknowledges, confusion over what type of conduct violates the TCPA has fueled a substantial increase in TCPA litigation over the past several years, so more clarity and simple guidance would be welcome.

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Unfortunately, the 81-page order is anything but simple. Instead, its rulings create new litigation risks for good-faith callers that have valid business reasons for contacting consumers, with "clarifications" that make compliance more difficult. Its rulings also expand the circle of businesses facing potential TCPA litigation risks beyond callers—to calling platforms and apps and even to carriers.

In short, the Order appears to raise more questions than it answers, even in the answers it provides.

New Challenges under Core TCPA Provisions. The Order addresses multiple requests for clarification related to traditional areas of concern under the TCPA, but frequently does so in ways that create uncertainty. Four such areas are discussed below: (i) automatic telephone

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dialing systems (''ATDS''), (ii) reassigned wireless numbers, (iii) revoking consent, and (iv) consent exemptions.

Definition of ATDS now includes future ''capacity''—not simply ''present ability''—to autodial.

In the Order, the FCC clarifies that it views an ATDS to be any equipment that has the ''capacity'' to store or produce random or sequential numbers and then dial those numbers, rather than equipment that only has the ''present ability'' to do so. Therefore, a telephone system that currently lacks the software necessary to perform autodialing functions may still be considered an ATDS as long as it has the ''requisite capacity'' or ''potential'' to perform those functions. Beyond this, the FCC declines to ''address the exact contours'' of the ATDS definition.

The FCC offers assurances that ''typical'' use of smartphone technology would not trigger ATDS classification, but offers no description of what counts as ''typical.'' By the FCC's own accounting, only an unmodified rotary-dial phone appears to be safe from an ATDS classification under this new definition.

By expanding the definition of ATDS and then leaving the definition's outer ''contours'' vague, the FCC leaves the door open for a wide variety of modern-day telephone systems to be deemed ATDS devices. Therefore, except in the unlikely circumstance where a business is using a rotary-dial phone to contact a consumer, it may risk a TCPA violation each time it calls a consumer's wireless phone without having first received her prior express consent.

Calls to reassigned wireless numbers now trigger liability after one unwanted call.

Citing problems consumers have with multiple unwanted telemarketing or debt collection calls to reassigned wireless numbers, the Order creates a strict liability standard for these calls that kicks in on the second unwanted call. A business that reasonably believes it has valid consent to call the wireless number of a ''called party'' and does not know it has been reassigned may make one additional call to that number in order to gain knowledge of its reassignment. After that, however, the caller is liable for unwanted calls because the ''called party''—defined as the wireless telephone subscriber (or a non-subscriber customary user), and *not* the intended recipient of the call—did not consent to receive those calls. Even if the first call does not ''connect to a person, answering machine, or voicemail,'' the company is deemed to have ''constructive knowledge'' that the number was reassigned from that point forward.

Moreover, in any dispute over a call, the FCC places the burden on the company to demonstrate (1) a reasonable basis for believing there was consent to call that number and (2) a lack of actual or constructive knowledge of reassignment. The Order is clear that the benign or ''good-faith'' intentions of the caller are irrelevant: ''The caller's intent does not bear on liability.''

This strict-liability-after-one-call standard creates a host of litigation risks for companies making autodialed or prerecorded calls to wireless numbers. First, because companies do not know when a wireless number is reassigned, and because calls frequently do not get answered, it is highly likely that a company will not learn that a number has been reassigned until it has called it multiple times. The FCC admits as much: ''The record shows that many calls can be made before there is actual knowledge of reassignment.'' Second, in many cases the called party may deliberately ignore the first call since it is from an unfamiliar number, exposing the caller to a lawsuit for any and all subsequent calls; in fact the Order expressly frees the owner of the reassigned number from any obligation to inform the caller of his error. Third, calls to wireless numbers are often dropped, so a caller may try again thinking that the first call did not go through, triggering liability. Fourth, the call may be answered but by a different member of the household who gives no indication of either reassignment or non-consent (e.g., ''Mommy is not home right now''). Under the new Order, none of these innocent errors free the caller from liability.

The Order states that callers have numerous options to determine whether a wireless number has been reassigned, including subscribing to commercial databases, requiring consumers to notify them of any number switch, or establishing various other internal policies or procedures. It seems clear that implementing these preventative measures will increase the cost associated with making telephone calls, and that none will eliminate the litigation risk; the FCC concedes that these tools will not work ''in every case.'' Its Order nonetheless requires companies to bear that risk.

Consumers may revoke consent to receive autodialed and prerecorded calls and texts, using ''any reasonable method.''

Under the new Order, consumers will be able to revoke previously provided consent for both informational and telemarketing calls. Currently, the TCPA does not allow companies to condition the purchase of property, goods, or services on whether the called party consents to receive telemarketing calls; it is silent, however, on whether companies can condition such purchases on whether the called party consents to receive informational calls. Because of this silence, companies have required consumers to consent to receive informational calls—such as account servicing calls—as a condition to purchase property, goods, or services. But if consumers can revoke consent for informational calls, can companies continue to contractually require consumers to consent to receive informational calls?

The Order also states that companies may not control the method by which consumers can revoke consent. ''Consumers have a right to revoke consent, using any reasonable method including orally or in writing. . . . [such as] at an in-store bill payment location.'' To determine whether any particular means are reasonable, the FCC will look at whether the caller could have implemented mechanisms to effectuate the requested revocation ''without incurring undue burdens.'' The FCC does not articulate what it would consider to be ''undue bur-

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dens,'' but because it views the TCPA as primarily concerned with consumer protection, it appears likely that it will take a more restrictive view than many businesses would prefer.

Certain calls are now exempt from the consent requirement, but for financial institutions the consent exemptionsmay be less than meets the eye.

The Order ''exempt[s] from the TCPA's consumer consent requirements, with conditions, certain pro-consumer messages about time-sensitive financial and healthcare issues.'' When the caller is a financial institution, the ''conditions'' on its exempted calls include a requirement that they ''must be sent . . . only to the wireless telephone number provided by the customer of the financial institution'' and that the calls or texts do not include any telemarketing or debt collection content.

Given that the FCC has previously stated that provision of a cell phone number ''reasonably evidences prior express consent by the cell phone subscriber,'' it is not clear why this requirement is needed for the exemption. Put another way, if the financial institution has already obtained the consumer's prior express consent, it should be able to make these informational calls or texts without relying on the exemption. But by including the requirement that, to meet the consent exemption, the financial institution can only call or text the ''wireless telephone number provided by the customer,'' the Order calls into question whether financial institutions can continue to treat a customer's provision of a cell phone number as evidence of ''prior express consent'' to call that number for other purposes, such as debt collection or account servicing calls.

Additionally, the consent exemption cannot be read to enable financial institutions to use any wireless number they have for a customer to make an exempt call. Indeed, recent enforcement activity by the FCC suggests that it will take a dim view of attempts to call a person at a wireless phone number obtained indirectly—such as through a Caller ID or skip-tracing—even if that person consented to receive calls to a wireless phone.

New Reach for TCPA Jurisdiction. Originally, the TCPA's prohibitions applied to companies that physically placed autodialed or prerecorded calls to consumers, with consumers—and the carriers transmitting the calls—being passive participants in the prohibited conduct. But emerging technologies for managing communication that enable consumers themselves to easily place prerecorded calls and text messages, and that further enable carriers to block all of the above, have moved the commission to signal to communications app makers and carriers that their use of these technologies—or in some cases their failure to do so—may expose them to TCPA liability as well.

An app or online service that enables prerecorded calls or text messages can be liable for unwanted calls or texts if it is ''so involved'' in those calls or messages.

Multiple companies that offer online platforms for consumers to send prerecorded phone, video, or text messages, like Glide or YouMail, had asked the FCC to clarify whether they might face liability for ''making'' or ''initiating'' unwanted calls or texts placed using these services. In the Order, the FCC states that consumer involvement in an unwanted prerecorded call or text is not enough, on its own, to excuse a company from liability for that call or text. Applying the ''so involved'' test used in the 2013 Dish Declaratory Ruling to establish a seller's liability for TCPA violations by a third-party telemarketer, the FCC rules that, if the company's app or platform was ''so involved'' in the placing of the call or text as to be deemed to have initiated it, the company is liable for any TCPA violations. This is a murky standard that may expose current makers of calling and texting apps—as well as future communication technology innovators—to litigation risk.

Carriers can offer call-blocking technology, but having the authority to do so may subject them to litigation risks outside the FCC's control.

Finally, the Order expressly permits carriers and VoIP providers to offer their customers call-blocking technology—sometimes called ''Do Not Disturb'' technology—stating that no legal basis exists that bars them implementing such technology. In the past, carriers have sought permission to provide this technology to their customers, but have not done so in part because of previous FCC positions that appeared to restrict the practice, as well as additional concerns, such as potential First Amendment issues. While the Order would appear to remove any concerns that using this technology would violate FCC rules, it still may leave carriers at risk.

For example, will carriers now be *expected* to offer this technology? And if they do not (or if the technology is not successful enough), will they expose themselves to lawsuits from or on behalf of customers who receive unwanted calls? State attorneys general, for example, have been highly critical of telephone carriers' failure to implement call-blocking technology to reduce unwanted robocalls. Now that the FCC has blessed the technology's use, carriers that decline to implement it may face scrutiny from state attorneys general. And what does this expectation mean for smaller carriers with fewer resources to develop and offer robocall-blocking?

Finally, the carriers may face litigation risk if the call-blocking technology is too sensitive, meaning that it blocks good-faith calls that the consumer may want to receive. For example, if the call-blocking tool provided by the carrier blocks a call from a consumer's financial institution that was designed to alert the consumer to fraud on his account, the consumer may look to sue the carrier. The FCC asserts that ''adequate disclosures'' can limit the harm associated with this risk, but they may not be able to limit it completely.

The Law of Unintended Consequences All of these questions about the Order demonstrate that its efforts to clarify the TCPA may have unintended and contrary consequences, many of which may increase companies' litigation risk without actually improving consumers' lives. Given how infrequently the Commission issues declaratory rulings on the TCPA, the Order's ambiguity may mean that further clarification will likely only come through the courts. This is an expensive proposition for those seeking to make TCPA-compliant calls and texts, and may discourage businesses from offering a range of valuable services that help their customers. Thus, far from empowering consumers, the new Order might have the unintended consequence of reducing consumer choice.