NOW THAT THE TCPA DUST HAS SETTLED

Calling Solutions for Landlines, Cells and Text for the ARM Industry
Your Presenters

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Today’s Agenda

• Autodialer defined – Per FCC Order
• Consent issues
  – Phone numbers in contact list
  – Consent for ported numbers
  – Revocation
• Reassigned phone numbers
• Text messaging
• Technology responses
• Work flow solutions
• Impact of the Order and Role of legal counsel
• Supreme court case discussions
• Thank you
Poll Question 1

• Have you read the entire FCC Order, dated 10 July 2015?
  – Yes, 100%. Ouch!
  – Skimmed it.
  – My attorney and/or compliance officer did.
  – No.
Automatic Telephone Dialing System defined by TCPA: 47 USC 227(a)(1): “ATDS”

- (a) DEFINITIONS — As used in this section —
  (1) The term “automatic telephone dialing system” means 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.
§ 227(b) Restrictions on use of automated telephone equipment

(1) Prohibitions:

It shall be unlawful for any person within the United States or any person outside the United States if the recipient is within the United States –

   to make any call (without the express consent of the called party) using any **automatic telephone dialing system** or an **artificial or prerecorded voice** - … to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call. **(Emphasis added)**

(2) Landline Calls – § 227(b)(1)(B) - [No liability for artificial/prerecorded informational voice calls – Commercial Call exemption applies - 64.1200(a)(3)(iii) ]
Autodialer Defined

• On July 10, 2015, the FCC released its Omnibus Declaratory Ruling

• The FCC reaffirmed its position that the TCPA is to be construed broadly

• The FCC reaffirmed TCPA is to be construed in favor of the consumer and EMPOWER consumers to stop unwanted calls (para. 1)

• The FCC reaffirmed TCPA protects consumer privacy and public safety (emergency line)

• The FCC reaffirmed TCPA’s restrictions to wireless numbers apply to non-telemarketing calls (Ex. informational calls; debt collection calls.) (7/10/15 Order, para. 123)
FCC 2015 Rules on Autodialers

• FCC’s July 2015 Order Reaffirms 2003, 2008 FCC rulings that ALL predictive dialers are autodialers. (7/10/15 Order, para. 12-13) because predictive dialers retain the capacity to dial thousands of numbers in a short period of time and could harm public safety.

• An autodialer is equipment:
  – which has “capacity to dial numbers without human intervention” – FCC 2003, 2008 Rulings (Note: How the human intervention element applies to a particular equipment involves a case-by-case determination)
  – that may call from a set list of consumers. (para. 10)
  – that has the capacity to dial predictively and store numbers even if not presently used for that purpose.” Id. (emphasis added)

• Speed dialing is excluded (7/10/15 Order, para. 17)
ATDS – The New Definition Checklist

• Four Point Check List + 1
  – Can it store numbers?
  – Can it dial predictively?
  – Can it dial by pulling from a data base of numbers?
  – Does it dial from a list of numbers?

• Does it dial thousands of numbers with vigor?
Poll Question 2

• Have you modified your dialing strategies since the release of the FCC’s 10 July 2015 order?

  – Not at all.
  – Thinking about it.
  – Yes, significant changes.
FCC Rules on Capacity

- "CAPACITY" Clarified: the capacity of an autodialer is not limited to its current configuration but also includes its potential functionalities (7/10/15 Order, para. 16)
  - "Capacity" to be interpreted Broadly (7/10/15 Order, para. 19)
  - Future software additions are included in capacity
  - There are "outer limits" to capacity - "must be more than a theoretical potential that the equipment could be modified to satisfy the ‘autodialer’ definition." Id.
  - Not all devices are autodialers even if has some capacity to store and dial numbers (7/10/15 Order, para. 18) – Ex. handset with speed dial is NOT a dialer. Rotary Phone not a dialer
Consent Requirements

• The FCC does not require any specific method by which a caller must obtain prior express consent. Para. 49 –
• Based on Longstanding Rule – “[P]ersons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary”.
• A number in someone else’s contact list is not prior express consent in part because consent must be express, not implied. Para. 47, 51, 52
• Burden on the caller to prove it obtained necessary prior express consent. Para. 47

FCC says consent ruling should be construed “narrowly”
FCC Amicus Brief, June 30, 2014,
Nigro v. Mercantile Adjustment Bureau, 769 F.3d 804 (2nd Cir. 2014)
Consent Requirements

• Can be verbal or in writing. (Note: TCPA Silent - Clarified by FCC 2/15/12/ Report)
• Via website - Roberts v. PayPal, Inc., 2013 U.S. Dist. LEXIS 76319 (N.D. Cal.)
• Placing number on loan app, credit card application, Conditions of Admission forms, patient intake, etc.)
• Get consent ONLY from consumer/debtor/subscriber/customary user (FCC 2015 Ruling emphasizes this.)
Revocation Requirements

**RULE:** “A caller may not limit the manner in which revocation may occur” (7/10/15 Order, para. 47, 64-70) –

Revocation can be made via any “reasonable means.” para. 55, 64 (reasonable means not defined)

FCC states it is unfair for called party to bear burden of showing revocation. para. 70

Porting number does not revoke consent. para. 54

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**Have Prior Express Consent to Call Landline, & Landline is Ported to Wireless:**

*You Have Consent*

**Prior Express Consent to Call Wireless & That Number is Ported to Another Wireless:**

*You Have Consent*

**Calls to Landline Without Prior Express Consent & That Number is Ported to Wireless:**

*Must Get Prior Express Consent Para. 54*
Additional Information on Revocation

• Caller’s burden to prove consent. Must have ability to do so. Para. 70
• Callers should maintain proper business records to track consent. Para. 70 - The well-established evidentiary value of business records means that callers have reasonable ways to carry their burden of proving consent.)
• PROVING ORAL CONSENT – Difficult, and documenting in account records could create fact dispute. Solution: RECORD, RECORD, RECORD
Poll Question 3

• Do you still manually dial “un-consented” cell phones on an auto-dial capable system?
  – Yes.
  – No.
  – Yes, but we’re looking for an alternative.
Reassigned Wireless Telephone Numbers

- "Called party" = current subscriber OR non-subscriber customary user of phone
- **One-free pass rule**—one liability-free call after reassignment
  - To qualify, caller bears the burden of showing it had no knowledge of reassignment and had a reasonable basis to believe there was valid consent
  - Purpose of one call is to gain actual or constructive knowledge of the reassignment
  - Unlimited period of time to make one-free call
  - The one call does not need to connect to a person or voicemail
  - “If this one additional call does not yield actual knowledge of reassignment, we deem the caller to have constructive knowledge of such.” (¶ 72)
Reassigned Wireless Telephone Numbers

• **Single-caller rule**—a “single caller” gets one-free pass.
  – Single caller defined as “any company affiliates, including subsidiaries.”
  – “Two affiliated entities may not make one call each, but rather one call in total.” (¶72, n.261)

• **Wrong/misdialed number calls?** One-free pass does not apply.

• **Bad faith defense?** NONE, even if called party purposely and unreasonably waited to notify the calling party regarding reassignment in order to accrue statutory penalties.
Reassigned Wireless Telephone Numbers

• Make manually dialed call to confirm identity
• Listen to name on voicemail
• Send email or mail request to confirm telephone numbers or update contact information
• Database tools such as Neustar’s “Verification for TCPA” product
• Strong support for “full participation from carriers to make this type of option more effective”
• Require consumers to notify businesses when they switch numbers via contractual agreements and seek recourse for violation of the agreement
• Include an interactive opt-mechanism in prerecorded calls so that recipients can easily report a reassigned or wrong number
Reassigned Wireless Telephone Numbers

• How to Comply (Cont’d)
  – Implement procedures for recording wrong number/reassigned number reports received by customer services reps placing outbound calls
  – Implement processes for allowing customer service agents to record new telephone numbers when receiving calls from customers
  – Utilize an autodialer, manual dialer, and/or live caller to recognize triple-tones that identify and record disconnected numbers
  – Establish policies for determining whether a number has been reassigned if there has been no response to a two-way call after a period of attempting to contact a consumer
  – Enable customers to update contact info by responding to any text message they receive
Technology Responses

- **System Separation**
  - Ontario maintains unique software code for both Auto dial and manual systems
  - Separate, and self sufficient
  - Full compliance controls on each

- **Process & Tools Underway**
  - Preclude subsequent conversion of manual platform to autodial
    - Registration
    - Unique System identification
    - Fail-safe software
Workflow Solutions

New Business from Client with “Solid” Consent

Scrub for Cells
- Cell phones
- Land lines
  - Autodial
  - Unmatched
  - Match: subscriber = consumer

Neustar Phone Ownership
- Cell phones
  - Autodial
  - Unmatched
  - Match: subscriber = consumer

Autodial Campaign
- Land lines + verified consented cells
  - Autodial
  - Un-verified consented cells
  - One pass Autodial

Autodial Campaign (pass AM to agents to listen)
Subsequent Campaigns
- Manual
- Autodial

Consent can be revoked at any time, please track & check
Compliance and Risk Management

- Consider benefits of using both a manual contact system and an ATDS
- Understand your network
- Map your manual call work flow
- Map your ATDS call work flow
- Maintain origin of all numbers [e.g. creditor, skip traced numbers, etc.]
- Write call center agent scripts
- Establish policies and procedures
- Train your staff
- Meet with your clients
Impact of the Order and Role of Legal Counsel

• Effective date
• Legal impact
  – Impact on the courts (FCC decisions are not necessarily binding on the courts (see Dish Network, L.L.C. v. FCC, 552 F. App’x 1, 1-2 (D.C. Cir. 2014))
• Force and effect of law?
• Role of Legal Counsel
  – Review contact management technology with IT and your vendor
  – Review process by which you obtain consent, manage consent and manage revocations
  – Review need for cell phone scrubs that determine whether a number is a cell number
  – Review need for cell phone scrubs that determine whether a cell number is indeed associated with the consumer you intend to contact
  – Discuss your reliance on “human intervention” if a defense to a claim
Poll Question 4

• Now that you’re familiar with the FCC’s ruling – which part concerns you the most?

  – Tracking consent (and revocation of consent)
  – The “future capacity” concept
  – Liability when autodialing reassigned cell phone numbers
  – Vagueness around “human intervention”
Supreme Court to Decide – Impact of Rule 68 Offers of Judgment


• May 18, 2015, the Supreme Court granted certiorari to decide:
  – (1) “[w]hether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim” and (2) “[w]hether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule 23, but receives an offer of complete relief before any class is certified”

  – Should the Supreme Court rule in favor of the *Campbell-Ewald* petitioners named plaintiffs in TCPA class actions who receive Rule 68 offers will not be able to proceed individually or as class representatives, requiring dismissal of both their individual and class claims
Thank You

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