Stetson Journal of Advocacy and the Law

The first online law review designed to be read online

3 Stetson J. Advoc. & L. 55 (2016)

Debt Collectors Using Autodialers, Beware! Defending TCPA and FCCPA Claims in Florida

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I. Introduction

55. This article primarily examines the dangers, and the best ways to avoid those dangers, for debt collectors making autodialed collection calls in Florida. Florida state and federal law complement each other to create powerful weapons for debtors who have received these calls, greatly increasing exposure for debt collectors.

56. Broadly speaking, an autodialer is any system that can make telephone calls without human intervention. This includes machines that dial numbers from a random number generator, or machines that dial preprogrammed numbers. The Telephone Consumer Protection Act (TCPA),[2] though not specifically targeted at debt collectors, imposes liability on anyone who makes autodialed telephone calls without prior consent of the person called. Although the TCPA does not create liability for calls dialed by hand, debt collectors commonly use autodialed calls to contact debtors because it is a more efficient and less costly means of placing calls. The

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2 47 U.S.C. §{} 227 (2012).

TCPA imposes monetary penalties on a per-call basis, which quickly increases financial exposure for nonconsensual autodialed calls. Furthermore, the Federal Communications Commission recently released new rules which make it more difficult for debt collection callers to avoid liability.

57. In addition, the Florida Consumer Collection Practices Act (FCCPA) specifically applies to debt collection activities in Florida.[3] The FCCPA creates liability for a caller who harasses a debtor, but does not specifically explain what harassment is. Debt collectors using an autodialer may thus unwittingly harass debtors by using an autodialer to make large numbers of calls to a single debtor. The FCCPA, like the TCPA, provides liability for damages. However, the FCCPA also allows plaintiffs to collect attorneys' fees from the caller.

58. For example, a retailer that issues consumer loans may face high rates of default for small sums of money. The retailer may hire a collection agency to call a large number of these debtors. The TCPA is not implicated should the agency choose to have a representative manually (and slowly) enter each phone number separately for each call. However, economically collecting debts from numerous customers may necessitate the use of an autodialer to contact these debtors, potentially triggering TCPA liability. High call volume may implicate the FCCPA in addition to the TCPA.

59. Debt collectors' use of autodialers has become extremely common. However, when not done in compliance with the TCPA and FCCPA, liability can quickly add up for an individual claim or even spark a class-action lawsuit.

II. Background of the TCPA

60. Passed in 1991, the Telephone Consumer Protection Act was originally enacted to protect consumers from telemarketing calls and so-called junk faxes, which the bill's sponsor called "the scourge of modern civilization."[4] The opposition to automated calls centered around four areas. First, Congress recognized that telemarketing calls were annoying, that opposition to these calls was widespread, and that telemarketers were perceived as "unethical and unscrupulous."[5] Second, Congress recognized that the telemarketer using an autodialer might tie up phone lines for both business and emergency purposes. A consumer unable to use his or her telephone line might thus be unable to make an emergency call.[6] Third, Congress was

3 FLA. STAT. §§{} 559.55–559.785 (2015).

4 137 CONG. REC. S9840-02, 1991 WL 126847 (1997).

5 H.R. REP. NO. 102-317, at 8–9 (1991).

6 137 CONG. REC. S9840-02, 1991 WL 126847.

concerned that a consumer would have to bear the financial cost of an unsolicited fax or telephone call advertisement. Lastly, Congress wished to protect consumers' right to privacy in the home.[7]

61. The TCPA was never intended to regulate debt collectors seeking to contact customers to recover legitimate debts. However, as explained below, the TCPA's restrictions on autodialed calls are so broad that debt collectors face liability for otherwise legal calls attempting to reach debtors. In addition, on July 10, 2015, the Federal Communication Commission (FCC) released new rules that clarified the liability these debt collectors face.

62. This article will first address the elements of an action brought under the TCPA against a debt collector, as interpreted by Florida federal courts. Second, this article will explain how the FCCPA, when combined with the TCPA, can greatly increase financial exposure to debt collectors. Finally, this article will address how the new FCC rules increase the dangers in making autodialed debt collection calls.

III. The TCPA in Florida Before the FCC'S July 2015 Rules

A. Elements of a TCPA Claim

63. Though the TCPA creates causes of action for parties who have received "junk faxes" and landline calls, the most prominent cause of action that applies to debt collections is the prohibition on making nonconsensual autodialed calls to a cell phone. The statute provides that it shall be unlawful:

> (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice–
>
> (iii) 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.[8]

64. Thus, a successful claim must demonstrate:

1. a call,

7 S. REP. NO. 102-178, at 1–2 (1991).

8 47 U.S.C. §{} 227(b)(1)(A)(iii) (2012).

2. using an automatic dialing system or prerecorded voice,
3. to a cell phone,
4. without prior consent.

65. As increasing numbers of Americans give up their land lines in favor of their cell phones, the potential to run afoul of this prohibition is expanding.

66. The element that there be a "call" to a cellular phone is largely self-explanatory and not ordinarily in dispute by the time a plaintiff has already brought a TCPA claim. For the purposes of the TCPA, text messages also qualify as "calls."[9] Thus, the most important elements to a debt collector's defense of a TCPA action will be whether the system used to place the call qualifies as an autodialer, and whether the customer gave consent to make an autodialed call.

67. Because the use of an autodialer is an element of the cause of action, a debt collector can avoid this type of TCPA claim altogether by having a customer representative contact debtors by entering each number into a telephone by hand. Of course, this option will increase operating costs by necessitating hiring and training additional customer representatives to place the same volume of calls.

B. Automatic Telephone Dialing System

68. The TCPA defines an "automatic telephone dialing system" as "equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers."[10] The statutory inclusion of random or sequential number generators betrays the TCPA's original purpose to target telemarketers. However, the FCC and Florida federal courts applying the statute have not restricted liability to these limited call systems. As one court has stated, "the key feature of an ATDS is the capacity to dial numbers without human intervention."[11] Note that the statutory language focuses on the *capacity* of the device.

69. Thus, technology that qualifies as an autodialer also encompasses systems that automatically call numbers from a pre-programmed list,[12] and "predictive dialers,"

9 *Legg v. Voice Media Group, Inc.*, 20 F. Supp. 3d 1370, 1373 (S.D. Fla. 2014).

10 47 U.S.C. §{} 227(a)(1) (2012).

11 *Wilcox v. Green Tree Servicing, LLC*, No. 8:14-CV-1681-T-24 TGW, 2015 WL 2092671, at *5 (M.D. Fla. 2015).

12 *Lardner v. Diversified Consultants Inc.*, 17 F. Supp. 3d 1215, 1222-23 (S.D. Fla. 2014).

which call numbers from a list in a way that predicts when a customer representative may be available to take the call.[13] These systems also happen to be the best way for debt collectors to reach customers who have given their telephone number to a retailer for potential collection purposes.

70. Without the benefit of discovery to reveal a caller's procedure or software, the call recipient has no way to know for sure whether the debt collector is using an autodialer. At least one federal court has held that the bare allegation that defendant used an autodialer is grounds for dismissal.[14] However, autodialed calls often contain telltale signs that debtors may plead to reach discovery and gain more information about the debt collector's call procedures. From the debtor's perspective, some of the hallmarks of an autodialer are as follows:

- robotic voice on the line
- lack of response when attempting to talk with the caller
- "click and pause" after answering the call[15]
- repeated calls in a single day
- repeated calls from different numbers
- the fact that the call recipient owed money on a debt.[16]

C. Consent to Receive a Call

71. Thankfully it is usually easy for a debt collector to obtain consent to make an autodialed call. During a retail transaction, for example, a customer may consent to receive autodialed phone calls when filling out a loan application.[17] Similarly, the Ninth Circuit ruled that a customer consented to receiving text messages when she provided a cell phone number without any corresponding instructions not to text her.[18] In addition, the Eleventh Circuit recently ruled that a caller obtained consent when the plaintiff provided his number on a form, *even when* the form did not require the number. In other words, merely providing a telephone number will constitute consent to be called by an autodialer.

13 *Legg v. Voice Media Group, Inc.*, 20 F. Supp. 3d 1370, 1375 (S.D. Fla. 2014).

14 *Hunter v. Diversified Consultants, Inc.*, Case No. No. 8:14-CV-2198-T-30TGW (M.D. Fla. Nov. 26, 2014).

15 *Martin v. Direct Wines, Inc.*, No. 15 C 757 at *2 (N.D. Ill. 2015).

16 *Isgett v. Northstar Location Services, LLC*, No. 4:14-CV-4810-RBH at *3 (D.S.C. 2015).

17 See *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1122 (11th Cir. 2014).

18 *Baird v. Sabre, Inc.*, No. 14-55293 at *1 (9th Cir. 2016).

72. However, even though consent is easy to obtain, it is also easy to take back. In another recent Eleventh Circuit decision, the court clarified that consent may be revoked by simple oral revocation, at least "in the absence of any contractual restriction to the contrary."[19] For example, a frustrated debtor may revoke autodialer consent merely by telling the debt collector to stop calling.

73. Note further that consent to make a call must be obtained from the *called* party, i.e., the subscriber of the telephone number, not the *intended recipient* of the call.[20] Thus, should a debtor change his or her number to avoid debt collectors, the new owner of the line who has not provided consent may then bring a TCPA claim against the debt collector.

D. Damages

74. Because the TCPA provides damages on a per call basis, liability is limited only by the number of calls a debt collector makes. These damages may even dwarf the underlying consumer debt. The TCPA allows a plaintiff to recover "actual money loss for such a violation, or to receive $500 dollars in damages for each such violation, whichever is greater."[21] In practice, this often means that each nonconsensual autodialed call costs the collector $500. Lack of knowledge or intent will not defeat a $500 damages award, as "[t]he TCPA is essentially a strict liability statute."[22]

75. In addition, if a debt collector makes a call "willfully or knowingly," a court may triple the actual damages or $500 amount.[23] The TCPA does not define "willfully or knowingly." Thankfully, in the Eleventh Circuit, willful or knowing conduct goes further than merely having knowledge that the debt collector made a call.[24] Willful or knowing conduct "requires the violator to know he was performing the conduct that violates the statute." This standard has been described as "an exacting one;" in the context of autodialed debt collection calls, a plaintiff must show that the debt collector knew that it was making a call, knew that number was a cell phone, knew that the system used to make the call would qualify as an autodialer, and knew that it did not have consent to make the autodialed call.[25]

19 *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1255 (11th Cir. 2014).

20 *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1252 (11th Cir. 2014).

21 47 U.S.C. §{} 227(b)(3)(B) (2012).

22 *Lardner v. Diversified Consultants Inc.*, 17 F. Supp. 3d 1215, 1220 (S.D. Fla. 2014).

23 47 U.S.C. §{} 227(b)(3) (2012).

24 *Lary v. Trinity Physician Fin. & Ins. Services*, 780 F.3d 1101, 1107 (11th Cir. 2015).

25 *Brown v. NRA Group, LLC*, No. 6:14-CV-610-ORL-31 at *4 (M.D. Fla. 2015) (holding that there was a genuine issue of material fact as to whether defendant knew it was using an autodialer); see also *McBeth v. Credit Prot. Ass'n, L.P.*, No. 8:14-CV-606-T-36AEP at *4 (M.D. Fla. 2015).

76. Thus, in practice, the damages for a TCPA claim are $500 for any call, or $1,500 for willful or knowing calls. Even if the plaintiff cannot show that he is entitled to $1,500 per call, $500 per call damages based on multiple calls over a period of time can reach large amounts, especially if the debt collector has not accurately documented that consent has been withdrawn.[26]

E. Venue

77. Finally, it is important to consider where a TCPA action may be brought. Unique among federal statutes, state courts and federal courts have concurrent jurisdiction to hear TCPA claims.[27] Removal to federal court is a matter of course upon filing an appropriate motion. Removal has two advantages. In the context of Florida specifically, the debt collector will be able to take advantage of the more stringent federal motion to dismiss standard and summary judgment standard. Furthermore, state court may be an unfriendly environment for debt collectors, who are not well known for being sympathetic clients. A defendant may also wish to remove a related FCCPA claim (see below) based on supplemental jurisdiction.[28]

IV. The FCCPA and Its Relationship to the TCPA

78. In addition to the TCPA, Florida has its own Florida Consumer Collection Practices Act (FCCPA) which is designed to protect debtors in Florida. Though not specifically targeted to debt collectors who use an autodialer, the statute nevertheless creates state-law liability on top of already heavy TPCA penalties. Most importantly, FCCPA claims create attorneys' fees liability and are hard to dismiss before trial.

A. Elements of the Claim

79. The FCCPA applies to debt collectors in Florida who attempt to collect a consumer debt. Essentially, consumer debt is any debt accrued by a consumer for a household purpose.[29] Although the FCCPA prohibits a host of unfair debt collection

26 47 U.S.C. §{} 227(b)(3) (2012).

27 *Mims v. Arrow Fin. Services, LLC*, 132 S. Ct. 740, 745 (2012).

28 28 U.S.C. §{} 1367(a) (2012); see *Speidel v. Am. Honda Fin. Corp.*, No. 2:14-CV-19-FTM-38CM at *3 (M.D. Fla. 2014).

29 FLA. STAT. §{} 559.55(6) (2015) (defining "consumer debt" as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.").

practices (such as using abusive language or posing as a law enforcement officer), two provisions are most applicable to debt collectors employing an autodialer. The caller may not:

- "Willfully communicate with the debtor or any member of her or his family with such frequency as can reasonably be expected to harass the debtor or her or his family, or willfully engage in other conduct which can reasonably be expected to abuse or harass the debtor or any member of her or his family."[30]
- "Communicate with a debtor if the person knows that the debtor is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address . . . "[31]

80. The FCCPA defines "communication" as the "conveying of information regarding a debt directly or indirectly to any person through any medium." Importantly, "communication" under the FCCPA includes not only calls during which a representative spoke to a customer, but also missed calls.[32] Thus, any debt collection call will qualify as a communication under the FCCPA.

81. The prohibition regarding harassing communications is a fact-specific inquiry which may present issues in winning a motion to dismiss the case or obtaining summary judgment. In *Story v. JM Fields, Inc.*, the Florida First District Court of Appeals explained what it means to make harassing calls:

> Proof of numerous calls does not make a jury issue on liability if all must agree the creditor called only to inform or remind the debtor of the debt, to determine his reasons for nonpayment, to negotiate differences or to persuade the debtor to pay without litigation. The trier of fact may consider such communications harassing in their frequency, however, when they continue after all such information has been communicated and reasonable efforts at persuasion and negotiation have failed. Beyond that point communication 'can reasonably be expected to harass the debtor or his family,' because it tends only to exhaust the resisting debtor's will. If the creditor intends that likely effect, further communication is willful and actionable.[33]

82. Essentially, the trier of fact must assess why and how many calls the debt collector made to the plaintiff, in addition to the content of the calls. In practice, however,

30 FLA. STAT. §{} 559.72(7) (2015).

31 FLA. STAT. §{} 559.72(18) (2015).

32 *Brown v. Flagstar Bancorp, Inc.*, No. 8:13-CV-2596-T-33TBM at *2 (M.D. Fla. 2014); *Bresko v. M & T Bank Corp.*, No. 8:13-CV-1243-T-30AEP at *2 (M.D. Fla. 2013).

33 *Story v. J.M. Fields, Inc.*, 343 So. 2d 675, 677 (Fla. 1st DCA 1977) (quoting FLA. STAT. §{} 559.72(7) (2015)).

call volume seems to be the most important factor. In *Story*, for example, whether the debt collector made over 100 calls to the debtor in a five-month period was an issue of fact for the jury.[34] Troublingly, few cases provide guidance regarding calls that do *not* constitute harassment. The cases that do usually involve a small number of calls over time; for example, six calls in four months, six calls in six months, and two calls over three months.[35] One federal court has held that a caller did not violate the FCCPA after calling 132 times when "Plaintiff did not communicate with Defendant to convey information about the alleged debt, to negotiate with Defendant, or to tell Defendant that it should no longer contact her."[36]

B. Damages

83. Regarding damages, "[a]ny person who fails to comply with any provision of s. 559.72 is liable for actual damages and for additional statutory damages as the court may allow, but not exceeding $1,000, together with court costs and reasonable attorney's fees incurred by the plaintiff."[37] Courts usually interpret the statutory damages limit as $1,000 per *action*, not per call.[38] However, authority exists for the $1,000 per call holding, and the Florida Supreme Court has not addressed the issue.[39] At least one federal court has refused to dismiss a pleaded entitlement to damages for $1,000 per call.[40]

84. Most importantly, the FCCPA enables the plaintiff to recover attorneys' fees. To prove his or her case, a plaintiff will often require discovery from a retailer or a debt collection agency asking to produce and inspect call records, as well as potential third-party subpoenas to telephone companies. Thus, the entitlement to fees may be more dangerous to debt collector defendants than statutory damages under the FCCPA. The court will consider "the nature of the defendant's noncompliance with s. 559.72, the frequency and persistence of the noncompliance, and the extent to which the noncompliance was intentional" in determining whether to award fees.[41]

34 *Story v. J.M. Fields, Inc.*, 343 So. 2d 675, 677 (Fla. 1st DCA 1977).

35 *Dennis v. Reg'l Adjustment Bureau, Inc.*, No. 09-61494-CIV at *3 (S.D. Fla. 2010); *Schauer v. Morse Operations, Inc.*, 5 So. 3d 2 (Fla. 4th DCA 2009); *In re Whitaker*, No. 08:09-BK-01619-MGW at *2 (Bankr. M.D. Fla. 2013).

36 *Lardner v. Diversified Consultants Inc.*, 17 F. Supp. 3d 1215, 1219 (S.D. Fla. 2014).

37 FLA. STAT. §{} 559.77(2) (2015).

38 *Arianas v. LVNV Funding LLC*, 54 F. Supp. 3d 1308, 1310–11 (M.D. Fla. 2014) (collecting cases).

39 See *Beeders v. Gulf Coast Collection Bureau*, 632 F. Supp. 2d 1125 (M.D. Fla. 2009); *Kahmeyer v. Federal Credit Corp.*, No. 09-SC-21113-L, 2012 WL 12092502 (Fla. Cir. Ct. May 18, 2012).

40 *Morser v. Hyundai Capital Am., Inc.*, No. 2:15-CV-117-FTM-29CM at *2 (M.D. Fla. 2015).

41 FLA. STAT. §{} 559.77(2) (2015).

C. Relation to the TCPA

85. Because debt collectors as a matter of course may use an autodialer to call a recalcitrant debtor multiple times over a period of time, a plaintiff may easily claim that these calls were harassing, triggering FCCPA exposure on top of any TCPA liability. In addition, should the debtor notify the caller of attorney representation pursuant to the FCCPA, the debt collector may not contact the debtor at all; attorney notification would thus rescind any consent that may have existed under the TCPA.

86. The FCCPA further increases financial exposure to statutory damages on top of any TCPA damages. If a court chooses to follow the minority view, FCCPA damages of $1,000 per call would surpass violations for ordinary non-intentional calls under the TCPA. Even with only $1,000 per action, the ability to recover attorneys' fees is a potent weapon for plaintiffs. Because FCCPA claims are difficult to dismiss at the pleading stage or win on summary judgment, unless the debt collector chooses to settle, the case may proceed to a jury who is most likely hostile to the collector (indeed, they may themselves have been subjected to harassing calls!).

87. Of course, the debt collector may choose to decrease the frequency of calls to avoid the FCCPA, though the statute and existing case law provide almost no guidance as to what a permissible frequency might be.

V. The FCC'S New 2015 Rules for the TCPA

88. On July 10, 2015, in response to numerous petitions to clarify the law regarding the use of autodialed calls, the FCC released *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991* ("2015 FCC Order"), a sweeping ruling clarifying the law regulating autodialed collection calls. For debt collectors who make autodialed calls to cell phones, these rules are, almost without exception, in favor of debtors. Note further that under the Hobbs Act, ordinary district courts are bound to follow these FCC rules.[42]

A. Expanded Definition of Autodialer

89. Recall that use of an autodialer is an essential element for a TCPA claim, and debt collectors may avoid the TCPA altogether by manually dialing telephone numbers. In the 2015 FCC Order, the FCC confirmed the already-familiar Florida rule

42 *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1121 (11th Cir. 2014).

that predictive dialers and devices that dial a fixed set of numbers are all autodialers.[43] However, the FCC expanded the universe of devices which may qualify as an autodialer, eviscerating many defenses based on the theory that the device used does not qualify under the TCPA.

90. Per the TCPA's statutory language, devices which have the *capacity* to make calls without human intervention are autodialers.[44] In its latest ruling, the FCC refused to adopt any test which would define an autodialer by the device's *current* capacity. A device which has the "potential functionality" to make autodialed calls, even if the device must first be modified, will be considered an autodialer.[45] By leaving the door open to any modification which will enable calls to be made without human intervention, it is difficult to see why this potential functionality test would not encompass every piece of modern telephone equipment.

91. The FCC ruling refused to cabin the potential functionality test, stating that each system would be evaluated on "case-by-case determination." The FCC did acknowledge that the definition would not encompass a handset with a speed dial button, or an unmodified rotary dialed phone, noting unhelpfully that the definition "do[es] not extend to every piece of malleable and modifiable dialing equipment that conceivably could be considered to have some capacity, however small, to store and dial telephone numbers." Faced with the question as to whether a modern smartphone would be an autodialer due to its capacity to store and dial numbers, the FCC merely noted that no individuals have been sued under the TCPA for using a smartphone to make an unwanted call.[46]

92. We have now come a long way from the intent of the TCPA, which was to target telemarketers whose standard *modus operandi* was dialing random or sequential numbers in an attempt to reach potential customers. The FCC's reasoning provides little explanation or reassurance to debt collectors seeking clarification on whether their device is an autodialer. Under the current definition, which provides little to no safe harbor, the only way to foreclose the autodialer element of a TCPA claim would be to dial each number manually.

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43 *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, ¶¶{} 10, 12 (2015).

44 47 U.S.C. §{} 227(a)(1) (2012).

45 *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, ¶{} 16 (2015).

46 *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, ¶¶{} 17, 18, 21 (2015).

B. Consent to Make Autodialed Calls

93. Although the 2015 FCC Order does not alter Florida's rule that providing an autodial caller with a number constitutes consent, the new TCPA rules make it much easier for customers to revoke consent to receive autodialed calls and much harder for debt collectors to effectively track consent.

94. Faced with the question of whether and how call recipients may revoke consent, the FCC stated that "a called party may revoke consent at any time and through any reasonable means." Under the "any reasonable means" holding, a consumer may revoke, at any time, "orally or in writing," including by way of "a consumer initiated call, directly or in response to a call initiated or made by a caller." A customer may also revoke consent "at an in-store bill payment location."[47]

95. Worryingly, the FCC also closed the door recently opened in Florida that would allow a customer to revoke consent orally "in the absence of any contractual restriction to the contrary."[48] The FCC ruled that "[a] caller may not limit the manner in which revocation may occur."[49] No longer will a debt collector be able to limit a customer's revocation of consent (for example, requiring the customer to notify the debt collector in writing if they no longer wish to receive calls) by means of a loan agreement.

96. The FCC assures that callers "will not find it overly burdensome to implement mechanisms to record and effectuate a consumer's request to revoke his or her consent."[50] However, because the ability to revoke is only restricted by vague notions of what is "reasonable," debt collectors must develop procedures to ensure every single customer-facing member of the organization has training in recognizing and reporting consent issues. For example, a retail sales associate with no relation to the billing department might now be required and trained to notify the appropriate division after speaking with a debtor who happens to walk into the store.

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47 *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, ¶¶{} 47, 64 (2015).

48 *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1255 (11th Cir. 2014).

49 *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, ¶{} 47 (2015).

50 *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, ¶{} 64 (2015).

C. The "Called Party" Rule and Reassigned Cell Phone Numbers

97. As explained above, Florida federal courts' interpretation of the TCPA requires a debt collector to obtain consent of the *called party* to make an autodialed collection call; i.e., securing the consent of the *intended recipient* will not shield the debt collector from liability. The 2015 FCC Order does not modify this holding.[51]

98. The called party issue is particularly applicable in cases where a customer gives consent to receive calls from a debt collector, then later changes his or her number potentially to avoid collection calls. Because the new subscriber has not previously consented to receive the autodialed call, the debt collector will be liable to the new subscriber under the TCPA. Petitioners asked the FCC to grant an exception for good-faith errors in attempting to reach the intended recipient, especially in light of the fact that there is no publicly-available directory for cell phones.

99. The FCC declined to grant such an exception. Rather, the FCC held that "callers who make calls without knowledge of reassignment and with a reasonable basis to believe" they possess consent may "initiate one call after reassignment as an additional opportunity to gain actual or constructive knowledge of the reassignment." Moreover, if this additional call does not yield actual knowledge, the caller will still be deemed to have constructive knowledge of the reassignment.[52] In short, debt collectors will have a one-call safe harbor to verify the debtor's identity or face TCPA liability.

100. The FCC suggests that callers implement policies and procedures to ensure that the called party is the consenting party. Among these policies, debt collectors could check voice mail to confirm the caller's identity, use emails to confirm customer numbers, include opt-out options by phone or text, or train customer service representatives to ensure that they accurately catalogue all numbers during customer calls. Several of these options do require that the customer take affirmative action to notify the debt collector, however, leaving the ability to confirm the customer's identity outside the debt collector's control. The FCC also suggests that callers may manually dial calls to avoid all liability, which provides little comfort in an environment where autodialed calls provide the best way to efficiently reach large numbers of debtors.[53] Debt collectors must thus remain vigilant and imple-

51 *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, ¶{} 72 (2015).

52 *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, ¶{} 72 (2015).

53 *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, ¶¶{} 84, 86 (2015).

ment strict policies and procedures to limit liability arising from wrong-number calls.

101. The FCC also rejected any defense to liability arising from a situation in which a customer in bad faith fails to notify the caller of a changed number. Quixotically, the FCC suggests that debt collectors may include indemnity clauses in their contracts which make the customer liable for damages which may arise from this failure to inform of a number change.[54] For debt collectors, this "solution" is practically unworkable. No retailer wants to gain a reputation for suing its customers. Furthermore, in the debt collection context specifically, the debt collector almost certainly cannot recover damages from a called party who cannot pay the underlying debt.

VI. Conclusion

102. The United States Court of Appeals for the District of Columbia Circuit has already taken an appeal to consider the validity of the 2015 FCC Order.[55] Until callers receive more guidance from the court, compliance with the TCPA and FCCPA restrictions remains a monumental hurdle. For debt collectors who still wish to call debtors, the only solution that is as close to a "sure thing" may be as follows:

1. Manually dial all calls – The TCPA is not implicated unless the debt collector uses an autodialer. Because any modern piece of telephone equipment under the 2015 TCPA Order might be considered an autodialer, the only safe way to avoid liability is to manually dial. Obtaining consent is not foolproof because the 2015 TCPA Order makes it extremely difficult to record consent revocation or avoid calling a number that used to but no longer belongs to a debtor.
2. Dial debtors infrequently – To avoid facing FCCPA damages and attorneys' fees, the only way to avoid liability for harassing calls would be to dial infrequently. The debt collector would still have an issue with ascertaining what volume of calls constitutes harassment, but calling infrequently would decrease the chance that call volume could be construed as harassment, and enable a debt collector to more effectively monitor when a notification that the debtor is represented arrives.

103. Unfortunately, these solutions are not practical in an environment when a debt collector needs to use an autodialer to reach multiple debtors quickly and economically. When making autodialed calls to cell phones, limiting financial exposure

54 *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, ¶{} 86 (2015).

55 *ACA International v. FCC,* No. 15-1211, *appeal docketed,* (D.C. Cir. Nov. 25, 2015).

under the TCPA requires debt collectors to implement strict policies and procedures to ensure the debt collector has consent to call, the collector is actually making calls to the debtor, and revocation of consent is accurately documented so the debt collector may cease autodialed calls. Furthermore, to avoid FCCPA exposure, the only real solution is to call less frequently.