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COURT CLARIFIES CONSENT NEEDED TO MAKE AUTODIALED CALLS TO CELL PHONES

The United States Court of Appeals for the Ninth Circuit recently amended an opinion in which it had upheld a grant of preliminary injunction and provisional class certification in a debt collection case against a collector. *Meyer v. Portfolio Recovery Assocs., LLC*, 696 F.3d 943 (9th Cir. 2012), *reh'g denied and op. amended and superseded*, 2012 WL 6720599 (9th Cir. Dec. 28, 2012). The case involved allegations that a collector violated the federal Telephone Consumer Protection Act by making autodialed calls to consumers' cell phones without prior consent.

Original Decision

As we reported in our *Alert* dated October 24, 2012, the district court had (i) provisionally certified a class of debtors who were contacted on their cell phones and (ii) granted a preliminary injunction regarding the use of an autodialer to place calls to cell phone numbers with California area codes, which numbers had been obtained through skip-tracing. The district court had limited the provisional class to all persons using a cell phone number that (i) was not obtained either from a creditor or from the class member and (ii) has a California area-code or was identified as belonging to a debtor residing in California.

In upholding the class certification, the Ninth Circuit rejected the collector's argument that individualized issues of consent should have precluded a finding of commonality or typicality because some debtors might have agreed to be contacted at any telephone number, even those obtained after the original transaction. In rejecting this argument, the Ninth Circuit stated that:

Pursuant to the FCC ruling, prior express consent is deemed granted only if the wireless number was provided by the consumer to the creditor, and only if it was provided at the time of the transaction that resulted in the debt at issue. Thus, consumers who provided their cellular telephone numbers to creditors after the time of the original transaction are not deemed to have consented to be contacted at those numbers for purposes of the TCPA.

Amended Decision

In its Order denying PRA's petition for panel rehearing and

rehearing *en banc*, the Ninth Circuit amended its opinion by replacing the above-noted two sentences of its opinion with the following:

Pursuant to the FCC ruling, prior express consent is consent to call a particular telephone number in connection with a particular debt that is given before the call in question is placed. PRA did not show a single instance where express consent was given before the call was placed.

Accordingly, the Ninth Circuit has made it clear that consent to make autodialed calls to cell phone numbers under the TCPA must be given (i) before a call is placed and (ii) "in connection with a particular debt," rather than solely at the time of the initial transaction. □

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