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## COURT REJECTS CONSENT ARGUMENT IN AUTODIALER CASE

The United States Court of Appeals for the Ninth Circuit recently upheld a grant of preliminary injunction and provisional class certification in a debt collection case against a collector. *Meyer v. Portfolio Recovery Assocs., LLC*, 2012 WL 4840814 (9th Cir. Oct. 12, 2012). The case involved an alleged violation of the Telephone Consumer Protection Act. The district court (i) provisionally certified a class of debtors who were contacted on their cell phones and (ii) granted a preliminary injunction regarding the use of a dialer to place calls to cell phone numbers with California area codes, which numbers had been obtained through skip-tracing.

In examining the provisional class certification, the Ninth Circuit noted that the debtor has the burden of meeting the commonality and typicality requirements of class certification under rule 23(a) of the Federal Rules of Civil Procedure. 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.

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. A Federal Communications Commission (FCC) declaratory ruling regarding consent under the TCPA defeated the collector's argument, the court said. *See* In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA Int'l for Clarification and Declaratory Ruling, 23 FCC Rcd. 559 (Jan. 4, 2008). Under the FCC's ruling, prior express consent is deemed granted only if the cell phone 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. Thus, the court concluded that those who provided their cell phone 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.

In challenging the injunction, the collector argued that the debtor failed to show a likelihood of success on the merits. The court disagreed, noting that the three elements of a TCPA claim (*i.e.*, that the defendant called a cell phone, using an automatic telephone dialing system, without the recipient's prior express consent) all were satisfied.

Specifically with respect to the term "automatic telephone dialing system," defined under the TCPA to mean equipment that has the capacity (i) to store or produce telephone numbers to be called, using a random or sequential number generator and (ii) to dial such numbers, the court found that because the collector's own securities filing shows that it uses predictive dialers (and it does not dispute that predictive dialers have the capacity described in the TCPA), the court was satisfied that the collector used an automatic telephone dialing system. The court noted that previously, in 2003, the FCC further defined "automatic telephone dialing system" to include predictive dialers. The court rejected the collector's arguments to the contrary.

Finally, the court concluded that the debtor had demonstrated irreparable harm sufficient to justify the injunction. The record, the court found, included 46,657 calls to cell phone numbers with California area codes that the collector had obtained through skip-tracing and no acknowledgement of wrongdoing or assurance of stopping calls to anyone other than the plaintiff. Thus, the record supported the district court's finding that the collector would continue to violate the TCPA if the injunction was not issued. □

✧ *Mike Tomkies and Margaret Stolar*

## FCC SEEKS COMMENT ON AUTODIALERS

The Federal Communications Commission (FCC) has issued a request for comment on a petition for declaratory ruling filed by Communication Innovators asking the FCC to clarify that predictive dialers that (i) are not used for telemarketing purposes and (ii) do not have the current ability to generate and dial random or sequential numbers are not "automatic telephone dialing systems" (autodialers) as defined by the Telephone Consumer Protection Act (TCPA) and related FCC rules. DA 12-1653, CG Docket No. 02-278 (Oct. 16, 2012); Petition for Declaratory Ruling Regarding Non-Telemarketing Use of Predictive Dialers, CG Docket No. 02-278 (June 7, 2012).

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The Communication Innovators petition seeks to eliminate significant confusion regarding the applicability of the FCC's TCPA rules to "predictive dialers" used to provide informational, non-telemarketing calls to consumers. "Predictive dialers," which essentially "predict" the time when a consumer will answer the phone, are described by the petition as innovative equipment that dials specifically programmed contact numbers and enables company representatives to provide important, timely informational calls to consumers accurately, efficiently, and cost-effectively. The TCPA prohibits making any call (other than for emergency purposes or with the prior express consent of the called party) using an autodialer to, among others, any cellular telephone number.

The petition argues that the plain language and legislative history of the TCPA, along with FCC precedent, support its request. It also argues that the FCC's interpretation of "autodialer" (specifically its 2003 TCPA Order and 2008 Declaratory Ruling [see article above]) has caused significant confusion and an array of unintended consequences that limit innovation, harming both consumers and businesses. The petition takes note of "skyrocketing TCPA class litigation," which it claims is, hindering innovation, diverting time and resources away from consumer-facing operations, chilling critical account communications and creating substantial costs that inevitably are passed on to consumers.

Comments are due November 15, 2012.

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