



April 5, 2013

## DEBT BUYER TO PAY OVER \$500,000 FOR TCPA VIOLATIONS

The United States District Court for the Western District of Wisconsin recently held that a debt buyer violated the federal Telephone Consumer Protection Act (TCPA) when it called a debtor's cell phone without prior consent. *Nelson v. Santander Consumer USA, Inc.*, No. 11-cv-307-bbc, 2013 WL 1141009 (W.D. Wis. Mar. 8, 2013). The court awarded the debtor \$513,000 (\$500 in TCPA statutory damages for each of the 1,026 calls made) plus an additional \$58,000 (\$500 for each of the 116 prerecorded messages left).

In *Nelson*, the debt buyer placed 1,026 calls to the debtor's cell phone and left 116 prerecorded messages over the span of approximately one year in an attempt to collect a debt. In making the calls, the debt buyer used a computer telephone software system that routed and placed inbound and outbound calls. The system had the capacity to (i) store telephone numbers and then call them and (ii) perform "predictive dialing" and "preview dialing." In "predictive dialing" the system times the dialing of numbers using an algorithm to predict when an agent will become available to receive the next call. In "preview dialing," an employee chooses a telephone number by clicking on a computer screen and the system calls it. The debt buyer's employees never called the debtor by pressing numbers on a keypad.

The debtor sued the debt buyer claiming that it violated the TCPA prohibition against making calls with an automatic telephone dialing system to a cell phone number without the prior express consent of the called party. See 47 U.S.C. § 227(b)(1)(A)(iii). The evidence showed that the debtor did not provide prior express consent to the calls because the debtor had not provided the cell phone number to the debtor's original creditor in her loan application documents or otherwise to the debt buyer. See our February 11, 2013 ALERT for additional information on the prior express consent needed to make autodialed calls to cell phones.

The debt buyer argued that it did not use an automatic telephone dialing system when placing the calls under consideration. An "automatic telephone dialing system" is defined under the TCPA as "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." The debt buyer claimed that it did not use a random or sequential number generator when it placed the calls under consideration because "random number generation" means random sequences of 10 digits and "sequential number generation" means (for example) (111) 111-

1111, (111) 111-1112 and so on.

The court disagreed, finding that the debt buyer used a "predictive dialer," which the Federal Communications Commission has determined meets the definition of an "automatic telephone dialing system." According to the FCC, a "predictive dialer" is equipment that dials numbers and, when certain computer software is attached, also assists the caller in predicting when an agent will be available to take the calls. The hardware, when paired with certain software, has the capacity to store or produce telephone numbers and dial those numbers at random, in sequential order or from a database of numbers. See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 F.C.C.R. 14014, 14091-93 (July 3, 2003). See our October 24, 2012 ALERT for additional information on a request for comment on a petition for declaratory ruling 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."

The court also found that the debtor did not need to show which calls were made to the debtor's cell phone using predictive dialing and which calls were made through preview dialing. According to the court, even if preview dialing falls outside the scope of the TCPA, the question is not how the debt buyer made a particular call, but whether the system it used had the "capacity" to make automated calls. In this case, it was clear that the system used had the capacity to perform predictive dialing.

*Nelson* illustrates the importance of obtaining a debtor's express consent before making autodialed calls to the debtor's cell phone if the telephone equipment used has the capacity to make calls by methods regulated by the TCPA. □

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