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Ninth Circuit Uses Potentially Dangerous Language Regarding What Constitutes Prior Express Consent Under the TCPA

Appellant, joined by a number of amicae including the American Bankers Association, is seeking rehearing or rehearing en banc in connection with a recent decision by the Ninth Circuit that should be of grave concern to any entity that uses auto-dialers in its contacts with consumers. That decision, in the case of *Meyer v. Portfolio Recovery Associates, LLC* (PRA), upheld a district court's grant of a preliminary injunction and provisional class certification, in a suit alleging violations of the Telephone Consumer Protection Act (TCPA), 47 § U.S.C. 227.[1]

Meyer had sued PRA in the court below claiming that PRA had violated the TCPA when it contacted debtors using wireless telephone numbers obtained via skip-tracing, a well-recognized method often used to locate or update an individual's contact information. At the beginning of the litigation, Meyer moved for a preliminary injunction preventing PRA from continuing to contact debtors through cell phone numbers obtained via skip-tracing. Meyer also moved for provisional certification of a class of debtors with California area codes who had been contacted by PRA on their cell phones. The district court granted both motions and PRA appealed.

The Ninth Circuit affirmed the provisional class certification finding that common issues predominated over individual issues in the case.[2] The appellate court rejected defendant's arguments that some debtors might have agreed to be contacted at any telephone numbers, and that at least some of the numbers obtained via skip-tracing and used in calling debtors in the putative class might also have been supplied to PRA by those debtors, in the course of the transactions that resulted in the debts, thus causing individual issues to predominate on the question of consent. In rejecting these arguments, the Ninth Circuit noted that PRA had failed in the court below to proffer even a single instance where a wireless number discovered

via skip-tracing had also been provided by the consumer to the creditor for contact purposes. Based on class certification precedent, it seems likely that if PRA had been able to demonstrate at least a few clear examples of overlap between numbers provided by consumers and numbers turned up through skip-tracing, the outcome in the Ninth Circuit (and probably also below) might have been different.

But the Circuit Court did not stop there. What really makes this case both noteworthy, and potentially frightening, is that the appellate court went beyond the issues necessary to its ruling to offer, in what was likely only dicta, its view of what constitutes "prior express consent" to contact a cell phone number using an auto-dialer. In what appears to be an erroneous reading of a declaratory ruling from the Federal Communications Commission (FCC), the Ninth Circuit seemed perhaps to be implying that prior express consent in a debtor-creditor situation may be granted only at the time of the initial credit application, and not subsequently during the course of the business relationship between the parties.

In support of its conclusion, the Ninth Circuit relied on a 2008 declaratory ruling responding to a request by ACA International for "clarification that the prohibition against autodialed or prerecorded calls to wireless telephone numbers . . . does not apply to creditors and collectors when calling wireless telephone numbers to recover payments for goods and services received by consumers." In its declaratory ruling, the FCC stated that "autodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt are made with the 'prior express consent' of the called party"[3] and are permissible under the TCPA. The FCC then went on to explain that "the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent . . . to be contacted at that number regarding the debt.[4]

In its ruling, the FCC pointed to provisions in the TCPA's legislative history to the effect that the TCPA's restrictions on certain types of calls do not apply when the telephone number used in the call was provided to the caller for normal business communication.[5] The FCC then went on to elaborate that, under its implementing rules, prior express consent is considered granted only if the wireless number provided to the creditor was given "during the transaction that resulted in the debt owed." Nowhere, however, did the FCC opine that valid prior express consent can only be obtained at the time a debt is initially incurred and not at other points during the life of the transaction. In possibly construing the FCC's ruling as limiting the opportunity of a creditor to obtain prior express consent only to inception of a transaction, the Ninth Circuit seems to have ignored both Congressional intent to permit calls to wireless telephone numbers provided by consumers for use in normal business communications, and the FCC's interpretation of Congressional intent, in its capacity as the expert agency charged by Congress with enforcing the TCPA.

Moreover, the Ninth Circuit's decision defies logic and common sense if the court means to be implying, for example, that during the course of a relationship, a consumer can never update his or her contact information with a new phone number, even if provided by the consumer, to the creditor, specifically with reference to the original transaction. Such a conclusion flies in the face of the business reality that sometimes phone numbers change and contact information must be updated, especially in the course of transactions like those involving home mortgage loans, that often go on for decades. Similarly, such an interpretation of the FCC's ruling would defeat any efforts at improved compliance and/or recordkeeping by businesses, completely contrary to the purpose intended by the Commission in providing guidance with respect to its rules.

The language in the Ninth Circuit's decision and its accompanying rationale misconstrue the ongoing nature of relationships between consumers and their creditors. A relationship between a consumer and a creditor typically begins, but does not end, with a credit application. Many more transactions occur between the consumer and creditor after credit has been issued. Limiting the ability for creditors to secure express consent via consumer provision of telephone numbers within a continuing relationship substantially limits creditors' ability to protect themselves from liability under the TCPA and to act within the law and its continuing evolution. In our view, nowhere in the FCC ruling relied on by the Ninth Circuit did the Commission limit valid prior express consent only to phone numbers provided at the initiation of a transaction.

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1. Meyer v. Portfolio Recovery Associates, LLC, 2012 WL 4840814 (C.A.9 (Cal.)).
2. *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Request of ACA Int'l for Clarification and Declaratory Ruling, 23 FCC Rcd. 559, 563* (Jan. 4, 2008).
3. *Id.* at 564.
4. *Id.*
5. *Id.* (citing to House Report, 102-317, 1st Sess., 102nd Cong. (1991) at 17).
6. *Id.* at 564-65.