



The FCC Issues New, More Stringent TCPA Regulation

By: Jacqueline Mottek, Esq., Director of Client Services

The Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (the “TCPA”), generally prohibits calls and text messages to cell phones using automated systems or artificial or pre-recorded voice unless the consumer gives “prior express consent.” The TCPA imposes statutory penalties of \$500 per negligent violation, and up to \$1,500 per knowing or willful violation. In class actions, the potential liability usually extends back four years prior to the filing of the complaint. Hence, the defendants’ exposure increases exponentially- to at least \$500,000 for 1000 calls and at least \$5 million for 10,000 calls.

What is “prior express consent”? Since 1992, the Federal Communications Commission (“FCC”), charged with implementing the TCPA, has interpreted the phrase to mean that “persons who knowingly give their phone number have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.” In re Rules and Regulations Implementing the TCPA, 7 FCC Rcd. 8752, 8769 (Oct. 16, 1992).

On June 11, 2012, the FCC published a much more stringent interpretation of “prior express consent” for telemarketing calls. The FCC’s new interpretation, that will go into effect on October 16, 2013, requires a prior, signed, written agreement, in which the caller specifically agrees to receive telemarketing calls or text messages via auto-dialer and/or pre-recorded voice. This rule does not apply to debt collection calls or texts, unless such calls or texts include or introduce any type of advertisement or marketing materials.

The new regulation, 47 C.F.R. § 64.1200(f)(8), specifically provides:

The term prior express written consent means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.

The written agreement shall include a clear and conspicuous disclosure informing the person signing that:

By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and

The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

The term “signature” shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.



The new regulation is very clear. The regulation now requires prior express written consent for robo-calls. And, it appears unlikely that courts will continue to follow the FCC's old interpretation finding sufficient consent to be called if a cell phone number is provided. See, e.g., *Emanuel v. Los Angeles Lakers, Inc.*, 2013 WL 1719035, *6 (C.D. of Cal., April 18, 2013) (court agreed with the "many federal courts" that "have concluded that when a customer provides a company his or her phone number in connection with a transaction, he or she consents to receiving calls about that transaction" on the phone).

What does this mean for your clients? TCPA telemarketing litigation undoubtedly will increase as a result of the revised regulation, and the financial stakes have just gotten higher.

Jacqueline Mottek, Esq., is the Director of Client Services at Heffler Claims Group. To learn more about the TCPA Regulation, please contact: Jacqueline Mottek, Esq. at (415) 209-4894 or jmottek@hefflerclaims.com. Read Jacqueline's biography at www.hefflerclaims.com/bios/JEM.html.

About Heffler Claims Group

Heffler Claims Group ("Heffler") is the pioneer in class action claims administration and mass tort claims management, providing administration services in many areas including antitrust, consumer, mass tort, securities, employment and government enforcement matters. With a dedicated team of professionals and state-of-the-art platforms, Heffler offers services for all phases of the settlement process, including planning and implementing a Notification program, designing custom databases and websites, providing all manner of call services through our enterprise call center, administering the claims process, and handling the distribution stages and escrow agent and tax services for cases. HF Media LLC, our in-house media company, is comprised of a nationally recognized team with more than 50 years of combined media and communication experience, spanning hundreds of court approved legal notice programs. HF Media uses the top research, measurement and evaluation currency in the advertising industry, providing industry-accepted and legally defensible methods for research, demographics, targeting, and overall measurement. Heffler is headquartered in Philadelphia, PA and has additional locations in New Jersey, California, Oregon and Oklahoma.