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Don Maurice, MauriceWutscher, LLP: MauriceWutscher, LLP is a law firm with offices in 10 states whose 25 lawyers represent the financial services industry nationwide. For nearly 30 years, Don has defended the financial services industry in bench and jury trials before various state and federal courts in both individual and class actions. He has successfully litigated for financial services companies before the U.S. Courts of Appeals for the Third and Eighth Circuits and has served as amicus counsel before the Second, Sixth and Ninth Circuit Court of Appeals as well as the US Supreme Court.

Joann Needleman, Clark Hill: Joann is the leader of the Consumer Financial Services Regulatory & Compliance Group. Joann has extensive litigation experience in state and federal courts, successfully defending creditors against claims brought under the Fair Debt Collection Practices Act and Fair Credit Reporting Act as well as state statutes. She provides counsel, consultation and litigation services to financial institutions, law firms and debt buyers throughout the country. Joann is the current president of the Board of Directors of the National Association of Retail Collection Attorneys, or NARCA. She also serves on the Consumer Financial Protection Bureau Consumer Advisory Board.

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Introduction

On July 18, 2015 the FTC **published a declaratory ruling** in response to questions from the telecommunications, telemarketing, and receivables management industries.

This ruling was intended to provide direction and clarity around the definition and use of technology used in contacting consumers; however, many felt this ruling in fact muddied the waters further.

What follows is a Q & A from a webinar we produced. We've allowed the original panelists the opportunity to update and change their answers to reflect evolving best practices.

Additionally, we've included a section on what **the recent CBE ruling** means for the industry.

This free whitepaper is presented as part of our TCPA Toolbox, offering a full suite of compliance and operational tools for the industry.

Our content sponsor for this TCPA topic is **Infutor Data Solutions**. Infutor Data Solutions provides marketers, data analysts, and fraud specialists with elite compiled databases including consumer, business, new movers, public and private telephone numbers, automotive owners, and email data. Infutor's compiled data assets are highly regarded in the information industry and used by many of the largest information companies, non-profit agencies, retailers, automotive marketers, fraud and skip-tracing agencies.

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Question 1: Manual dialing vs. alleged auto dialing

Q: "Our Company currently manually dials all calls. What authority would we cite when we receive a frivolous claim in regards to an auto-dialer that would be most effective in explaining the law to the least sophisticated consumer? There is language in the ruling that the TCPA was never intended to apply to manually dialed calls, but shouldn't we be able to do better than that?"

- **John Bedard**: I would like to suggest that we remove this concept of manually dialing. **Just because you use your fingers to dial a phone number does not mean that the TCPA does not regulate the call you're making**. This question remains timely, because every consumer and every consumer lawyer is going to accuse your machine of being a dialer because of the language of this ruling.

- **Joanne Needleman**: Based upon the ruling, the issue of whether you have a manual or Automatic Telephone Dialing System (ATDS) or not unfortunately is a fact issue.

> ***"Just because you use your fingers to dial a phone number does not mean that the TCPA does not regulate the call you're making." – John Bedard, Bedard Law Group***

- **John Rossman**: If you're certain your device is not an ATDS, because your telephony company told you and your lawyers looked at it and agreed that that's the case, I think you can write a compelling letter, or make a compelling call to opposing counsel or consumer to say that you're not using an ATDS.

- **Don Maurice**: A plaintiff has to have some factual allegation that supports the use of an ATDS. The fact that I use a phone is not enough. The fact that I made a call is not enough. So I usually try to press them on something like that. What do you have to show that it's an ATDS? Give me some ideas of how you support this. Usually what works for a plaintiff is, *I heard clicking*, or *I heard pauses*, or *There were a few seconds before it was connected to someone*. That may indicate it. But if they don't have anything like that, you might be able to successfully challenge the claim.

- **Paul Brennan**: I do not allow my collectors to provide any advice that could be deemed "legal." However, to answer the question, we have been "threatened" by attorneys who are "assuming" we are dialing with an ATDS. We have provided a schematic of our dialing platform which clearly shows the separation. The claims just go away.

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Question 2: Sequential dialing

Q: "If my dialer does not allow sequential dialing, am I okay? Also, would adding contract provisions that prohibit the use or initiation of the feature or software patches that disable the feature be additional best practices?"

- **John Rossman**: The FCC said that there must be more than a theoretical potential that the equipment could be modified to satisfy the auto-dialer definition. **In this case, if there is, in essence, a "kill switch" on it, that might be a very compelling workaround**. Has it been tested in any court? No.

- **Don Maurice**: Remember, with the FCC order we also have to consider the ability to dial from a list of numbers. So when we talk about auto-dialing and dismantling just sequential or random numbers, we need to make sure we're thinking about lists of numbers as well. I think it would be great if the device would melt, at the first ability to try to call more than 100 numbers, with or without human intervention.

- **John Bedard**: I like this approach, because it's a two-step approach. **The first step is to ensure that the thing you have and that you begin with is not a dialer**. **The second step ensures the impossibility of modification.** And so if it is impossible to modify, then you really don't have a dialer to begin with, and we've eliminated this worrisome thing about future capability, because we've inserted impossibility into the process.

A 2-Step Approach to the Issue of Capacity

1. Ensure the technology you're using is not a dialer.
2. Ensure that the technology you're using has no potential for modification.

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Question 3: Reassigned Numbers

Q: "Assuming what you use falls under the definition of an auto dialer, what suggestion does the panel have for reassigned numbers? We know there is no silver bullet but how can we mitigate the risks?"

- **Don Maurice**: It's very important to stress consent, and all the different ways that you have and get consent.

- **John Rossman**: Part of your scripting, when you do get someone on the phone, must be to get their consent to call them back in the future. This won't work for wrong numbers, but once you get that person on the phone, you confirm it's the right party, and then you get that consent.

- **John Bedard**: The other thing that the FCC suggested was inserting contract terms that require consumers to notify creditors when they stop using or abandon telephone numbers. Additionally, the FCC suggested that if the caller [e.g., a debt collector] ends up making a call as the result of the consumer's failure to provide that notice, then there's a claim against the consumer who didn't provide that notice that they stopped using that number.

  One of my big proposals to my own clients and to folks who ask is that we, as an industry, really need to get creditors and our own clients on the front end of obtaining consent, and obtaining the proper kind of contract terms to protect against that risk downstream. That's not a perfect answer for what to do today about reassigned numbers, but it is something that you can begin to do in the future to help reduce that risk.

- **Don Maurice**: Is there a possibility of a bona fide error defense in the TCPA? I don't see it. I don't see how it helps that much in the real dollar cost of defending these, unless the courts begin to see it as a means to escape liability, which you took all the steps you could to avoid calling a reassigned number. And then perhaps it means something.

- **Paul Brennan**: We all use cell phone scrub services. Some now provide processes for identifying reassigned numbers. Considering the litigious environment we all work in, the cost of the service far outweighs the cost of the product. Just another "cost of doing business."

- **Caren Enloe**: Unfortunately, it's a risk you can't mitigate, particularly where the calls go to an unidentified voice mail. The best thing you can do is train your collectors to look for red flags like does the voice mail identify the phone's owner as someone other than your consumer. The concern is there are people buying up burner phones and waiting for reassigned calls and then making money on those. There is no bona fide error defense and the FCC only gives you one free call.

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Question 4: Cell Phone or Not?

Q: "If a consumer states that you have reached them on their cell phone, and they do not want further calls at that number at the end of it, and if the agency is certain it is *not* a cell phone, what options does it have? It seems as though the cell phone excuse is a simple way to stop all collection calls."

- **John Rossman**: If the consumer says stop calling me, you have to stop calling them, regardless of whether it's a cell phone or a land line. The FDCPA prohibits calls with intention to annoy, abuse or harass. If the debtor says stop calling me, any calls after that, so goes the consumer attorney argument, are made with an intention to annoy, abuse or harass.

- **Paul Brennan**: If we come across a consumer that requests no calls, it immediately becomes a "cease and desist." We have determined that this class of consumer is likely not willing to pay and we refocus our efforts on those that may.

- **Caren Enloe**: I recommend stop calling. At a minimum, that is a request to cease and further contact at that number and future calls are going to run amuck of the FDCPA and CFPB's UDAAP umbrella.

***One of my big proposals to my own clients and to folks who ask is that we, as an industry, really need to get creditors and our own clients on the front end of obtaining consent, and obtaining the proper kind of contract terms to protect against that risk downstream. That's not a perfect answer for what to do today about reassigned numbers, but it is something that you can begin to do in the future to help reduce that risk.* – John Bedard, Bedard Law Group**

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Question 5: Challenges to the Ruling

Q: "There have been challenges made against this FCC TCPA ruling. Does anybody have any insight into the status of those? Is there any hope out there for success on that front?"

- **John Rossman**: I think until this affects an industry that's going to resonate with the politicians, we won't see any action from the political side.

  As far as the D.C. Circuit is concerned, I know I was reading just the other day that the D.C. Circuit revived a lawsuit that had been previously dismissed, challenging the authority—actually challenging the very existence and structure of the CFPB.

Question 6: Does one consent cover all accounts?

Q: "If you have one account that you have prior express consent, and you have another account that you don't, if the call is made on the dialer for the prior express consent call, can you talk about all of the accounts for that consumer?"

- **John Bedard**: The FCC says no. From their 2008 declaratory ruling, **consent is unique to the account.**

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Question 7: Patient Billing Calls

Q: "Our company's patient-generated calls in reference to physicians' billing: we currently use TCN ADTS and VoApps. How does the TCPA ruling apply?"

- **Don Maurice**: Certain exemptions were made for healthcare, but I do not believe they apply to billing. You will still need consent.
- **Joann Needleman**: If you're contacting the consumer because they have an appointment, their lab results, directions to the hospital, your medication, your refills, those are pro-consumer. But the minute you ask the consumer for their co-pay or anything else, that is not part of the exemption.

Question 8: Revocation of Consent

Q: "How and when can it be revoked?"

- **Don Maurice**: Every contact with that person that you're calling should also involve an attempt to reengage consent, no matter if you have it or not.
- **John Bedard**: In my view, because of what the FCC has said about revocation, it is as important as consent. If you don't have processes, mechanisms, tools in your office to capture revocation when it happens, then having consent isn't any good. If consent can vanish as quickly as you got it, and you don't have a way to capture it, that's a problem.

  If your collection platform does not have a convenient way to easily document both consent and revocation of consent, that's going to be a problem for your agency.
- **John Rossman**: Look out for letters revoking consent, faxes revoking consent, someone going to your website, some kind of chat function on your website, emailing revoking consent. You need to have all your inbound channels of communication aligned so you can capture those revocations of consent and act on them quickly.

  I've had a lot of people ask me, does that mean one contact? No, no, no. That means one *call*. So if that person doesn't answer, you hit a voicemail, that's your one bite. It's not one call where you actually talk to the person.

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- **Caren Enloe**: According to the FCC Order, consent generally may be revoked through any reasonable means and the caller may not dictate how revocation may be made. The FCC therefore held that "the consumer may revoke his or her consent in any reasonable manner that clearly expresses his or her desire not to receive further calls, and that the consumer is not limited to using only a revocation method that the caller has established as one that it will accept." Id. at ¶ 70. This means that consent can be revoked orally on the phone, as well as in writing – anything that is "reasonable" and I would expect that term to be construed liberally. It is imperative for company employees to be properly trained to recognize when consent is being revoked, to document revocation, and to make sure that the number in question is properly designated such that it does not end up in further dialer campaigns or auto dial buckets.

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Question 9: Does Consent Travel?

Q: "As a third-party agency, if my client who placed an account in my office for collection received consent to call a cell phone, does this consent apply to me as a third-party agency?"

- **Caren Enloe**: Yes. Both the 2008 and 2015 orders address this and answer the question affirmatively, but I would caution third parties to make sure the consent provided is of the correct scope. For instance, if the consent language is expressly provided and only addresses automated dialing but not automated messaging, that could become a problem.

- **John Bedard**: We can't forget the 2008 declaratory ruling which answered the question in the affirmative in the narrow context of credit applications. When you're applying for credit, if you include your phone number in the credit application, then the FCC thinks that that is adequate consent.

  And then the FCC went further in that order to say, and when you do have that consent, the agents that you hire to make calls on your behalf can also benefit from that consent. But the liability also travels back up the chain as well. So if consent follows the chain of agency, so too does liability follow it back up.

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Question 10: What, If Anything, Does the CBE Decision Change?

On March 30, insideARM reported on this headline: "**CBE Group Wins Landmark TCPA Decision Regarding its Patent-pending Product Manual Clicker Application.**"

Tim Bauer added this "insideARM Perspective" to his piece:

> This case should be closely reviewed by the ARM industry. It is a significant victory on a significant issue in TCPA cases. insideARM contacted both CBE and the attorney that represented CBE in the matter for comment.
>
> Dale Golden, CBE's Attorney at Golden Scaz Gagain, PLLC commented:
>
> "We view this decision by the Court as confirmation that industry leaders like CBE can protect themselves from TCPA liability by designing products and procedures to ensure calls placed do not fall under the purview of the statute. While the concept of 'human intervention' has been subject to various interpretations by different courts, this decision leaves little doubt that CBE's MCA lives up to its designer's intent—protecting creditors and agencies from TCPA liability."
>
> Mike Frost, CBE Chief Compliance, Sales Officer and General Counsel reacted:
>
> "CBE is humbled by the Court's decision that affirms the compliance of our Manual Clicker Application. We're grateful to the CBE family for the hard work and investment necessary to create this innovative solution and to Dale Golden for his work in representing CBE in this case."
>
> Finally, Chad Benson, CBE President and Chief Operating Officer noted:
>
> "This very important decision from the Court validates the time, money and effort invested in our TCPA-compliant solution. This important ruling affirms this powerful compliance tool protects both CBE and its clients from TCPA risk, while eliminating performance and regulatory problems associated with other dialing alternatives."

While it's true that this is a significant victory on a TCPA issue – it's a significant victory for CBE Group, and probably shouldn't be seen as a victory for the industry as a whole. This was one case where the industry got lucky: the right district, the right judge, and the right plaintiff, who had some issues presenting the case.

The "clicker" idea is an interesting one, and worthy of exploration. However, it remains risky, even if it was successful in this one instance. As Tim Bauer suggested, it's definitely a case that should be closely reviewed and followed by the industry.

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