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Newsletters

Consumer & Class Action Litigation Newsletter - April 2014

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What's Going on at the FCC and Petitions Seeking Rulings on TCPA Issues

On March 25, 2014, the Commissioner of the Federal Communications Commission, Michael O'Reilly, posted an article on the FCC's website entitled: "TCPA: It's Time to Provide Clarity." The article discusses the Commissioner's opinion that the FCC needs to address the increasing number of petitions seeking clarity on TCPA issues. Additionally, the article recommends that the FCC should provide the courts with guidance on the growing TCPA complexities, which are swiftly changing with advancements in technology, changes in communication, and changes in business models. The Commissioner encourages the FCC to address the inventory of petitions seeking rulings on:

> "what it means to initiate a call, whether there is liability for calls made to reassigned phone numbers, whether consent can be obtained through intermediaries, whether consent can be inferred from consumer behavior or social norms, whether devices including smartphones could be considered automatic telephone dialing systems, and what types of faxes are actually unsolicited."

The Commissioner also suggests that the FCC reconsider its own precedent and previous TCPA interpretations.

The FCC is currently reviewing a variety of petitions for declaring rulings regarding TCPA issue with at least one order to be expected as a result. Additionally, the FCC has sought public comments on at least five petitions seeking clarifications of the TCPA as it relates to "capacity" under the definition of an ATDS, whether the TCPA applies to calls made for non-telemarketing purposes, and the meaning of "prior express consent" as related to recycled and reassigned cellular phone numbers. *See, e.g.*, *Communication Innovators,*

Inc. Petition, CG Dkt. No. 02-278 (filed June 7, 2012) (seeks clarification that predictive dials not used for telemarketing and without current ability to generate and dial random or sequential numbers are not ATDS's; item on FCC circulation list); *YouMail, Inc. Petition*, CG Dkt. No. 02-278 (filed Apr. 19, 2013) (seeks clarification that its software which does not have the current capacity to store, produce, or dial random or sequential numbers is not an ATDS and that its software does not initiate calls because it does not cause calls to occur; public comment sought); *Professional Association for Customer Engagement Petition*, CG Dkt. No. 02-278 (filed Oct. 18, 2013) (seeks clarification that a dialing system's "capacity" is limited to what it is capable of doing, without further modification, at the time the call is placed; public comment sought); *Glide Talk, Ltd. Petition,* CG Dkt. No. 02-278 (filed Oct. 28, 2013) (seeks clarification that the TCPA's restrictions on the use of autodialers to call wireless numbers applies only to equipment that could at the time of the call, be used to store numbers or generate sequential or randomized telephone numbers; public comment sought); *United Healthcare Services, Inc., Petition*, CG Dkt No. 02-278 (filed Jan 16, 2014) (seeks ruling that parties are not liable under the TCPA for "informational, non-telemarketing autodialed and prerecorded calls to wireless numbers for which valid prior express consent has been obtained but which, unbeknownst to the calling party, have subsequently been reassigned from one wireless subscriber to another"; public comment sought); *TextMe, Inc., Petition,* CG Dkt. No. 02-278 (filed Mar. 18, 2014) (seeks clarification of the meaning of the term "capacity" as used in the TCPA's definition of ATDS; public comment sought).

The aforementioned recent activity has persuaded some courts to grant motions to stay TCPA actions under the primary jurisdiction doctrine. In analyzing and granting United Healthcare System's motion to stay in a case involving the exact issue presented in United Healthcare Systems' FCC petition, the Eastern District of California reasoned 1) judicial economy weighs against issuing a decision that may be undermined by an anticipated ruling by the governing body; 2) Plaintiff will suffer no further injury while the case is stayed; and 3) the case is in the early stages of litigation and therefore, Plaintiff will not be prejudiced by the stay. *Matlock v. United Healthcare Systems,* 2014 WL 1155541 (E.D. Cal. Mar. 19, 2014). The Western District of Washington similarly granted defendant's motion to stay under the primary jurisdiction doctrine and relying upon Communication Innovators' FCC petition on the issue of "capacity" and the TCPA. *Hurrle v. Real Time Solutions, Inc.,* 2014 WL 670639 (W.D. Wash. Feb. 20, 2014). It should be noted, however, that a number of other courts have denied similar motions to stay.

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Criminal Eavesdropping Statute Found Unconstitutional by Illinois Supreme Court

In *The People of the State of Illinois v. Melongo*, --- N.E. 3d ----, 2014 WL 1096905, the Illinois Supreme Court affirmed the Cook County Circuit Court's ruling that 720 ILCS 5/14-2, commonly known as the criminal eavesdropping statute, is unconstitutional.

In the underlying circuit court action, the defendant was charged with three counts of criminal eavesdropping and three counts of using or divulging information obtained through the use of an eavesdropping device. The basis for the charges is that the defendant had secretly recorded three telephone conversations with a third party, and had posted those recordings on defendant's website. The defendant filed a motion to declare the eavesdropping statute unconstitutional under the due process clauses of both the Illinois and United States Constitutions, arguing no rational relationship existed between the requirement for two-party consent and a legitimate state interest. The Defendant also raised first amendment claims. The Circuit Court found the statute both facially unconstitutional and unconstitutional as applied to the defendant.

The Supreme Court reviewed the ruling *de novo*, under a presumption that the statute is constitutional. The Court addressed the defendant's argument that the statute is overbroad. While the purpose of the eavesdropping statute is to protect conversational privacy, the Court found that the statute, as written, deems all conversations to be private and thus not subject to recording absent consent. This is so even if the participants have no expectation of privacy. Since the statute criminalizes the recording of conversations that cannot be deemed private - *i.e*. -any conversation loud enough that the speakers should expect to be heard by others - the statute's scope is simply too broad. Moreover, the Court found fault with the statute's failure to distinguish between open and surreptitious recording.

The Court concluded that the recording provision of the eavesdropping statute, section 14-2(a)(1), burdens substantially more speech than is necessary to serve a legitimate state interest in protecting conversational privacy. Thus, it is unconstitutional on its face because a substantial number of its applications violate the first amendment. Since the

provision was found unconstitutional, defendant was then in a position "of an innocent party subject to a naked prohibition against disclosure." Accordingly, the Court held that the publishing provision, section 14-2(a)(3), was also overbroad.

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Mortgagor has Standing to Challenge Mortgage Assignment on Grounds that the Assignor Lacked Authority to Assign

In *Sullivan v. Kondaur Capital Corp.*, 88 Mass. App. Ct. 202 (2014), the Massachusetts Appellate Court addressed whether borrowers have standing to challenge mortgage assignments. In *Sullivan*, the borrower mortgaged the subject property to MERS, acting as nominee for WMC Mortgage Corp., its successors, and assigns. MERS thereafter assigned the mortgage to Saxon Mortgage Services, Inc. Saxon then assigned the mortgage to Kondaur. Kondaur foreclosed and purchased the subject property at the foreclosure sale.

The borrowers subsequently filed an action challenging Kondaur's title to the subject property based on an allegation that the signer of the Saxon assignment lacked authority to assign the mortgage. The Appellate Court rejected Kondaur's argument that the borrower lacked standing to challenge the Saxon assignment. That ruling was based on the theory that the borrowers had standing to challenge Kondaur's title to the property, which was based in part on the Saxon assignment.

The Appellate Court adopted the distinction drawn in *Culhane v. Aurora Loan Servs. of Nebraska*, 708 F.3d 282, 291 (1st Cir. 2013) and *Wilson v. HSBC Mortgage Servs., Inc.*, 744 F.3d 1, 12 (1st Cir. 2014) that a borrower has standing only to challenge "void" assignments, not to raise alleged defects in the assignment that would make the assignment "voidable" at the election of one of the parties to the assignment. However, while the Appeals Court cited to the *Wilson* decision, its holding was contrary to *Wilson*. While *Wilson* held that a borrower *lacked* standing to bring a foreclosure challenge based on a lack of authority to assign the mortgage, *Sullivan* held that the borrower *had* standing to challenge the Saxon signer's authority to assign the mortgage.

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Indiana Appellate Court Rules on Whether an Out-of-State Debt Buyer Needs a License

In *Wertz v. Asset Acceptance, LLC*, 2014 WL 1133554 (Ind.App. Mar. 21, 2014), the debtor filed a class action counterclaim under the FDCPA and the Indiana Deceptive Consumer Sales Act because the debt buyer filed a lawsuit against the debtor without first obtaining a license under the Indiana Uniform Consumer Credit Code ("IUCCC"). The debt buyer moved to dismiss the debtor's class action counterclaim because the IUCCC does not apply to out-of-state buyers which have no office in Indiana. The debtor responded to the motion to dismiss by arguing that the debt buyer needed a license under the IUCCC or the Indiana Collection Agency Act ("ICAA"). The trial court held "Wertz's counterclaims under the FDCPA and [IDCSA] are premised on the assumption that Asset needed to have been licensed either under the IUCCC or the [ICAA]. It did not . . .". The debtor appealed.

The Indiana Appellate Court on a matter of first impression unanimously affirmed the trial court's decision to dismiss the class action counterclaim with prejudice. The Appellate Court held that the debt buyer was not required to obtain a license under the IUCCC because it was an out-of-state debt buyer which did not have any physical situs in the State of Indiana. To support its opinion, the Court cited both the commentary to the IUCCC and the Indiana Department of Financial Institutions' publications interpreting the IUCCC's license requirement. The Court found the debtor's argument to disregard the IUCCC's commentary was "without merit" under Indiana law. The Court also found that it must defer to the Indiana Department of Financial Institutions' reasonable interpretation of the IUCCC's license requirement. The Indiana Department of Financial Institutions determined that the IUCCC's license requirement does not apply to an out-of-state debt buyer which does not have a physical situs in Indiana.

For more information, please contact John P. Ryan.

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