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FCC Has Chance To Stem TCPA Reassigned-Number Suits

By **Allison Grande**

Law360, New York (September 02, 2014, 1:34 PM ET) -- The Federal Communications Commission is currently weighing companies' liability under the Telephone Consumer Protection Act for calls and texts sent to reassigned cellphone numbers, and attorneys say the agency could put a significant dent in TCPA litigation by limiting companies' responsibility to verify numbers' owners.

In a recent public notice, the FCC's consumer and governmental affairs bureau announced that it is seeking comment on a petition for an expedited declaratory ruling filed by Rubio's Restaurant Inc. The petition requests that the FCC clarify the TCPA's applicability to nonmarketing calls and texts sent to numbers that have been provided to a company but have subsequently been reassigned to another subscriber.

The Mexican restaurant chain urged the FCC to confirm that callers who obtain prior express consent to send informational communications to a cellphone number provided by employees are not liable under the TCPA if the number is reassigned without their knowledge. It also asked the FCC to add an affirmative, bad-faith defense that releases companies from liability if they can show that the party they intended to contact purposefully delayed or failed to tell the company the number had been reassigned.

"Businesses are frustrated by TCPA lawsuits from plaintiffs who acquire a 'recycled' telephone number," said Scott Shaffer, an Olshan Frome Wolosky LLP partner. "If the FCC allows for a good-faith exception when calling or texting recently reassigned numbers, it would slow down the recent avalanche of TCPA litigation."

Enticed by the potential to recover uncapped statutory damages of between \$500 and \$1,500 per violation, the plaintiffs' bar in recent years **has seized on** ambiguous and outdated language in the TCPA statute, which was drafted in 1991, to support claims that telemarketers and other businesses have peppered consumers with unwanted calls or texts, according to attorneys.

The TCPA mandates that companies obtain prior express consent for nontelemarketing communications made using an autodialer or prerecorded message, which has prompted the swell of suits related to recycled telephone numbers. Consumers who receive numbers that previously belonged to users who had given consent to receive messages can argue the permission is no longer valid.

"The burden on companies is enormous," Sutherland Asbill & Brennan LLP partner Lewis Wiener said. "When someone gives them a cellphone number, the company basically has to ask can they trust it, because they don't know if that person has or may have relinquished the number. It becomes a trap for the unwary."

As the suits continue to mount, the pressure on the FCC to step in and provide some clarity has also increased, attorneys noted.

"There is a lot of confusion over TCPA liability for calls made to reassigned or wrong numbers," Kelley Drye & Warren LLP partner Lauri A. Mazzuchetti said. "If the FCC does not step in and bring some sanity and a common sense approach to the application of this statute ... courts will continue to be flooded by TCPA litigation abuses targeting companies that believe in good faith they are making calls for which they have valid consent, but have no reliable means to determine whether and when a wireless phone number is reassigned."

But while many are pressuring the FCC to weigh in on the issue, not all stakeholders agree that the agency's intervention is necessary.

"It is always impactful when the FCC comments on issues like this, but I think the caselaw has divined a clear and appropriate resolution already: the called party is the party who received the call. Period," plaintiffs' attorney Joseph Siprut of Siprut PC said, noting that courts have laid out viable options to help callers escape liability, such as using an actual person to make the first call or using a reverse lookup to identify the current subscriber.

The Rubio's petition, which was filed on Aug. 15, is the most recent of several petitions currently pending before the FCC seeking to put an end to the raging dispute.

"Every time the FCC starts to focus on the reassigned phone number issue, a different request that raises a slightly different angle pops up," Reed Smith LLP partner Judith Harris said.

United Healthcare Services Inc. filed a petition in January seeking confirmation that parties are not liable for placing informational, nontelemarketing autodialed and prerecorded calls to wireless numbers for which valid prior express consent had been obtained but which, unbeknownst to the calling party, had subsequently been reassigned to another subscriber.

The Association of Credit and Collection Professionals filed its own petition for rulemaking in late January that requested that the commission modify its TCPA rule to, among other things, clarify that prior express consent attaches to the person incurring a debt and not to the specific telephone number provided by the debtor, and to establish a safe harbor for autodialed "wrong number" nontelemarketing calls to wireless numbers.

While the newest petition requests relief similar to its predecessors, it "adds a new wrinkle," Snell & Wilmer LLP partner Becca Wahlquist said. The petition provides a much tighter fact pattern that deals solely with the issue of whether it was lawful to send automated alerts informing employees of food safety concerns affecting a particular restaurant, when the cellphone number that receives the alert no longer belongs to the employee, attorneys noted.

"The petition is far more narrow than some similar ones, in that it does not involve commercial texts or calls and that the messages were intended to go to an employee that has provided express written consent," Klein Moynihan Turco LLP managing partner David O. Klein said. "This would be a good petition for the FCC to consider and rule on in order to help level the playing field."

In deciding the petition and others like it, the FCC will be charged with deciding whether it wants to continue to strictly adhere to the confines of statutory language that was enacted more than 20 years ago, or if there is room to ease the regulations so that unintended mistakes don't prompt a flood of litigation, attorneys said.

"The FCC has a history of reaching decisions that stifle commerce and expose well-meaning American businesses to company-crushing potential damages under the TCPA," said Martin Jaszczuk, Locke Lord LLP's TCPA class action litigation section head. "Rubio's petition presents the FCC with an opportunity to reverse some of that damage."

If the FCC does decide to bend to the mounting pressure to ease its regulations, the ruling's impact will depend on how far it chooses to go to provide companies with a shield against reassigned number claims, according to attorneys.

On the one hand, the commission could limit its declaration to the holding that employers can't be held liable for calling a mobile phone number that has since been reassigned without notice, which would buck the general trend among federal courts to assign the brunt of the risk to the callers.

However, the commission would make a larger impact if it sides with the second part of the restaurant's request, which is to create an exemption if the subscriber who has been reassigned to the number has a track record of allowing calls to pile up in order to multiply their potential statutory damages.

"Although the burden of proving such a defense would rest on the caller, validating such a defense could help to tilt the balance of TCPA litigation toward defendants in cases involving 'professional plaintiffs,'" Vinson & Elkins LLP partner Jason Levine said. "From the perspective of callers, this would be a positive development and a potential deterrent to TCPA lawsuits."

Attorneys are less than confident the FCC would grant such a sweeping exemption, given the potential difficulties it could present for consumers who claim they tried to squelch the unwanted communications but that their requests were not received. However, attorneys noted that any movement by the FCC on the issue at this point would be welcomed.

"A lot of stakeholders are waiting with bated breath to see what the FCC is going to do with this," Wahlquist said. "Scores of companies are facing reassigned number TCPA lawsuits, and there's hope that the FCC will say something that really puts some common sense back into the situation."

--Editing by Katherine Rautenberg.

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