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Encore Capital Rages Against the TCPA Machine, Noble Corp. Educates, PACE Elucidates in New FCC Comments (TCPAland Comment Review Vol. 1)

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Well yesterday was the deadline for supplemental comments on the FCC's big TCPA Public Notice. So today I begin the process of reading and digesting these things and reporting to all of you ?

I have just reviewed these in the order I happened to open them. No editorial discretion exercised here. Have fun. I did. More to come tomorrow.

Louisiana Credit Union League Comment

Well we're off to a hot start with the Louisiana Credit Union League discussing a case called "*March v. Crunch Sand Diego, LLC*" throughout its comment. Eesh. But the LCUL comment is otherwise thoughtful and discuses the interaction between *Marks* and cell phones thusly: "If it is possible (as we believe it is) that a cellular phone in regular use with a stored contact list can be conceivably determined to be problematic for a business to use to make reasonable business communications as in the case of credit unions with its members, this matter cries for regulatory clarity and an application of a reasonableness standard that can cover not just this generation of technological communications – but innovations yet to come in this arena." Comment can be found here: Louisiana Credit Union League – FCC Comment

Noble Systems Corporation

Now we're talking. Noble comes out swinging noting that *Marks* "essentially adopted the plaintiff's proposed construction verbatim…[with] the resulting holding of the court [] inconsistent with itself (as there are two differing statements of the holding in the decision), overly broad, and ambiguous as to its scope and application." The comment then points out that "Because random and sequential number generators unequivocally stored numbers that were to be dialed, it makes sense to read the statutory language as proposed by the defendant, consistent with its plain meaning." From which Noble concludes that the statutory language is not ambiguous: "Rather, the statutory language appears deliberately and carefully crafted to cover two known modes of operation for dialing numbers using random or sequential number generators." Nice point.

Noble further drives home the FCC's lack of authority to edit an unambiguous statutory definition:

“The Commission should be cognizant that the statutory language is not ambiguous, and is deliberately crafted to cover the known contemporaneous dialer technology at the time the TCPA was passed. The Commission does not have any basis from deviating from the plain meaning of the ATDS statutory definition in the TCPA in forming its rules.”

In the remainder of Noble’s robust comment, it makes the following points with thorough analysis and copious factual support:

- If a digital circuit produces a number, the number must be stored in memory in some manner. Without storing the number, the number does not exist. (Does this sound like Sarte to anyone else?)

- Congress knew about the status of technology in 1991, which plainly included numerous dialing systems that indeed randomly or sequentially created numbers to be dialed;

- The *Marks* definition does not define the phrase “automatic” so the formulation is essentially meaningless–“The scope of the term “automatically” is subject to interpretation, and is likely to result in extensive litigation to define its metes and bounds. The scope of how proximate human intervention is required to accomplish call origination would have to be defined in excruciating detail to provide guidance to call originators.”

- The word “dialing” needs to be defined because “modern VoIP and wireless phones typically utilize a form of “en-bloc” signaling from the phone device to the switch, where all the telephone digits are sent in one message…”The switch receiving the call request with the digits cannot differentiate between the user having manually selected all the digits versus the user pressing a speed dial (or redial) function.” (Nice point!)

- And in a brilliant–and much needed–analysis of the FCC’s purported ability to expand the TCPA to keep up with evolving technologies, Noble points out: “There is no basis whatsoever to conclude that Congress intended, nor that the TCPA authorizes, the Commission to adapt or extend the statutory language of an ATDS in anticipation of the development of new technologies. The only authority granted to the Commission was to exempt new technologies. “

Really magnificent stuff guys. *Begins a slow clap.* I encourage all of you in TCPAland to join the the applause and also review the full comment found here: Noble Systems Corp. – FCC Comment

Ohio Credit Union League

Neat and tidy comment from the PCUL asks the FCC to clarify that the TCPA really only applies to telemarketing calls. Also raises recent First Amendment challenges as a reason to consider trimming back the scope of the statute. Urges that the statutory definition should be faithfully applies (including random or sequential number generation.) Concludes with request for “present” as opposed to “potential” capacity.

Nice stuff Paul and Miriah. Full comment here: Ohio Credit Union League – FCC Comment

PACE

The Professional Association for Customer Engagement has been a long-time TCPA reform advocate. Their comment is suitably and predictably well presented.

PACE starts by reminding the FCC that Congress made a policy choice when choosing to restrict dialers that use random or sequential number generation because they tend to tie up emergency lines and hospitals.

PACE then does a very nice job of mapping the history of the FCC's 1992 and 1995 orders respecting the Commission's earliest articulation of what random and sequential number generation means. (I presume you folks pulled that from TCPAland's Key FCC Orders analysis?)

PACE next borrows copiously from the outstanding ruling in *Pinkus* to explain why *Marks* just flat misread the TCPA's ATDS definition. How embarassing.

PACE also blisters the logic that Congress ratified the FCC's 2015 Omnibus because Congress cannot, by silence, bless an interpretation contrary to the plain meaning of an Act. Citing Ashton v. Pierce, 716 F.2d 56, 63 (D.C. Cir. 1983) (Nice find!)

It concludes with a searing one liner: "A system is not an ATDS simply because it can automatically call telephone numbers from a list—a function not covered by the statute."

Well done MM&S. The comment can be found here: Professional Assoc. for Customer Engagement (PACE) – FCC Comment

Wisconsin Credit Union League

Here's a nice little comment with a polite Midwestern feel.

The WCUL asserts: "We respect and support the rights of consumers to be free from unwanted "robocalls," but unfortunately, the TCPA has been interpreted in ways that unduly impede credit unions' ability to reach members for legitimate business purposes." It also suggests that random and sequential number generation is the hallmark of an ATDS: "That term should mean only equipment that has the present capability to generate random or sequential numbers and to dial those numbers without human intervention." The comment is short and to the point, but well worded and–I suspect–it will be well received given the more aggressive tone of other comments.

The comment can be found here: Wisconsin Credit Union League – FCC Comment

Allstate

First, shout out to our long time followers–hi guys!

Allstate's Comment takes a nice pro-consumer bend, reminding the FCC of the importance of immediate communications in times of natural disasters like Hurricane Florence and Michael. As the Comment puts it: "Contacting our customers through systems that have stored information and which can connect them immediately to our teams is essential to our mission of protecting them from life's uncertainties." Well said.

As with other Commenters, Allstate urges the FCC to: "adopt a standard that considers the actual use of the equipment and focuses on its ability to randomly generate and dial numbers and not

merely call numbers from electronic databases.

The Comment also seeks clarity on “capacity” linking back to the smartphone issue: “using the *Marks* decision as a guideline of what constitutes an ATDS, every smartphone could qualify under the definition. Such a broad definition could continue to expose Allstate and its agents to frivolous and potentially crippling litigation aimed at not helping consumers but rather benefiting plaintiffs’ attorneys seeking to exploit large companies under the guise of consumer protection. The law should not be a “gotcha.””

Another brief comment, but very punchy and impactful. Good work Maria and team! The comment can be found here: Allstate – FCC Comment

Encore Capital Group

Here’s a nice one to end on for the day. Encore begins by noting that its never done this before but it realizes now how important this stuff is: “To date, Encore has purposely abstained from directly commenting on the definition of an automatic telephone dialing system (“ATDS”), but we feel compelled to comment at this pivotal juncture given the importance of this issue to the one out of five American consumers our company works with.”

The Encore comment is fearless in attacking *Marks.* It states: “The Ninth Circuit literally re-wrote the statute so as to separate from the same clause the requirements “to store numbers to be called” and “using a random or sequential number generator.”” And it draws a stark conclusion: “[*Marks*] subject[s] to the Act’s coverage any conventional smartphone that can store and then dial numbers. This means that, for the 77% of Americans who own smartphones,6each is “a TCPA-violator-in-waiting, if not a violator-in-fact.””

Encore goes on to characterize the *Marks* formulation as “convoluted,” a “drastic[] alter[ation]” of the statute, an “outlier,” and “directly contradict[ing]” *ACA Int’l.* And then it asserts: “*Marks* took the liberty of creating its own novel reading (if not blatant re-writing) of the statute and came up with the same result that the ACA ruling vacated.”

Way to jump in with both feet!

Encore then engages in an impassioned defense of predictive dialers and explains why they do not meet the statutory ATDS definition. It concludes with a reminder that TCPA litigation is out of control and industry needs some help from the FCC. The Comment concludes with a fitting call for the FCC to “end the madness”:

“For the past decade, businesses have been operating in a state of limbo, unsure how to define an ATDS and staring down the barrel of potentially door-shutting litigation. Between the pervasive confusion over the definition of an ATDS and the abusive litigation environment, it has been a veritable minefield for legitimate callers to reach their customers. Now is the time for the FCC to put an end to the madness.”

You can almost feel the angst in this comment. But for an industry that has, indeed, been oppressed and picked apart by frivolous litigation over the last decade, Encore’s aggressive Comment must feel good to read. Nice to see someone is truly fighting to stem the tide here beside just little ole me. Here’s looking at you Sheryl and Tamar!

Encore's Comment can be found here: Encore Capital Group – FCC Comment

Part 2

Part 3

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