CLIENT ALERTS & INSIGHTS

FCC Petition May Create Safe Harbor For TCPA Consent

JUNE 18, 2020

Authors: Laura E. Kogan

The Federal Communications Commission ("FCC") seeks comment on the Petition for Expedited Declaratory Ruling Regarding the Application of 47 U.S.C. § 227(b)(1) of the Telephone Consumer Protection Act ("Petition") filed by Assurance IQ, LLC, CG Docket No. 02-278.

For any company that uses telephone services to contact existing or potential customers, this is a significant Petition. The Petition arises out of a lawsuit filed against Assurance IQ, LLC by serial-TCPA litigant James Shelton. On May 11, 2019, an individual went to Assurance's website and filled out a request for an insurance quote, providing James Shelton's telephone number, address, and email, plus other information relevant to the request for a quote. The website contained all appropriate TCPA disclosures for valid consent.

In reliance on this consent, Assurance called Shelton. Shelton sued Assurance in a putative class action, claiming that it was an unknown third-party that provided consent. (Go figure that all of these serial-plaintiffs conveniently keep having supposedly "unknown third-parties" putting their information into lead generation websites.) Assurance has filed a Petition with the FCC requesting a declaratory ruling on two issues:

1. "Confirming that where it is determined that a calling party has sufficient information to establish a 'reasonable basis to believe that they have valid express consent of the called party to make the call' the caller may rely on that consent for TCPA purposes until such time as the called party claims to the caller that he or she did not provide the consent;" and
2. "Playing [] a brief, prerecorded introductory message on an otherwise live call does not convert the entire call into a prerecorded or artificial call within the scope of the TCPA."

While the second issue is certainly important, the first issue is critical for any company that contacts prospective or even existing customers by telephone. Even setting aside the "unusual" circumstances involving James Shelton, there can be myriad ways that companies inadvertently call a telephone number in earnest believing consent to be valid, only to discover that it accidentally called the wrong person or telephone number. These situations are not even limited to telemarketing. For example, there have been a number of cases against medical providers or healthcare companies, such as when a patient accidentally provides an old telephone number for contact or the patient transposes a digit (e.g., writing "-1243" for his or number instead of "1234") when providing it to the medical facility.

Yet callers, through no fault of their own, face immense and potentially crippling statutory damages under the TCPA for calling such telephone numbers. And while some courts have (rightly) held that callers may rely on a reasonable belief of consent, other courts have not followed suit. The

Assurance Petition gives the FCC the opportunity to provide much needed clarification to protect callers who act with a reasonable belief that they have consent.

For additional information about the Assurance Petition and what it means for defendants, marketing companies, financial institutions, health care companies, and debt collection activity, please contact:

David M. Krueger at dkrueger@beneschlaw.com or 216.363.4683; or

Laura E. Kogan at lkogan@beneschlaw.com or 216.363.4518.