Cullen | Dykman

FCC Denies Exemption from TCPA for Mortgage Servicing Calls

January 6, 2017

The Federal Communications Commission ("FCC") has denied a request for an exemption from the Telephone Consumer Protection Act ("TCPA") that would have allowed lenders to make auto-dialed mortgage servicing calls to wireless telephone numbers without the consent of the person being called.

The TCPA was enacted in 1991 to address certain calling practices that were believed to be an invasion of consumer privacy and a risk to public safety. Along with the FCC's implementing rules, the TCPA prohibits auto-dialed calls to wireless telephone numbers except when made: (i) for an emergency purpose, (ii) solely to collect a debt owed to or guaranteed by the United States, (iii) with the prior express consent of the called party, or (iv) pursuant to a FCC-granted exemption, which exemption power is exercised in very limited and narrow circumstances. This encompasses both voice and text calls, as well as short message service ("SMS") calls and text, calls made using Internet-to-phone technology.

The Mortgage Bankers Association ("MBA") filed a petition requesting the FCC to exempt non-telemarketing mortgage servicing calls to wireless telephone numbers from the prior-express-consent requirement. Examples of the types of "mortgage servicing" calls that MBA sought to exempt include calls to determine the reasons and nature of delinquency, and to counsel homeowners on their obligations and potential options. MBA cited in its petition that in the case of a mortgage default, mortgage servicers must be able to speak to delinquent borrowers as early as possible to communicate the borrower's options.

The FCC used a three-part test to determine whether it would grant the exemption, analyzing (i) whether MBA was clear that the messages would be free to the end user, (ii) whether the messages were time-sensitive or some other compelling public interest supports timely receipt of these calls, and (iii) whether the caller could apply conditions to the exemption to preserve consumer privacy interests.

The FCC first found that MBA failed to show that it was capable of meeting the requirement that the mortgage servicing calls would not be charged to the called party. Further, MBA failed to show that the exempted calls would not count against any plan limits on the consumer's voice minutes or texts. Second, the FCC found that even if MBA had satisfied the "no charge" requirement, the public interest in and need for timely delivery of these calls, as described by MBA, does not justify setting aside a consumer's privacy interest in favor of the exemption. The various federal and state laws that MBA cited as requiring outbound mortgage servicing calls do not require telephone contact until a borrower is at least 20 to 36 days into the delinquency period; therefore, the FCC found that these calls lack the urgency present in prior exemptions that have been granted (i.e., exemption granted for robocalls to alert consumers to possible fraudulent credit card transactions on their accounts or data breaches of their identity). The FCC also found that MBA's assertion that autodial calls are necessary for mortgage servicers to effectively communicate with their customers was unsupported due to the fact that mortgage servicers have other effective means to make contact with customers and that such calls can be made without the use of an autodialer.

Even though the exemption was denied, the FCC pointed out in its order that mortgage servicers are free to autodial consumers without an exemption by simply relying on the prior express consent a consumer provides when including their wireless telephone number on a mortgage application. Also, a mortgage servicer may obtain new consent by one of many available means, including by email.

Please note that the TCPA only applies to auto-dialed calls to wireless phone numbers. Calls to wireless numbers that are not auto-dialed, and calls to landlines, are not prohibited by the TCPA.

The MBA has filed an application with the FCC for review of the FCC's order. That application is currently pending.

If you have any questions regarding this advisory or the TCPA in general, please feel free to contact Joseph D. Simon at 516-357-3710 or via email at jsimon@cullenanddykman.com, Kevin Patterson at 516-296-9196 or via email at kpatterson@cullenanddykman.com, or Elizabeth A. Murphy at 516-296-9154 or via email at emurphy@cullenanddykman.com.

Practices

- Banking and Financial Services
- Regulatory and Compliance

Industries

- Financial Institutions

Attorneys

- Joseph D. Simon