



Maybe You Can't Hear Me Now: Autodialer Restrictions

Child support programs across the county are considering various new technologies to enhance collections and services. The federal Office of Child Support Enforcement (OCSE) recognizes the importance of frequent communication and early intervention techniques to engage parents and prevent accumulating arrearages. As part of the Project to Avoid Increasing Delinquencies (PAID), OCSE published a Practice Guide for States¹ that suggested programs to consider:

- Automatically reminding parents of appointments and hearings by phone to encourage their involvement
- Features such as an autodialer, predictive dialing, or short message service (text and voice) to automatically call a parent when payments are missed
- Automatically reminding parents of their responsibilities at intake, after order establishment, after non-payment, and upon notification of unemployment

But the Telephone Consumer Protection Act of 1991 (TCPA) restricts the use of auto dialers and other telephone technology. Because the TCPA contains a private right of action and provisions for damages, it is important for Title IV-D agencies to consider the relevant provisions of the TCPA when deciding if and how to use automated telephone equipment for child support services.

TCPA Restrictions

Twenty-three years ago, Congress enacted the TCPA to address the growing number of consumer complaints about telephone technology abuses.² The law bans certain practices invasive of privacy and requires the Federal Communications Commission (FCC) to prescribe implementing regulations.³

Under the TCPA, it is illegal to make a call to a cellular phone, without prior express consent, using either (1) an automatic telephone dialing system or (2) an artificial or prerecorded voice.⁴ The prohibition includes both voice and text calls,⁵ and applies to all non-emergency calls regardless of content.⁶

¹ Project to Avoid Increasing Delinquencies, Practices Guide Version 2.0, Federal Office of Child Support Enforcement, Administration for Children and Families, July 2008

² *Mims v. Arrow Fin. Servs, LLC*, 132 S.Ct. 740, 744 (2012)

³ *Id.*

⁴ 47 U.S.C. § 227(b)(1)(A)(iii)

⁵ Rules and Regulations Implementing the TCPA, 18 FCC Rcd. 14014, 14115 (2003) (“2003 FCC Rules”)

⁶ 47 U.S.C. § 227(b)(1)(A); *see also Gager v. Dell Fin. Servs.*, 727 F.3d 265, 273 (3d Dist. 2013) (“The only exemptions in the TCPA that apply to cellular phones are for emergency calls and calls made with prior express consent.”)

The TCPA also outlaws calls to a residential line, without prior express consent, using an artificial or prerecorded voice unless the purpose of the call is exempted by FCC rules or orders.⁷ Among those FCC exemptions are calls made for a non-commercial purpose or by a tax-exempt nonprofit organization, and commercial calls that do not contain an unsolicited advertisement.⁸

Automatic Telephone Dialing System (Autodialer)

The TCPA defines an autodialer as “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”⁹ In 2003, the FCC interpreted this definition as including a predictive dialer, where the dialer has the capacity to randomly generate and dial sequential telephone numbers *even if* that capacity has not been enabled.¹⁰

The FCC clarified in 2008 that the TCPA applies to predictive dialers using call lists, as opposed to randomly or sequentially generated telephone numbers.¹¹ The key is “the capacity to dial numbers without human intervention.”¹²

Prior Express Consent

The TCPA’s restrictions on calls to cellular and residential telephones do not apply if the caller has obtained prior express consent. In 1992, the FCC explained that “persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number that they have given, absent instructions to the contrary.”¹³ Today, the FCC’s website tells consumers: “Your written or oral consent is required for ALL autodialed or prerecorded calls or texts made to your wireless number.”¹⁴

The FCC has clarified that providing a cellular phone number to a business (as part of a credit application, for example) “reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.”¹⁵ Almost all courts to date have followed the FCC ruling and have held that providing a phone number to the caller constitutes prior express consent.¹⁶

⁷ 47 U.S.C. § 227(b)(1)(B)

⁸ 47 U.S.C. § 227(b)(2)(B)(i), (ii)

⁹ 47 U.S.C. § 227(a)(1)

¹⁰ 2003 FCC Rules at 14092

¹¹ Rules and Regulations Implementing the TCPA, 23 FCC Rcd.559, 566 (2008) (“2008 FCC Rules”)

¹² *Id.*

¹³ Rules and Regulations Implementing the TCPA, 7 FCC Rcd. 8752, 8769 (1992)

¹⁴ <http://www.fcc.gov/guides/robocalls> (last visited November 1, 2014)

¹⁵ 2008 FCC Rules at 564

¹⁶ See *Chavez v. Advantage Group*, 959 F.Supp.2d 1279, 1282 (D.Colo. 2013) (listing cases following the 2008 FCC Ruling on prior express consent); *but see Mais v. Gulf Coast Collection Bureau, Inc.*, 2013 WL 1899616 (S.D. Fla. 2013) (refusing to follow the 2008 FCC Ruling as inconsistent with the TCPA’s requirement of “express” consent)

As to the type of consent required, the FCC held that “telemarketing” calls to cellular phones required written consent, but reaffirmed that only oral consent was needed for noncommercial calls.¹⁷ Since the burden to prove prior express consent is on the caller,¹⁸ records demonstrating that the cellular phone number was provided in writing or oral consent was given should be maintained. It is also important to note that the TCPA allows consumers to revoke their prior express consent at any time.¹⁹

Artificial or Prerecorded Voice Systems

The TCPA requires that all artificial or prerecorded telephone messages state, at the beginning of the message, the identity of the caller.²⁰ In addition, the message must contain either the caller’s telephone number or address. If the called party hangs up, the system must automatically release the line within 5 seconds.

Exemptions for Residential Line Calls

The TCPA contains different standards for calls to cellular phones versus residential lines.²¹ The exemptions that the FCC provided by rule for calls to residential lines include²²:

- A call “not made for a commercial purpose”
- A call “made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing”
- A call “made by or on behalf of a tax-exempt nonprofit organization”

The FCC rules define “telemarketing” as a telephone call “for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services.”²³ Because child support collection arguably does not fall within the definition of telemarketing, calls to residential line consumers likely are permitted without prior consent.

State Agencies and Sovereign Immunity

The Eleventh Amendment guarantees that a state and its agencies will be immune from lawsuits brought in federal court unless the state consents or Congress expressly

¹⁷ Rules and Regulations Implementing the TCPA, 27 FCC Rcd.1830, 1841 (2012) (“2012 FCC Rules”)

¹⁸ 2008 FCC Rules at 565

¹⁹ *Gager v. Dell Fin. Servs.*, 727 F.3d 265, 270-71 (3d Cir. 2013)

²⁰ 47 U.S.C. § 227(d)(3)

²¹ *Compare* 47 U.S.C. §227(b)(1)(A)(iii) (prohibiting calls without prior written consent using an automatic telephone dialing system or artificial/prerecorded voice to a cell phone) *with* 47 U.S.C. §227(b)(1)(B) (same for residential lines *but* allows FCC to provide exemptions by rule or order)

²² 47 C.F.R. §64.1200(a)(3)(ii)-(iv)

²³ 47 C.F.R. §64.1200(f)(12)

abrogates that immunity.²⁴ Congress may abrogate the states' sovereign immunity only by "unequivocally express[ing] its intent to abrogate the immunity" in a clear statement within the law itself.²⁵

The TCPA contains no statement indicating that Congress intended to abrogate the states' sovereign immunity protection. Child support programs operated by a state agency, therefore, may have some protection from TCPA lawsuits brought in federal court. But county-based child support programs and private vendors generally do not enjoy such immunity.²⁶ Further, since the TCPA allows private causes of actions in state courts, state-run programs need to consider whether state law provides similar immunity.

Violations of the TCPA

Individuals have a private cause of action in either state or federal court for violations of the TCPA.²⁷ Congress expressly provided that state laws outlawing the use of automatic telephone dialing systems or artificial or prerecorded voice messages are not preempted by the TCPA.²⁸ Further, the Attorney General of each state has the ability to file civil lawsuits in federal court seeking to enjoin individuals violating the TCPA and for damages.²⁹ Notice must be provided to the FCC and it has the right to intervene.³⁰

Damages under the TCPA are actual monetary loss or \$500 for each violation, whichever is greater.³¹ For willful or knowing violations, the court has the discretion to increase the amount of the award up to triple the original amount—\$1,500 for each call to an individual's cellular phone without consent.³² A cumulative damage award under the TCPA, therefore, may be very expensive.³³

Conclusion

Modern telephone technology can help child support programs engage parents by providing them with relevant information and helpful reminders in an efficient and inexpensive way. Yet the TCPA's restrictions on this technology are substantial and

²⁴ U.S. Const. amend. XI; *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974)

²⁵ *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996); *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 786 (1991)

²⁶ See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (local government entities such as counties usually are not entitled to Eleventh Amendment immunity)

²⁷ 47 U.S.C. §227(b)(3); *Mims*, 132 S.Ct. at 749-50

²⁸ 47 U.S.C. §227(f)(1)

²⁹ 47 U.S.C. §227(g)(1)

³⁰ 47 U.S.C. §227(g)(3)

³¹ 47 U.S.C. §227(b)(3)(B)

³² 47 U.S.C. §227(b)(3)

³³ See, e.g. *Maryland v. Universal Elections, Inc.*, 729 F.3d 370 (4th Cir. 2013) (affirming \$1,010,000 in damages for TCPA violations on election night in 2010)

damages may be extensive. By carefully obtaining consent from parents to use their cellular telephone number, or only using residential telephone numbers to contact them, programs may be in the best position to avoid TCPA violations.

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