

UTILITIES AND TELECOMMUNICATIONS ALERT

SIXTH CIRCUIT FINDS PRIOR EXPRESS CONSENT IN TCPA CLAIM DESPITE TWO INTERMEDIARIES

The United States Court of Appeals for the Sixth Circuit recently held that debtors' who gave their cellular telephone numbers to a hospital in completing authorizations as part of their hospital admissions gave "prior express consent" to receive calls from hospital's anesthesiology provider's debt collector. *Baisden v. Credit Adjustments, Inc.*, No. 15-3411, 2016 WL 561735 (6th Cir. Feb. 12, 2016). The Telephone Consumer Protection Act ("TCPA"), codified at 47 U.S.C. § 227(b)(1)(A)(iii), prohibits making a call using an automatic telephone dialing system or an artificial or prerecorded voice to a wireless telephone number without obtaining prior express consent. The *Baisden* opinion analyzes the meaning of "prior express consent" against the background of the Federal Communications Commission's ("FCC") previous prior interpretations of the phrase.

In *Baisden*, Plaintiffs received medical care from a hospital. They also received anesthesiology services from a separate entity within the hospital. When Plaintiffs failed to pay their bills, the anesthesiology company transferred the delinquent accounts to a debt collection agency. The debt collection agency called Plaintiffs cellular telephone numbers in an attempt to collect the debt. Plaintiffs filed suit alleging violations of the TCPA.

As part of Plaintiffs admission to the hospital, they executed patient consent and authorization forms and provided their cellular telephone numbers. Importantly, these forms advised Plaintiffs that, "I understand that [the hospital] may use my health information for many reasons as needed[,] listing, "billing and payment" as a reason. Another form stated, "I understand [the hospital] may use my health information for a range of purposes including insurance/payment eligibility verification; billing and collecting monies due from me...". The District Court held that Plaintiffs gave their "prior express consent" by providing their telephone numbers on these forms to the hospital.

The Sixth Circuit affirmed. First, it looked at the FCC's interpretative history. In 1992, the FCC held that persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they gave given, absent instructions to the contrary. In 2008, the FCC extended this holding to cell phone numbers, but also noted the creditor has the burden of proving express consent. In 2014, the FCC held that the TCPA does not prohibit a caller from obtaining the consumer's prior express consent through an intermediary. The FCC emphasized that there is no one way to provide consent but that it is a fact and context specific determination.

The *Baisden* Court held that consent to be called at a number in conjunction with a transaction extends to a wide range of calls regarding that transaction, even in at least some cases where the calls were made by a third party. The Court went on to state the appropriate analysis turns on whether the called party granted permission or authorization, not on whether the creditor received the number directly.

The Court found that Plaintiffs sought medical treatment from the hospital, and in the course of this relationship, both gave the hospital their cell phone numbers and authorized it to disclose their cell phone numbers to others. The "other" in this case, the anesthesiology provider, had a significant

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relationship to the hospital, plaintiffs, and most critically, the debts owed by plaintiffs that arose from the transactions in which plaintiffs provided their cell phone numbers.

However, the Sixth Circuit's holding appears to conflict with a 2014 decision by the Second Circuit which held that a plaintiff did not give prior express consent when he gave his cell phone number to a power company to discontinue his mother-in-law's service after her death. While the caller escaped liability in the Sixth Circuit's *Baisden* case, the sufficiency and extent of explicit authorization that a consumer gives to use his or her telephone number is obviously critically important. The fact that other circuit courts, such as the Second Circuit, have issued conflicting decisions creates a great deal of ambiguity as to what authorization is required to avoid potential liability under the TCPA.

Damages for violations of the TCPA are \$500 per negligent call and \$1,500 per willful call. While this may seem small, cases involved class actions have settled in the tens of millions when there are thousands of plaintiffs and thousands of calls. Given this potentially massive liability, companies should be absolutely sure that they have obtained the required consent before using an automatic telephone dialing system or an artificial or prerecorded voice to reach a wireless telephone number.

Click on the link to read [Baisden, et al. v. Credit Adjustments, Inc.](#)

If you have any additional questions regarding the above or if you have any questions with respect to TCPA compliance issues, please contact Charles Zdebski at 202.659.6605 (czdebski@eckertseamans.com), or Brett Freedson at 412.566.1912 (bfreedson@eckertseamans.com).

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