



## Another Victory for TCPA Defendants

Eleventh Circuit Ruling in *Mais v. Gulf Coast Collection Bureau, Inc.*

By: Thomas J. Cunningham and J. Matthew Goodin

The Eleventh Circuit handed TCPA defendants another victory with its September 29, 2014 ruling in *Mais v. Gulf Coast Collection Bureau, Inc.*, No. 13-14008, 2014 U.S. App. LEXIS 18554 (11th Cir. Sept. 29, 2014). In *Mais*, the court unsurprisingly held that the district court exceeded its authority when it refused to follow the FCC's 2008 Declaratory Ruling explaining what constitutes "prior express consent" under the TCPA. The district court had found that listing a cell phone number on hospital admission forms did not constitute express consent to be called at that number in connection with collection of a debt related the services provided at the hospital. The Eleventh Circuit reversed and remanded, instructing the district court to enter "final summary judgment" for the defendant.

The facts of the case are not extraordinary or unique. Upon admission to a hospital, the plaintiff's wife completed admission forms on which she provided plaintiff's cell phone number. The admission forms made clear that a telephone number provided on the forms could be given to persons providing services at the hospital, who could further provide that information to third-parties in connection with the collection of any debt relating to the services provided. The plaintiff received certain radiation services he did not pay for, and the hospital provided plaintiff's cell phone number to the radiologist, who provided it to a debt collector, who called the number several times in an attempt to collect the debt.

Plaintiff sued the debt collector (and others) under the TCPA arguing that he did not expressly consent to be called by the debt collector on his cell phone in connection with the debt. Defendants moved for summary judgment based on the submission of the cell phone number on the admission forms and the FCC's 2008 Declaratory Ruling, which stated that:

the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.

2014 U.S. App. LEXIS 18554 at \*7. Defendants argued, among other things, that the Hobbs Act, 28 U.S.C. § 2342, precluded the district court from reviewing the FCC's assessment of what constitutes consent under the TCPA. Because plaintiff's claim fell squarely within the scope of the 2008 Declaratory Ruling, defendants argued, the court lacked jurisdiction to



countermand that Ruling. The district court disagreed, finding that plaintiff was entitled to summary judgment. Defendants sought and obtained leave to take an interlocutory appeal under § 1292(b).

On review, the Eleventh Circuit found that the district court exceeded its jurisdiction by sidestepping the 2008 FCC Ruling and effectively declaring it to be inconsistent with the TCPA. The court agreed with defendants that the Hobbs Act precluded the district court from disregarding a clear ruling by the FCC. The Eleventh Circuit reversed the district court's ruling in favor of plaintiff and remanded with instruction to grant summary judgment to the defendant.

Notably, a judge in the Southern District of New York recently concurred with the district court here and directly rejected the FCC's view of what constitutes express consent under the TCPA. *See Zybuero v. NCSPlus Inc.*, 2014 U.S. Dist. LEXIS 129850 (S.D.N.Y. Sep. 15, 2014) (writing "this Court agrees with the *Mais* Court that '[t]he FCC's construction is inconsistent with the statute's plain language because it impermissibly amends the TCPA to provide an exception for 'prior express or implied consent.'"). While the issue certainly should be settled and the weight of authority supports the Eleventh Circuit's view here, the extraordinary relief that was required to achieve the correct result in this case (*i.e.*, interlocutory appeal) leaves some cause for concern. Overall, however, this is the latest good news for defendants in TCPA cases.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors:

**Thomas J. Cunningham** | 312-443-1731 | [tcunningham@lockelord.com](mailto:tcunningham@lockelord.com)

**J. Matthew Goodin** | 312-443-0472 | [jmgoodin@lockelord.com](mailto:jmgoodin@lockelord.com)