

## SIXTH CIRCUIT FINDS “PRIOR EXPRESS CONSENT” IN AFFIRMING DISMISSAL OF TCPA CLASS ACTION AGAINST HEALTHCARE PROVIDER’S DEBT COLLECTOR

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### Financial Institutions and Services Litigation Alert

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The Sixth Circuit (the "Court") recently sided with a defendant-debt collector in a putative class action in which the plaintiffs claimed that the defendant's calls to their cell phones violated the Telephone Consumer Protection Act<sup>[1]</sup> ("TCPA"). In *Baisden v. Credit Adjustments, Inc.*,<sup>[2]</sup> the Court held that "prior express consent" can be "obtained and conveyed via intermediaries." In reaching this conclusion, the Court applied binding guidance from the Federal Communications Commission ("FCC") and followed the holding of the Eleventh Circuit in *Mais v. Gulf Coast Collection Bureau, Inc.*<sup>[3]</sup>

In *Baisden*, the plaintiffs each received medical care from a hospital in Columbus, Ohio. During the admission process, they provided their cell phone numbers and signed consent forms that permitted the hospital to release their "health information" to third parties for purposes of "billing and payment" and "billing and collecting moneys due." The plaintiffs were then treated and billed by a physicians' group affiliated with the hospital. When the plaintiffs did not pay their bills, the physicians' group transferred the plaintiffs' delinquent accounts to the defendant-debt collector. In attempting to collect the debt, the debt collector called plaintiffs on the cell phone numbers they had provided to the hospital. Plaintiffs alleged that the debt collector violated the TCPA (1) because the debt collector placed the calls using an "automatic telephone dialing system" and an "artificial or prerecorded voice," (2) without the plaintiffs' consent to do so where they had not given their numbers directly to the debt collector or to the physicians' group, the creditor on whose behalf the calls were made.

The Court upheld the district court's entry of summary judgment in favor of the debt collector, reasoning that the plaintiffs were precluded from bringing claims under the TCPA because they had given "prior express consent" when they provided their cell phone numbers to the hospital. The Court concluded that "the provision of a cell phone number to a hospital that then provides that cell phone number to an affiliated physicians' group that provided medical services to a consumer arising out of the same occurrence can constitute 'prior express consent' under the TCPA."<sup>[4]</sup>

The Court concluded that the plaintiffs gave "prior express consent" in this case because their cell phone numbers fell within the definition of "health information" that they had agreed could be shared with third parties for debt collection purposes. The Court stated that a contrary finding "would be nonsensical" because it would render inoperative the consent form provisions authorizing the disclosure of information as "necessary for ... purposes" of "billing and collecting moneys due."<sup>[5]</sup>

The Court thus rejected the "narrow reading" advanced by plaintiffs, namely that a debt collector only has prior express consent to call a consumer's cell phone to collect a debt where the consumer has provided the cell phone number to the creditor during the application process. Instead, the Court held that "consumers may give 'prior express consent' under the FCC's interpretations of the TCPA when they provide a cell phone number to one entity as part of a consumer transaction, which then provides the number to another related entity from which the consumer incurs a debt that is part and parcel of the reason they gave the number in the first place."<sup>[6]</sup>

In supporting its conclusion, the Court looked to several sources, which bear noting:

- First, the Court looked to the FCC's 1992 interpretation of the TCPA, in which the FCC ruled that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given."<sup>[7]</sup> The Court's reliance on this early order is significant, because it confirms that debt collectors may avail themselves of the FCC's 1992 pronouncement regarding prior express and are not limited to the later 2008 declaratory ruling.
- Second, the Court looked to the FCC's 2008 declaratory ruling where the FCC stated that "the provision of a cell phone number to a creditor ... evidences prior express consent ... to be contacted at that number" and further stated that calls placed by a debt collector are "treated as if the creditor placed the call."<sup>[8]</sup> While the plaintiffs argued that the 2008 declaratory ruling only applies where the consumer provides a cell phone number at the start of a credit relationship (i.e., on a loan application), the Court, relying on its earlier precedent, rejected this and noted a consumer provides prior express consent by providing a cell phone number at any point during a credit relationship.<sup>[9]</sup>
- Finally, the Court looked to the FCC's *GroupMe* declaratory ruling and its reaffirmation of that ruling in the FCC's July 2015 order, in which the FCC ruled that a caller may obtain prior express consent through an intermediary.

In rejecting a narrow interpretation of "prior express consent," the Court joins the Eleventh Circuit in providing a path for debt collectors in the healthcare field to comply with the TCPA. Thus, the *Baisden* decision appears to support a common-sense reading of the TCPA's consent provisions as they relate to debt collectors generally.

#### Notes:

[1] 47 U.S.C. § 227.

[2] --- F.3d ---, 2016 WL 561735 (6th Cir. 2016).

[3] 768 F.3d 110 (11th Cir. 2014).

[4] *Baisden*, 2016 WL 561735, at \*7.

[5] *Id.* at \*9.

[6] *Id.* at \*7.

[7] *In re Rules and Regulations Implementing the TCPA*, 7 FCC Rcd. 8752, 8769 (1992).

[8] *In re Rules and Regulations Implementing the TCPA*, 23 FCC Rcd. 559, 564-65 (2008).

[9] *Hill v. Homeward Residential, Inc.*, 799 F.3d 544 (6th Cir. 2015).

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