



THE TELEPHONE CONSUMER PROTECTION ACT AND ITS EFFECT ON MORTGAGE SERVICING

THE LAW

The Telephone Consumer Protection Act (TCPA) is, at its core, a privacy statute enacted for the purpose of protecting consumers from excessive, unsolicited phone calls delivered by means of automated telephone dialing system (ATDS).

Specifically, the statute makes it unlawful to make any call using any automatic telephone dialing system or an artificial or prerecorded voice to any telephone number assigned to a cellular telephone service or any service for which the called party is charged for the call. The FCC has interpreted the meaning of A very broadly. ATDS includes not only auto-dialers, but also calls made with telephone equipment that has the capacity to auto-dial.

Exceptions

- » A call made for emergency purposes (e.g. Identity theft warning).
- » A call made with the prior express consent of the called party.

Penalty

A plaintiff suing under the TCPA does not have to prove any actual damage, but can recover statutory penalties of \$500 to \$1,500 for every call in violation of the TCPA.

What is Consent?

To show prior express consent for a call, a servicer must prove it had clear and conspicuous signed, written consent to call the borrower via Automatic telephone dialing system at the specific phone number provided by the borrower, and that the servicer informed the borrower that such consent was not a condition of any good or service.

- » Even if a servicer has sufficient prior express consent, a borrower can revoke this consent at any time in any reasonable manner, including orally.

LATEST DEVELOPMENTS

A Failed Petition

In June 2016, the Mortgage Bankers Association petitioned the Federal Communications Commission to exempt calls related to mortgage servicing from TCPA provisions that require prior consent before communication. In November 2016, the FCC denied the petition citing that the industry had failed to demonstrate that:

- » The exempted calls would not count against any plan limits on the consumer's voice minutes or texts.
- » The public interest in and need for timely delivery of these calls does not justify setting aside a consumer's privacy interest in favor of the exemption because the servicer is not required to contact a delinquent borrower until 20 to 36 days into the delinquency period. There is no emergency as contemplated by the statute.

Where We Stand

The FCC found that the petition'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 ATDS.

- » 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.
- » A mortgage servicer may obtain new consent by one of many available means, including by email.
- » Because consent is so easily revoked, servicers should take care to track the consent status of each borrower have procedures in place to quickly remove cellular telephone numbers from the pool of potential autodialed numbers, should a borrower revoke consent.