VENABLE LLP

client alert

www.Venable.com
DECEMBER 2011

AUTHOR

Ian D. Volner
idvolner@Venable.com
202.344.4814

Unusual Supreme Court Case Could Have Far-Reaching Consequences for TCPA Compliance

This week, the Supreme Court heard oral arguments in a case arising under the Telephone Consumer Protection Act ("TCPA"). The Act governs the conduct of all telephone solicitation in the United States, including solicitations sent via fax or to cellular telephones via text or email messaging. While the case does not address any of the substantive ambiguities in that Act, or the FCC's rules implementing the Act, it deals exclusively with a narrow legal question that only a lawyer (or nine Justices) could love. The outcome of the case, which is expected in a few months, could significantly affect the calculus of risk that telemarketers face in attempting to comply with the TCPA.

The plaintiff, Mr. Mims, received about a dozen calls from Arrow Financial Services, a subsidiary of Sallie Mae. For some reason, Mr. Mims sued in Federal Court in Florida for damages and for injunctive relief. For reasons equally obscure, Arrow moved to dismiss the case on grounds that the TCPA only permits individual plaintiffs (this was not a class action suit) to sue in Small Claims Court or other state courts. The trial court agreed and the Federal Circuit Court upheld the trial court's decision. Instead of refiling the case in state court, the plaintiff elected to seek Supreme Court review and the Court accepted the case and heard oral arguments on November 28.

Although the Justices had some difficulty in framing the exact issue the Court was asked to decide, the question seems to boil down to this: because the TCPA says that an individual plaintiff "may" seek $500 in damages for each violation of the TCPA in state court, does that mean that an individual plaintiff may not file such a claim in a federal court? The Justices plainly and understandably had some difficulty in understanding exactly what Congress intended, calling the provision of the statute permitting private lawsuits in state courts "unusual," "odd" and, ultimately, "weird." Therefore, it is hard to forecast how the Court will decide.

What really is "weird" about the case, and what can affect the calculus of risk to telemarketers, is how the case got to the Supreme Court in the first place. Generally, individual plaintiffs file in state court or small claims court because of the perceived "home court advantage," but Mr. Mims did not do so. Generally, companies subject to TCPA would prefer to

litigate individual claims in federal court. There is an old saying—slightly revised—that weird cases make weird law. That is the risk here. If the Supreme Court upholds the position taken by Arrow Financial, there may be a movement away from class action lawsuits under the TCPA and toward groupings of individual cases in state courts, which are much more inclined to find in favor of a plaintiff or group of individual plaintiffs, especially where the defendant is an out-of-state merchant.

For more information, please contact the authors at idvolner@Venable.com or at 202.344.4814.