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Telemarketers Pay Millions in Class Actions

VIOLATIONS OF FEDERAL ROBOCALL REGULATIONS OFTEN LEAD TO LITIGATION

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Class actions claiming violations of the Telephone Consumer Protection Act create potentially crippling exposure for companies that, without prior express consent, use an auto-dialer or prerecorded or artificial voice message to contact customers by phone, or those that send faxes or text messages. With statutory damages of \$500 to \$1,500 per violation, no statutory cap on the maximum recovery and detailed—and sometimes downright surprising requirements—liability can add up fast. Alleged damages in the tens of millions of dollars are not uncommon. Capital One just entered into a proposed \$75 million class settlement; Bank of America has agreed to pay \$32 million to resolve six class actions filed against it. With so much money at stake, the TCPA has created a booming class-action industry.

TCPA Basics

Congress passed the TCPA in 1991, before the advent of the national do-not-call registry, when telemarketing was a booming business. At that time, according to congressional findings, over 300,000 solicitors were calling more than 18 million Americans every day. The TCPA aimed to protect consumers from unwanted calls and faxes, particularly those that imposed a cost on the consumer, such as calls to cellphones or pagers. The TCPA vested the Federal Communications Commission with enforcement and rule-making authority. Under that authority, the FCC has,

for example, concluded that text messages constitute calls and are governed by the TCPA. The FCC has issued many detailed rules and orders since 1991 that have fleshed out requirements under the act. It is critically important for businesses to be familiar with not just the TCPA, but also to regularly review the FCC's evolving implementing rules. This is particularly important because the TCPA creates a private right of action not just for violations of the statute itself, but also for violation of FCC regulations promulgated under the law.

While a detailed review of the TCPA and its implementing regulations is outside the scope of this article, an overview of some of the basic requirements is necessary.

- **Telemarketing.** Under current FCC rules, companies must obtain prior express consent in writing for all auto-dialed or prerecorded telemarketing calls or texts, also known as “robocalls,” to cellular and residential phones, per *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, FCC 12-21 ¶ 2 (2012). Businesses also must allow individuals to opt out of future robocalls during a robocall. While the FCC previously had permitted companies to make automated or prerecorded telemarketing calls to the residential lines of individuals with whom they had an “established business relationship” without other indicia of consent, the FCC eliminated that exemption in 2012. Written consent is now required even where a business is contacting an existing customer if the call is made for the purpose of encouraging the purchase or rental of, or investment in, property, goods or services.

- **Non-telemarketing calls.** Moving beyond advertising calls, the rules become less



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black-and-white. No prior consent is necessary to auto-dial or send a prerecorded message to a residential landline for noncommercial purposes, or for commercial purposes that don't involve telemarketing. For example, your child's school can call your landline to let you know that there is a snow day. Auto-dialed or prerecorded calls or texts to cellphones (or other lines that charge the caller) still require prior express consent even if made for purely informational purposes. Unlike for telemarketing calls, however, this consent can be oral.

- **Facsimiles.** The TCPA also prohibits unsolicited fax advertisements, unless the sender and receiver have an established business relationship and the fax displays an appropriate opt-out notice. The opt-out notice requirements are detailed and unexpected, requiring careful review. For example, some courts have held that a defendant can be held liable for \$500 per fax even where an opt-out notice is conspicuous and effective if it does not expressly state that the sender's failure to comply with the opt-out request within 30 days is unlawful, as in *Paldo Sign & Display v. Wagner Equities*, 2014 WL 4376216, *7 (N.D. Ill. Sept. 4, 2014).

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Faxes sent without an advertising purpose are not covered by the act. But the definition of “advertisement” has been construed broadly by some courts. For example, the U.S. Court of Appeals for the Seventh Circuit held that an attorney newsletter was an advertisement under the TCPA even where 75 percent of the newsletter provided “mundane advice,” since 25 percent was aimed at “alerting potential clients to the availability of his services,” in *Holtzman v. Turza*, Nos. 11-3188 & 11-3746 (7th Cir. Aug. 26, 2013).

Key Litigation Issues

▪ Who is responsible for compliance?

Companies often hire third parties to manage their fax, call or text messaging advertising campaigns, and they often require these entities to assume responsibility for compliance with governing laws and regulations. But when push comes to shove, these assurances may not provide them much protection, particularly if the telemarketer later goes bankrupt in the face of overwhelming TCPA litigation. The law is ambiguous as to whether sellers may be held liable for third parties who market on their behalf. The FCC, however, has issued a declaratory ruling stating that companies may be held vicariously liable for calls or text messages sent by third-party telemarketers if federal common law agency principles are satisfied, in *In the Matter of Dish Network*, 28 F.C.C. Rec. 6574, ¶ 1 (May 9, 2013). *Gomez v. Campbell-Ewald*, No. 13-55486 (9th Cir. Sept. 19, 2014), should also be reviewed.

On the issue of faxes, the FCC has submitted a letter brief to the Eleventh Circuit taking an even more aggressive position, arguing that the entity whose products or services are advertised is directly liable under the law. The Eleventh Circuit has not ruled on that issue yet. Until these issues are fully resolved, companies will be best served by assuming that they may be held liable for any marketing done on their behalf and implementing rigorous safeguards to ensure compliance with the TCPA.

▪ **Consent.** All of the conduct regulated under the TCPA is permissible with prior express consent, although different forms of consent are required depending on the circumstances. Thus, perhaps the most litigated issue in TCPA cases is whether the recipient consented, how

the consent was given, and if it was subsequently revoked. *Osorio v. State Farm Bank*, 746 F.3d 1242 (11th Cir. 2014), is a recent example. In that case, the plaintiff alleged that he had not consented to receiving auto-dialed telephone calls (some 327 in total), and that his housemate, who had given the plaintiff’s number to the caller, did not have authority to consent on the plaintiff’s behalf. The plaintiff also asserted that even if there had been consent, he had revoked the consent by orally instructing the caller to “stop calling.” The court ruled that whether the housemate had authority to consent, and whether there had been an effective revocation, were jury issues that precluded summary judgment.

The Telephone Consumer Protection Act also prohibits unsolicited fax advertisements, unless the sender and receiver have an established business relationship and the fax displays an appropriate opt-out notice.

In the class-action context, consent issues like that in *Osorio* take on special significance, because where individualized issues regarding consent are present, they will likely predominate over common issues, making class certification inappropriate.

▪ **Are FCC rules controlling?** The FCC has promulgated many rules and orders under the TCPA, some of which litigants believe conflict with the text of the TCPA. For example, one FCC rule can be interpreted as requiring detailed opt-out notices even on faxes that were solicited by the recipient, while the TCPA itself regulates only unsolicited faxes. Defendants have challenged this regulation as ultra vires. This challenge has given rise to a jurisdictional debate over whether defendants can assert the ultra vires challenge in the district court.

In *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013) cert. denied, 134 S. Ct. 1539 (2014), the Eighth Circuit concluded that district courts could not hear such challenges because the federal Hobbs Act vested jurisdiction exclusively in the FCC followed by appeal to the federal courts of appeal. *Nack* advised that the district court might nonetheless “entertain any requests to stay proceedings for pursuit of administrative determination” of whether the FCC’s rule was properly promulgated. Following this suggestion, numerous district courts throughout the country have avoided the jurisdictional question by staying TCPA cases in which defendants have challenged the FCC’s rule-making authority, as in *Raitport v. Harbour Capital*, Civil No. 09-cv-156-SM, Opinion No. 2010 DNH 039 (D.N.H. Sept. 12, 2013).

During the pendency of these stays, defendants have petitioned the FCC for waivers and declaratory rulings, while plaintiffs have submitted comments that such rulings are unwarranted—making for, in effect, another battlefield in TCPA litigation.

▪ **Is any judgment just too big?** Perhaps the most attention-grabbing aspect of TCPA litigation is the magnitude of the potential damages. To date, courts have ruled that however large aggregate TCPA damages may be, the damages scheme is consistent with due process, as in *Texas v. American Blastfax*, 121 F. Supp. 2d 1085 (W.D. Tex. 2000). Although this precedent does not foreclose the possibility that a sufficiently large damages award could be the basis for a successful as-applied challenge, it is unclear whether such a challenge will ever wend its way through the courts to the U.S. Supreme Court, as most defendants would prefer the certainty of a settlement over the risk of potentially bankrupting exposure.

Conclusion

TCPA litigation has transformed routine business acts—making telephone calls and sending text messages and faxes—into activities fraught with risk. Because the stakes are so high, careful attention must be paid to compliance with the TCPA and FCC implementing regulations in the first instance, and if a suit is filed, it should be treated with the utmost seriousness. Defenses to these suits exist, but they must be carefully crafted. ■