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Cellphone User Protection Law Puts Businesses in Peril

Government's broad interpretation of TCPA leads to litigation explosion

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In 1991, Congress enacted the Telephone Consumer Protection Act (TCPA) to curb the use of unwanted robocalls and spam faxes, which were inundating consumers. For years, there was little litigation involving the law. As recently as 2007, there were only 14 TCPA lawsuits filed in federal court. But litigation has skyrocketed. Last year, there were 3,710 TCPA lawsuits, a 45 percent increase over 2014. A whopping 877 of those cases were filed as putative class actions, exposing business defendants to potentially crippling damages. (Statistics provided by Web Recon LLC.) There is every reason to expect the explosion to continue.

One major reason is the continued shift toward the use of cellphones. When the TCPA was passed, text messages did not exist, there were only a few million cellphones in the entire country, and those phones were expensive to use, generally charging the user for each call or text message received. For this reason, the TCPA contained onerous rules to protect cellphone users from unwanted calls.

Now, more than 90 percent of U.S. adults have a cellphone, virtually all service plans come with unlimited talk and text, and 8 trillion texts are sent each year. Indeed, more than 40 percent of Americans no longer have a land line. Realistically, if businesses want to communicate with customers or potential customers, they must contact cellphones. Yet, Congress has not revised the TCPA, which continues to single out cellphone owners for kid-glove treatment.

In addition, the Federal Communications Commission has issued various regulations and orders interpreting the TCPA's requirements. In most cases, these interpretations have imposed more restrictions on faxes, calls and texts, including detailed disclosure requirements that can be tricky to understand. Businesses that comply with the spirit of the TCPA's requirements are nevertheless routinely sued for alleged technical violations.

Finally, the TCPA's penalty structure is partly to blame for the explosion in case filings. The TCPA allows for statutory damages of $500 to $1,500 per violation, has no statutory cap on maximum recovery, includes no explicit good-faith defense, and provides an easier path to class certification than many types of consumer claims. This potent mixture has resulted in large class settlements. In 2015 alone, HSBC agreed to pay $40 million to resolve a TCPA lawsuit, Chase Bank sought approval of a $34 million settlement, and Abercrombie agreed to a $10 million settlement.

As these examples make clear, the TCPA does not just affect marketing companies. Every business needs to pay careful attention to the TCPA's detailed requirements and have a solid compliance plan in place. That plan must evolve to address changing FCC interpretations and case law. Below, we discuss some of the key litigation issues for 2015 and beyond.

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What's an Autodialer?

The TCPA only applies to telephone calls (and text messages) using an artificial or prerecorded voice or an "automatic telephone dialing system" (ATDS), often referred to as an "autodialer." With few exceptions, calls made with an autodialer require the prior express consent of the recipient and, for many types of calls and texts (including all those promotional in nature), this consent must be in writing and include detailed disclosures. As a result, understanding what is and is not an ATDS is crucial.

The TCPA defines an ATDS as "equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." Many interpreted that definition to mean that the ATDS must itself generate the telephone numbers to be called by using random or sequential digits. Calls made using a fixed set of existing customer numbers, for example, would not fall within that interpretation. Unfortunately, the FCC has interpreted ATDS far more broadly.

In a July 2015 omnibus order, the FCC found that to be an autodialer, "the equipment need only have the *capacity* to store or produce telephone numbers" randomly or sequentially (*In re Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC 15-72 (emphasis added)). Under this interpretation, it appears that the FCC order would capture any technology that automatically dials telephone numbers from a database even if those numbers are not created

by a number generator. Moreover, the FCC explained that "capacity" means "potential ability." This means that a device currently not capable of dialing random or sequential numbers is still an autodialer if, for example, it requires only the addition of software to actually perform autodialing functions. Under this broad interpretation, almost any modern dialing system could potentially be considered an autodialer.

The FCC did acknowledge that "there must be more than a theoretical potential that the equipment could be modified to satisfy the 'autodialer' definition," and thus, for example, the theoretical possibility that a rotary phone could be modified to become an autodialer is not enough for it to be covered by the TCPA.

There is another silver lining. The FCC suggested that calls and texts made with "human intervention" are not intended to fall within the definition of an ATDS. Unfortunately, the FCC did not explain exactly when there is human intervention; it only said that this is a "case-by-case determination."

The FCC's decision is now on appeal before the U.S. Court of Appeals for the D.C. Circuit. Thus, the FCC's expansive definition may not last. For now, however, the safest course for businesses, particularly those unable to get the prior express written consent required for many calls/texts made with an ATDS, is to dial the same way your grandmother did.

No Marketing Necessary

For auto-dialed calls and texts to cellphones, a common misconception is that the TCPA only requires a business to get prior express consent before making marketing calls. In fact, consent is almost always required. Advertising or marketing calls and texts require "prior express written consent," which requires the consumer to provide written consent after receiving a specific written disclosure that she may receive auto-dialed advertising calls or texts to the number provided and that the consent is not a condition of purchase.

While nonmarketing calls and texts to cellphones do not require the same detailed disclosure, they still require prior express consent either orally or in writing. As a result, businesses must ensure they have prior express consent even before making service-related calls to existing customers' cellphones using an autodialer. Moreover, because land lines can be converted into cellphone numbers, the best practice is to obtain consent from all customers or to periodically use a service that scrubs the telephone numbers in your contact database to determine which are wireless and which are land lines. The TCPA places the burden of establishing consent on the defendant, so it is critical to maintain good records of consents obtained.

There are a few circumstances where the FCC has determined that prior express consent is not required. In July 2015, the FCC exempted certain kinds of "pro-consumer" autodialed calls and texts. First, subject to certain limitations, it exempted calls and text messages from financial institutions notifying customers of (1) fraud alerts; (2) security breaches; and (3) instructions for money transfers. Similarly, the FCC, again with certain conditions, exempted calls and texts from health care providers regarding (1) appointment reminders; (2) wellness checkups; (3) hospital preregistration instructions; (4) preoperative and postoperative instructions; (5) lab results; (6) prescription notifications; and (7) home health care instructions. It remains to be seen whether the FCC will grant other "pro-consumer" call exemptions in the coming years.

Getting Consent

As discussed above, complying with technical disclosure requirements has been a hot litigation topic. Plaintiffs have brought suits even where they actually consented to receive calls and texts, but where the consent language allegedly did not track the specific disclosures required by the FCC. For instance, it is not surprising that companies would not think to include a disclaimer that consent to receive a call or text is not a condition of making a purchase, where the user is signing up to receive calls or texts in a setting not connecting with any purchase transaction. Nevertheless, class action lawsuits have been spawned by such alleged technical deficiencies in disclosures.

Similarly, lawsuits have been brought regarding the adequacy of opt-out language contained on faxes, even where the faxes were sent with the express consent of the recipient and where there is no dispute that the opt-out process was effective.

One and Done

Millions of phone numbers are reassigned each year, which inevitably results in businesses calling and texting individuals who never provided consent. Defendants had argued that so long as they were intending to call someone that had consented (i.e., the prior subscriber of the number), they had not violated the TCPA. In the July 2015 order, the FCC rejected that argument and concluded that whoever is assigned the phone number is the person that must have consented.

The FCC did provide a narrow exception, concluding that there is no TCPA liability for the first call to a reassigned cellphone number. According to the FCC, this provides businesses with sufficient opportunity to confirm that they were calling the right person. In practice, however, this approach is unlikely to provide businesses adequate protection. With respect to texts, for example, which are one-way communications, a business will not know it has contacted the wrong person unless the person affirmatively responds. Similarly, calls to the wrong number will go unnoticed if the calls go to voice mail or if the recipient answers, but does not tell the business they have the incorrect number. Unfortunately, the FCC imposes no duty on consumers to let companies know they have reached the wrong person. In fact, the order expressly rejects even a bad-faith defense against call and text message recipients that intentionally deceive the caller or sender in order to induce more liability.

This issue, too, is on review before the D.C. Circuit. However, in the meantime, businesses should ensure they have a strong process in place for removing any phone numbers after a call recipient has indicated that the wrong party has been called. In addition, number-scrubbing services are available that will review each number in a company's contact database to verify the identity of the current subscriber and to determine if he or she is the same party who provided the original consent.

Light at Tunnel's End?

The TCPA landscape is constantly evolving. As noted above, the D.C. Circuit is set to hear multiple appeals of TCPA cases. Additionally, the Supreme Court is set to decide S*pokeo v. Robins*, which will address whether a plaintiff has Article III standing when there is a technical violation of a statute but suffers no actual harm. These decisions could dramatically alter the TCPA landscape and provide defendants with new weapons.

That being said, the best defense to a TCPA lawsuit remains avoiding one through scrupulous compliance with the TCPA and its regulations and, if the suit is filed, by giving the case your full attention and moving forward with a carefully crafted litigation strategy. ■

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