Antitrust & Complex Business Dispute News

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The Chair's Comments

Moore

The unrelenting winter weather not only cancelled school days and forced a postponement of crucial ACC basketball games, but it also affected our section CLE and annual meeting, which will now take place on March 27 in Cary—always assuming that the calendar is right, and it will in fact be spring by then. Those of you who were unable to attend in February now have a chance to hear from Judge Jolly, get the views of veteran in-house counsel on complex litigation, get tips from Andrew Chamberlin on trying complex cases, get up to speed on fiduciary duty claims and recent decisions regarding proportionality in e-discovery, and get your ethics hours through a session on privilege issues. For those of you registered for the canceled program, I understand that the State Bar has extended the 2013 grace period to the end of March 2014—so be sure to get your hours.

We have also postponed the deadline for suggestions for renaming the newsletter to that date, so for a shot at the $100 prize for the best submission, send in any additional suggestions to me at ***lmoore@rbh.com*** or one of our editors, Bailey King, ***Bailey.King@smithmoorelaw.com*** or Tom Segars, ***Tom.Segars@elliswinters.com***.

Thanks to Bailey and Tom for the latest edition of the newsletter. It includes advice on clear writing from Stephen Feldman—something of benefit to all of us, no matter what the context. We also have an article on the Telephone Consumer Protection Act from Michael DeFrank of Wyrick Robbins, which will bring you up to date on the law on telemarketing calls, and tell you what you need to know to keep your clients from running afoul of that act's ban on automated calls—and texts—to cell phones without express prior consent. Nora Sullivan of Ellis & Winters has provided an analysis of the Supreme Court's decision in **Mississippi ex rel. Hood v. AU Optronics**, which held that *parens patriae* suits

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HELLO? HELLO?: The Telephone Consumer Protection Act, Cell Phones, and You

By Michael D. DeFrank

In 2012, plaintiffs around the country filed 1,101 lawsuits[1] claiming violation of the Telephone Consumer Protection Act of 1991 ("TCPA"), Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227, 47 C.F.R. § 64.1200 *et seq.*). TCPA lawsuits were estimated to increase by 70% in 2013.[2] Many companies are choosing to settle TCPA class action lawsuits for tens of millions of dollars rather than risk a judgment which could exceed $100 million. A growing number of individuals now make their living as professional TCPA plaintiffs.[3] Despite this daunting litigation landscape, when a company is named as a defendant in a TCPA lawsuit, their first question frequently is "What is the TCPA?"

This article will address the provisions of the TCPA which apply to telephone calls and texts made to cellular phones, discuss recent changes to the TCPA, and provide practical tips for navigating this evolving and perilous statute.

Background of the TCPA | The TCPA was enacted by Congress in 1991. It is administered by the Federal Communications Commission ("FCC"), which has the authority to prescribe rules and regulations which have the force of law. 47 U.S.C. § 227(b)(2); **Satterfield v. Simon & Schuster, Inc.**, 569 F.3d 946, 953 (9th Cir. 2009). The primary impetus for the TCPA was the increase in telemarketing calls using artificial or prerecorded voices. However, the statute is more expansive than just telemarketing

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calls—Congress found that residential telephone subscribers consider *all* automated or prerecorded calls, "regardless of their content or the initiator of the message, to be a nuisance and an invasion of privacy." Telephone Consumer Protection Act of 1991§ 2 ¶ 10.

The TCPA imposes restrictions on calls to cellular telephone numbers, calls to residential telephone numbers, and sending advertisements by facsimile. 47 C.F.R. § 64.1200. Nearly 38% of American households use cell phones only and 60.1% of adults aged 25-29 live in wireless-only households. *See* Stephen J. Blumberg, Ph.D. and Julian V. Luke*, Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2013*, Division of Health Interview Statistics, National Center for Health Statistics (Dec. 2013), pp. 1-2, ***http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201312.pdf*** (last accessed March 6, 2014); *see also* Sean Lev, *Technology Transitions Policy Task Force, Acting Director, Remarks at TIA Network Transition Event* (June 21, 2013) (noting that "more than a third of U.S. households are now wireless-only and the percent of adults between the ages of 25 and 29 living in wireless-only homes is 60%. Yes 6-0."), p. 2 ***http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-321781A1.pdf*** (last accessed Feb. 27, 2014).

This article focuses primarily on Section 227(b)(1)(A) of the TCPA which prohibits calls made using an automated telephone dialing system ("ATDS"), artificial, or prerecorded voice to call a cell phone. Section 227(b)(1)(A) of the TCPA provides,

It shall be unlawful…to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automated telephone dialing system or an artificial or prerecorded voice… (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

47 U.S.C. § 227(b)(1)(A). The TCPA does not define several key terms in the statute, including "call," "prior express consent," and "called party." As a result, the FCC and the courts have attempted to interpret these terms.

"Calls" Although not expressly mentioned in the TCPA, the FCC and courts have interpreted "calls" to include text messages. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02-278, 18 FCC Rcd. 14014, 14115, ¶ 165 (2003) ("2003 TCPA Order"); **Satterfield**, 569 F.3d at 953.

"Automated Telephone Dialing System" Section 227(a)(1) of the TCPA defines 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." 47 U.S.C. § 227(a)(1). In 2003, the FCC found that predictive dialers fall within the definition of ATDS. 2003 TCPA Order, 18 FCC Rcd. at 14093, ¶ 133. In 2008, the FCC reiterated that, "a predictive dialer constitutes an [ATDS] and is subject to the TCPA's restrictions on the use of autodialers." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Request of ACA International for Clarification and Declaratory Ruling*, CG Docket No. 02-278, 23 FCC Rcd. 559, 566, ¶ 12 (Jan. 4, 2008) ("ACA Declaratory Ruling").

A predictive dialer is the standard type of dialing system used by debt collectors and telemarketers. *See generally* 2003 TCPA Order, 18 FCC Rcd. at 14091, ¶ 131. In most cases, callers program the numbers to be called into the equipment and the predictive dialer uses an algorithm to predict when agents will be available to handle calls and dials numbers based on those predictions. When paired with software, a predictive dialer can store or produce numbers and dial them randomly or in order. *See id.* Several courts have held that the dialing equipment needs only to have the *capacity* to store or produce randomly or sequentially generated numbers to qualify as an ATDS. Even if the dialer does not actually utilize this capacity, it constitutes an ATDS for purposes of the TCPA. *See, e.g.*, **Satterfield**, 569 F.3d at 951; **Lozano v. Twentieth Century Fox Film Corp.**, 702 F. Supp. 2d 999, 1010 (N.D. Ill. 2010).

Expanding the definition of ATDS to include autodialers and predictive dialers which merely have the capacity to store or produce randomly or sequentially generated numbers has led to a marked increase in TCPA class action lawsuits. By some estimates, TCPA class action lawsuits involving autodialers have risen by 592% over the past few years and predictive dialer cases have increased by at least 800%. *See* Communication Innovators, *Petition for Declaratory Ruling*, CG Docket No. 02-278, p. 15 (June 7, 2012); Comments of the U.S. Chamber of Commerce, *Communication Innovators Petition for Declaratory Ruling*, CG Docket No. 02-278, p. 5 (Nov. 15, 2012).

"Prior Express Consent" In 2007, the FCC made a rule under the TCPA which generally prohibits making telephone calls to cell phones using an ATDS or prerecorded message without the prior express consent of the called party. This prohibition applies to telemarketing calls, along with purely informational calls (*i.e.*, flight updates, debt collection calls, surveys, credit card fraud warnings). *See generally* ACA Declaratory Ruling, 23 FCC Rcd. at 564, ¶ 9.

Consumers who provide their cell phone numbers to a business as part of their contact information have expressly consented to being called by both the business and its collection agents. *See id.* ("Because we find that autodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt are made with the 'prior express consent' of the called party, we clarify that such calls are permissible. We conclude that the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt."); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 92-90, Report and Order, 7 FCC Rcd. 8752, 8769, ¶ 31 (1992) ("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, absent instructions to the contrary.").

As of October 16, 2013, prior express written consent is required for telemarketing calls to cell phone numbers (see below).

"Called Party" The "called party" is the party who has standing to sue under the TCPA, and the lack of a definition of the term

"called party" has led to expansive interpretations of who has standing to sue. In the debt collection arena, the FCC concluded in a 2008 Declaratory Ruling that, "the provision of a cell phone number to a creditor, *e.g.,* as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt." *See* ACA Declaratory Ruling, 23 FCC Rcd. 559, 564, ¶ 9. Calls to a cardholder at a cell phone number they provided do not violate the TCPA. However, consumers change their wireless telephone numbers, and sometimes change their numbers specifically to avoid debt collection calls. What happens when a credit card company or their collection agent calls a cell phone number that no longer belongs to their cardmember? What if the cardmember never told the company that she has changed wireless numbers?

In **Soppet v. Enhanced Recovery Co.**, 679 F.3d 637, 639 (7th Cir. 2012), a debt collector contacted two cell phone numbers that had previously been provided by the debtors. At the time of the collection calls, however, the numbers had been reassigned to new subscribers who had not consented to receive calls. The debt collector argued that the term "called party" means the intended recipient of the call. The Seventh Circuit rejected this argument and held instead that the "called party" is the person subscribing to the number at the time that the call is placed. **Soppet**, 679 F.3d at 643. Some courts have gone so far as to hold that the person who carries and regularly uses a cell phone may also be entitled to sue for calls made to that phone. *See, e.g.*, **Page v. Regions Bank**, 917 F. Supp. 2d 1214, 1219 (N.D. Ala. 2012).

On January 31, 2014, ACA International, a trade organization of credit and collection companies, petitioned the FCC to adopt a rule that, "by providing a wireless telephone number during the transaction or relationship that underlies the debt, or during the collection of a debt, an individual consents to be contacted regarding the debt on any wireless number affiliated with that person or the underlying debt." *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Petition for Rulemaking of ACA International*, CG Docket No. 02-278 (Jan. 31, 2014) ("2014 ACA International Petition"), pp. 13-14. This rule would substantially limit the universe of potential plaintiffs and would remedy the situation where a debt collector is liable for a call to an unintended recipient because the consumer never provided his new wireless telephone number.

The 2014 ACA International Petition also argues, "the Commission should establish a safe harbor for non-telemarketing calls when the debt collector had previously obtained appropriate consent and had no intent to call any person other than the person who had previously provided consent to be called, or had no reason to otherwise know that the called party would be charged for the incoming call." 2014 ACA International Petition, p. 15. The ACA International Petition is currently pending before the FCC.

Recent Revisions to the TCPA Regarding Telemarketing Calls The FCC recently amended its rules to place additional restrictions on telemarketing calls to both wireless and residential phone lines. The revisions, which took effect in 2013, were intended to harmonize the TCPA with the Federal Trade Commission's ("FTC") Telemarketing Sales Rule. The TCPA applies to entities not within the FTC's jurisdiction, such as banks and financial institutions, insurance companies, intrastate telemarketers, and airlines. *See* 15 U.S.C. § 45(a)(2) (describing exceptions to the FTC's jurisdiction). The revisions include new rules for opt-out requirements, prior express written consent, and elimination of the established business relationship exception (which applies only to landlines).

Opt-Out Requirements Effective January 14, 2013, the FCC revised the TCPA regulations to require an automated, interactive opt-out message for telemarketing messages to both cell phones and landlines. The opt-out message must allow customers to immediately opt out of receiving additional calls, disconnect the call, and automatically add the sellers to the national do-not-call registry. 47 C.F.R. § 64.1200(b)(3).

Prior Express Written Consent The FCC recently enacted rules which raise the bar for obtaining consent to make telemarketing calls. As of October 16, 2013, prior express *written* consent is now required for all telemarketing calls and text messages made to a cellular number using an ATDS. Prior express written consent is also required for all artificial or prerecorded telemarketing voice calls to both wireless and residential numbers. 47 C.F.R. §§ 64.1200(a)(2), (a)(3). The revised TCPA rules require that a "clear and conspicuous" disclosure notify the potential recipient of the telemarketing call that: (1) by signing the agreement, the individual is authorizing the seller to deliver telemarketing calls to the number provided by the individual using an automatic telephone dialing system or an artificial or prerecorded voice; and (2) signing the agreement is not a required condition of purchasing any property, goods, or services. 47 C.F.R. § 64.1200(f)(8)(i).

Prior express written consent is still not required for purely informational non-telemarketing calls (*i.e.*, flight updates, debt collection calls, surveys, and bank account fraud alerts). However, an informational call which includes an upsell—for example, a flight update which includes an offer for the customer to upgrade to first class for a fee—does require prior express written consent. *See generally In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 Report and Order, FCC 12-21, ¶ 28 (Feb. 15, 2012) ("2012 TCPA Order"). Although prior express written consent is not required for non-telemarketers, it is possible that future plaintiffs will argue that the content required for prior express written consent (47 C.F.R. § 64.1200(f)(8)(i)) sets the standard for content of prior express consent in general.

Elimination of Established Business Relationship The recent revisions to the TCPA rules also eliminated the "established business relationship" exception for prerecorded telemarketing calls to residential telephone lines. 2012 TCPA Order ¶¶ 18, 35-43, 66. Before October 16, 2013, telemarketers could make calls to residential telephone numbers without prior express consent if they had an "established business relationship" with the called party. An "established business relationship" is created through a previous purchase or product inquiry. *See* 47 C.F.R. § 64.1200(f)(5). Telemarketers are now required to obtain prior express written

consent to call, regardless of whether there is an "established business relationship." 2012 TCPA Order ¶¶ 35, 39, 43.

Damages and Settlements Remedies under the TCPA include a private right of action and statutory damages in the amount of $500 for each violation and up to $1,500 for each willful violation. *See* 47 U.S.C. § 227(b)(3). It is not difficult to see how damages can pile up quickly. As an example, if a debt collector called a wireless number which no longer belonged to a debtor twice a day for a year, the debt collector would be liable for $365,000-$1,095,000, depending on how many of the calls were deemed willful violations of the TCPA. There is no cap on TCPA damages, including class actions, and the damages are not tethered to a defendant's net worth.

Recent settlements include the following:

- September 2013 — $32MM class action settlement by Bank of America for calls and texts made regarding mortgages and credit cards between 2007-2013 in **Rose et al. v. Bank of Am. Corp. et al**, Case No. 5:11-cv-02390-EJD (N.D. Cal.), ECF No. 59-1;
- May 2013 — $10MM settlement by Steve Madden Ltd for claim based on text messaging campaign estimated to have a class of 200,000 people in **Ellison v. Steve Madden Ltd.**, Case No. 2:11-cv-05935-PSG-AGR (C.D. Cal.), ECF No. 41-1; and
- August 2012 — $47MM settlement by Jiffy Lube franchisee and its vendor who were alleged to have sent promotional text messages in violation of the TCPA to 1.9 million class members in **In re Jiffy Lube International, Inc. Text Spam Litigation**, Case No. 3:11-MD-02261-JM-JMA (S.D. Cal.), ECF No. 76-2.

Importantly, TCPA claims are not just for telemarketing and debt collection calls, but also include rebate reminder calls, fraud alerts, equipment return reminder calls, and various other autodialed calls. Regardless of whether the defendant prevails, they are often forced to incur the expense of proving the affirmative defense of plaintiff consent at the summary judgment stage. *See, e.g.*, **Greene v. DIRECTV, Inc.**, Case No. 10 C 117, 2010 WL 4628734, at *5 (N.D. Ill. Nov. 8, 2010) (after discovery and briefing, the court granted summary judgment to defendant, finding that plaintiff did consent to receive on her cell phone an autodialed fraud alert phone call in regards to a potential fraudulently opened DIRECTV account when she provided her cellphone number to the credit bureaus as the number at which she wished to be contacted for such purposes).

Protecting Against TCPA Claims TCPA claims are a burgeoning area of litigation. Because of the lack of guidance in the language of the statute, the law is in flux, and is subject to new FCC rules and judicial decisions. Companies and their counsel attempting to limit TCPA liability should be aware of the following considerations:

Do the company's practices fall within the broad scope of the TCPA? This is particularly relevant as more companies communicate with consumers through text messaging and the new rules which require opt-out mechanisms and prior express written consent for certain calls.

The statute of limitations for TCPA claims is four years. 28 U.S.C. § 1658(a). Companies should maintain records of prior express consent to call and prior express written consent to make telemarketing calls for four years.

Companies can limit liability with vendors who are hired to conduct phone, text, or fax campaigns by requiring representations and warranties, indemnity, and risk-shifting provisions in contracts with vendors.

Review insurance policies to determine whether coverage is provided for TCPA claims. Most commercial policies now contain exclusions for TCPA claims.

Because of the uncertainty surround the TCPA, companies who use an ATDS, artificial or prerecorded voice device to call or text consumers or potential consumers need to be familiar with the TCPA and regularly monitor changes. Several organizations maintain TCPA blogs which provide timely updates on developments in this area of the law.

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[1] Patrick Lunsford, *FDCPA Lawsuits Filed by Consumers Decline,* Accounts Receivable Management, (Jan. 13, 2013) *available at* ***http://www.insidearm.com/daily/debt-buying-topics/debt-buying/fdcpa-lawsuits-filed-by-consumers-decline-7-percent-in-2012/*** (last accessed Feb. 27, 2014).

[2] Darren Waggoner, *TCPA Lawsuits Projected to Grow 70 Percent in 2013*, Collections & CreditRisk, (Dec. 26, 2013), *available at* ***http://www.collectionscreditrisk.com/news/tcpa-lawsuits-projected-to-grow-3016431-1.html*** (free registration required) (last accessed Feb. 27, 2014); Patrick Lunsford, *TCPA Lawsuits Really are Growing Compared to FDCPA Claims*, Accounts Receivable Management, (Oct. 22, 2013) *available at* ***http://www.insidearm.com/daily/debt-buying-topics/debt-buying/tcpa-lawsuits-really-are-growing-compared-to-fdcpa-claims/*** (last accessed Feb. 27, 2014).

[3] *Suing Telemarketers – Simple and Cheap*, ***http://www.killthecalls.com/suing-telemarketers.php*** (last accessed Feb. 27, 2014); *see also* Mark Eckenwiler, *How To Make A Telemarketer Cry (or, Suing Bozos for Fun & Profit)*, (May 30, 2005), ***http://www.panix.com/~eck/telemarket.html*** (last accessed Feb. 27, 2014).