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TRENDS

FILINGS

Filings under the Telephone Consumer Protection Act are on the rise, say attorneys James G. Snell and Carlos P. Mino in this BNA Insight. The authors advise companies to guard against these claims—and possible multimillion dollar judgments—by reviewing policies and practices to ensure that they do not fall within the broadly construed provisions of the law, particularly where the company uses messaging services for mobile phones.

Telephone Consumer Protection Act Cases Are on the Rise



By JAMES G. SNELL AND CARLOS P. MINO

Telephone Consumer Protection Act (TCPA) claims are on the rise. According to insideARM.com, as of August 2012, there was a reported 54-percent increase in TCPA filings—many alleged as class actions—

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over the prior year. Moreover, the Federal Communications Commission and Federal Trade Commission recently demonstrated increased interest in enforcing TCPA regulations.

Originally, the TCPA was viewed as a statute that could be enforced through small claims actions. However, it has been used by plaintiffs to assert class actions, and the courts and the FCC have in some instances interpreted broadly the prohibitions under the TCPA. Courts and regulators are also grappling with the application of the TCPA to technologies developed after the Act was passed.

TCPA Overview

The TCPA was enacted in 1991, purportedly to protect consumers from aggressive telemarketers, and was codified as 47 U.S.C. Section 227. Section 227, and regulations promulgated under this section and codified at 47 C.F.R. Section 64.1200, provide a variety of restrictions, but most recent suits arise out of the prohibitions of Section 227(b)(1), in particular subsections (A), (B) and (C), which relate to calls or transmissions made using an automatic telephone dialing system ("ATDS"), an artificial or prerecorded voice or a fax machine. Calls made using an ATDS or artificial or prerecorded voice are commonly referred to as "Robocalls." The following is a summary of these prohibitions.

- Section 227(b)(1)(A)(iii) generally prohibits the use of an ATDS or an artificial or prerecorded voice to make a non-emergency call without the prior express

consent of the called party to a cellular phone or other similar device or service for which the called party is charged. Claims brought under this section have been subject to differing and often broad interpretations of key elements. For example, a number of courts and the FCC interpret a “call” to include the sending of a text message, though text messaging is not expressly mentioned in the TCPA. In addition, the Ninth Circuit has construed the definition of ATDS broadly. 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.” The Ninth Circuit has interpreted the term “capacity” to cover systems that do not have the required functionality but may be re-purposed to have such functionality. Some commentators have noted that this definition may be broad enough to cover smartphones that most consumers carry with them today.

- Similar to subsection (A), Section 227(b)(1)(B) generally prohibits making non-emergency calls with an artificial or prerecorded voice to residential phone lines without prior express consent. FCC regulations exempt some types of calls made under this section, including calls that are not made for a commercial purpose or that do not include or introduce an unsolicited advertisement or that are made to someone with whom the caller has an established business relationship.

- Section 227(b)(1)(C) prohibits the use of fax machines, computers, or other devices to send unsolicited advertisements to fax machines, exempting cases where, for example, there is an established business relationship with the recipient and the fax contains a compliant opt-out notice.

The TCPA provides a private right of action for violations and statutory damages in the amount of \$500 for each violation and up to \$1,500 for each willful violation. When multiplied against a large number of calls, text messages or fax transmissions, potential damages in these cases can be significant.

Private Enforcement of TCPA

As noted, the number of private lawsuits filed under the TCPA rose significantly over the past year. Moreover, plaintiffs have accused a broad range of conduct of violating the Act. Some defendants have challenged and defeated such claims, while others have settled such claims or lost on the merits. The following is a summary of some of the more significant settlements and affirmance of a verdict for various alleged violations of the TCPA.

- *Texting Using ATDS*: There were at least two significant proposed settlements of text messaging claims over the past year. The first settlement, in *In re Jiffy Lube International Inc.*, No. 3:11-MD-02261 (S.D. Cal.), relates to a TCPA class action brought against a Jiffy Lube franchisee (Heartland Automotive Services, Inc.) and its vendor for a text messaging promotional campaign. Plaintiffs alleged that an estimated 1.9 million class members received text messages in violation of the TCPA. After the court denied defendants’ motion to dismiss based on First Amendment and vicarious liability grounds and denied a motion to compel arbitration, the defendants agreed to a settlement valued at \$47 mil-

lion. Similarly, in *Ellison v. Steve Madden Ltd*, No. 2:11-CV-05935 (C.D. Cal.), the defendants agreed to a settlement valued at \$10 million to settle a claim based on a text messaging campaign promoting various products and events to an estimated class of about 200,000 people.

- *ATDS and Artificial or Prerecorded Voice Calls*: There have also been notable settlements in cases alleging the use of an ATDS or artificial or prerecorded voice. In *Meilleur v. AT&T Inc.*, No. 2:11-CV-01025 (W.D. Wash.), AT&T agreed to a class action settlement valued at \$4 million to resolve claims that it made calls using an ATDS and an artificial or prerecorded voice to an estimated class of 15,000 people.

- *Fax Litigation*: Fax advertising cases have also resulted in significant settlements. In *Addison Automatics, Inc. v. Precision Electronics Glass, Inc.*, No. 1:10-CV-06903 (N.D. Ill.), the defendant agreed to a settlement valued at nearly \$16 million to settle plaintiffs’ claims that they received fax advertisements but did not have the required established business relationship with the defendant. Also of note, a jury verdict for a fax case was recently reinstated by the Georgia Supreme Court in *A Fast Sign Co. v. American Home Services, Inc.*, No. S11G1708 (Ga.), where the court held that damages for fax cases under the TCPA were properly calculated according to the number of faxes sent (rather than the number of faxes received), and reinstated a jury verdict of \$459 million against the defendant based on an estimated 306,000 faxes sent.

Despite these settlements and verdicts, defendants have succeeded in defending TCPA claims. For example, while Heartland was unsuccessful in arguing against vicarious liability in the *Jiffy Lube* action on the basis that it did not actually send the text messages, Taco Bell Corporation succeeded with this defense in *Thomas v. Taco Bell Corp.*, No. 8:09-CV-01097 (C.D. Cal.). In that case, the franchisor, Taco Bell Corporation, won a motion to dismiss because the court found that Taco Bell Corporation did not send the text messages at issue and it was not involved in developing or directing the franchisees’ messaging campaign.

Similarly, defendants have succeeded in arguing that a text message confirming that a party has opted out of a promotional text message campaign does not violate the TCPA. Recently, the court in *Ryabyschuk v. Citibank (South Dakota) N.A.*, No. 3:11-CV-1236 (S.D. Cal.), granted the defendant’s motion for summary judgment, stating that “imposition of liability under the TCPA for a single, confirmatory text message would constitute an impermissibly ‘absurd and unforeseen result.’”¹ This ruling follows on the heels of a similar order granting a motion to dismiss in *Ibey v. Taco Bell Corp.*, No. 3:12-CV-0583 (S.D. Cal.), entered earlier in 2012.

FCC and FTC Activity Under TCPA

In addition to private enforcement actions, the FCC and FTC have increased enforcement of the TCPA.

¹ Oct. 30, 2012, Order Granting Defendant’s Motion for Summary Judgment, Denying Defendant’s Motion to Strike, and Denying Plaintiff’s Motion for Summary Judgment, Dkt. No. 53.

Congress enabled the FCC to further prescribe regulations implementing the requirements of the TCPA, which the FCC did under 47 C.F.R. Sections 64.1200 and 68.318. The FCC periodically revises and amends the TCPA regulations, the most recent of which begin to go into effect in January and October 2013. Among the current revisions, the FCC (1) requires that artificial or prerecorded voice telemarketing or advertising calls have opt-out mechanisms (effective Jan. 14, 2013); (2) requires that prior *written* consent be received for ATDS and artificial or prerecorded voice telemarketing or advertising calls to cellular and residential phones (effective Oct. 16, 2013); and (3) redrafts or eliminates exceptions for prohibited calls, including the elimination of any established business relationship exception for artificial or prerecorded voice calls to residential phones (effective Oct. 16, 2013). The FCC also recently issued a declaratory ruling that certain confirmatory opt-out text messages do not violate the TCPA.

Additionally, the FCC and FTC held a Robocall summit in October 2012 with consumers and industry leaders. At the summit, the FTC announced a \$50,000 reward for the winner of a competition for development of technology that blocks Robocalls on both cellular and landline phones.

The FCC has also sought to intervene in some private actions to confirm that it has final authority on TCPA interpretation issues. The FCC recently succeeded in arguing in *Leyse v. Clear Channel Broadcasting Inc.*, No. 10-3739 (6th Cir. 2012), that, per the rule enabling au-

thority granted to it by Congress, courts should defer to the FCC's interpretation of TCPA regulations. The FCC, however, lost an argument that the Hobbs Act prohibits lower courts from having subject matter jurisdiction where a party challenges the propriety of an FCC order interpreting the TCPA. The FCC subsequently filed a petition for rehearing en banc of the *Leyse* ruling, which is still pending. It is unclear at this time how other courts will respond to the FCC's positions, but parties in private litigation should follow these decisions.

What Companies Should Do to Minimize Risk

Companies should review their policies and practices to ensure that they do not fall within the sometimes broadly construed provisions of the TCPA, particularly where the company uses messaging services for mobile phones. In particular, policies and practices should be reviewed in light of new regulations from the FCC, which, among other things, require opt-out mechanisms, and prior express *written* consent for ATDS and artificial or prerecorded voice telemarketing or advertising calls to cellular and residential phones.

Companies that hire vendors to conduct phone, text or fax campaigns should also exercise care to minimize potential claims, including by requiring representations and warranties and risk shifting provisions in contracts with vendors.