

The Telephone Consumer Protection Act USA

In light of the recent onslaught of class action lawsuits alleging violations of the U.S. Federal Telephone Consumer Protection Act, and the controversy surrounding recent legal and regulatory opinions interpreting the Act and the extraordinary potential for damage awards that can bankrupt a company if class action liability is established, we speak to Michael L. Mallow and Christine M. Reilly, both partners at Loeb & Loeb LLP.

Tell us about your firm, Loeb & Loeb LLP.

Loeb & Loeb LLP is a multi-service law firm with more than 300 attorneys in seven offices throughout the United States and Asia. The firm's dedicated Consumer Protection Defense Department was created in response to the surge in consumer class actions and regulatory actions facing companies having consumer-facing businesses in the United States. Our group is comprised of more than 20 experienced litigators and trial attorneys who defend clients that are the subject of government enforcement actions, regulatory investigations, and private class action lawsuits alleging violations of consumer protection and unfair competition laws. We have represented a variety of clients from a diverse range of industries with a focus on defending consumer privacy claims, including alleged violations of the Federal Telephone Consumer Protection Act (TCPA), marketing and advertising misrepresentation claims, economic product defect claims, and consumer finance-related claims.

What types of cases do you deal with on a regular basis?

A significant part of our practice involves defending economic product defect claims

as well as advertising misrepresentation and omission claims. Most recently, as companies struggle to keep pace in an increasingly digital world, we've seen significant changes in marketing techniques and the preferred means of communication with consumers. The growing emphasis on mobile media and marketing has led to a tremendous surge in consumer protection litigation linked to the use of auto-dialers, prerecorded messages, and SMS text messages. As a result, a significant portion of our practice is dedicated to defending companies who are faced with claims alleging violations of the TCPA and advising companies on TCPA compliance strategies, policies and procedures. We have particular expertise in internet marketing, telemarketing, and debt collection.

What are the key aspects of the TCPA that companies should be aware of?

The TCPA covers certain types of automated telephone calls made to residential as well as mobile telephones.

For residential phones, it is unlawful to initiate any telephone call using an artificial or prerecorded voice to deliver a message to a residential phone unless: (1) the call is made with the "prior express consent" of the called

party; (2) initiated for emergency purposes; or (3) the call is not made for a commercial purpose (i.e., is not a telemarketing call). Currently, there is also an "established business relationship" exemption for telemarketing calls made to residential lines, but that exemption will no longer exist as of October 16, 2013.

For mobile phones, it is unlawful to make a call or send an SMS text message using an "automated telephone dialing system" (i.e., auto-dialer) or an artificial or prerecorded voice to a wireless number unless: (1) the call is made with the "prior express consent" of the called party or (2) the call is made for emergency purposes. Importantly, there is no exception for non-commercial purposes or an exemption for "established business relationships" for mobile calls. As a result, these prohibitions apply to telemarketing calls as well as to purely informational or transactional calls such as flight updates, debt collection calls, surveys, and bank account fraud alerts. Some companies do not realize this or confuse these rules with those applicable to residential calls. This can be a very costly mistake.

What are the consequences of a TCPA violation?

The consequences can be staggering, if not catastrophic, which is why litigation readiness and compliance procedures are critical for companies to have in place before they are sued. The TCPA provides statutory penalties of \$500 per unlawful call or text message and up to \$1,500 per call or text message if the conduct is held to be willful. For calls or text messages made en masse, liability figures can easily reach the multi-million dollar range. As a result, many TCPA class action lawsuits settle. Some of the more notable TCPA settlements include a \$46.8 million settlement for Jiffy Lube and a \$24.15 million settlement for Sallie Mae. It is generally difficult to obtain early dismissal in these lawsuits, because consent tends to be the primary issue and cannot typically be resolved at the pleading stage. These suits can be costly to defend, can bring unwanted attention and publicity to businesses, and can negatively impact business relationships. Any company that communicates with consumers by tele-

phone or text should be informed about the TCPA.

What are the main legal issues under the TCPA relating to the use of telephones, mobile devices, and faxes when communicating with consumers?

There are usually three salient issues in a TCPA case. The first is the issue of consent, which tends to be the most significant and most litigated issue. The phrase "prior express consent" tends to be narrowly construed, so consent should be clear and unmistakable. Beginning on October 16, 2013, it must also be in writing for telemarketing calls made to both residential and mobile telephones. Misdirected calls, including calls made to reassigned telephone numbers where a company had consent from prior subscribers, are generally held to lack the requisite consent. On the other hand, many courts hold that voluntarily providing a company a telephone number constitutes the requisite consent. Responses by companies to user-initiated texts (e.g., text to win) also tend to be consensual, though the scope of the consent is often an issue. While a user may have consented to receive calls or text messages about a certain product or offer, they may not have consented to receiving additional promotional calls about unrelated goods or services or calls from third-party affiliates or partners. Several petitions are currently pending before the Federal Communications Commission ("FCC") regarding whether a caller can rely on representations from a third party that they have obtained the requisite consent from the called party.

Another significant issue is the meaning of an "automated telephone dialing system" (ATDS) as applied to mobile phones. This is currently a controversial area as the law struggles to keep pace with changing technology. The TCPA was enacted in 1991, when traditional auto-dialer equipment was used to make telemarketing calls. But a technical reading of the statute could potentially encompass everyday technology such as iPads or even smartphones. This is due largely to the FCC's expansive interpretation of an ATDS. The statute 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." A system need not actually store, produce, or dial numbers; it need only have the capacity to do it. As recently as November 2012, the FCC has stated that an ATDS "covers any equipment that has the specified capacity to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists." The latter part of this definition is very broad. Several petitions are pending before the FCC to gain further clarity on the meaning of an ATDS and the term "capacity," including whether Internet-to-phone messaging technology qualifies as an ATDS.

Since consent and ATDS are typically issues that survive the pleading stage and may not be suitable for resolution on summary judgment, class certification is also an important issue in TCPA cases. There is a strong argument to be made that consent is an individual issue that renders TCPA claims unfit for class-wide certification. Many courts have denied class certification of TCPA claims on this basis, particularly in the fax context. However, courts are starting to become more receptive to class certification of TCPA claims. In November 2012, the Georgia Supreme Court certified a TCPA action against FASTSIGNS and awarded \$459 million in damages. That same month, the Western District of Washington certified a nationwide class against Papa John's in an action alleging \$250 million in damages. Papa John's has agreed to settle the lawsuit for \$16.5 million.

How complex are the statutory and regulatory frameworks of the TCPA and what are the major challenges?

While the statutory and regulatory provisions are not necessarily complex, what is challenging in these cases is the application of the statute to new and evolving technology coupled with a very aggressive plaintiffs' bar that continually tests (and attempts to expand) the TCPA's reach. For example, several TCPA cases were

filed on group text messaging applications, which motivated a number of companies to file petitions with the FCC seeking guidance on whether the technology at issue falls within the TCPA's provisions. Similarly, a slew of cases were filed alleging that confirmatory text messages from companies in response to consumer requests to opt-out of text messaging violated the TCPA, even if the consumer had initially agreed to receive text messages. The FCC ruled that such one-time confirmatory text messages were not violations of the statute; however, this ruling came after several companies expended substantial legal fees litigating these cases and/or settling them.

The FCC has been slow to respond to these novel issues, which has only worked to the benefit of plaintiffs and their counsel. In May 2013, the FCC ruled that sellers may be held vicariously liable for TCPA violations committed by third-party telemarketers. The issue had been pending before the FCC since 2010, though courts have consistently recognized vicarious liability in TCPA cases for years. Though courts have been quicker to respond than regulators, decisions often vary widely (some of them entirely contradictory), making informed decision-making on policies and procedures and litigation strategy difficult. For example, while manually dialed calls have been thought to be outside the reach of the TCPA, a recent decision calls this into question. Suffice it to say, results are not always predictable when it comes to the TCPA.

How can your firm assist companies in light of these challenges?

We take a two-pronged approach to TCPA matters. First, we advise our clients on litigation readiness strategies and compliance protocols before they are sued. We prepare a compliance program for our clients uniquely tailored to their business, outlining recommended policies and procedures, employee training, document retention and collection, complaint protocols, and testing. For most companies, it is not a matter of if they will be sued in a TCPA class action, but when they will be sued. Our goal is to position our clients to be in the strongest, most defensible

position prior to suit, while also considering the company's business goals and needs.

Second, we aggressively defend our clients in the face of a TCPA lawsuit. We immediately assess the parties involved (many are repeat players), the primary merit issues in the case, possible defenses, likelihood of class certification, supporting documentation and data from the client, and whether there may be indemnification or insurance coverage. We pride ourselves on taking creative approaches to resolving these cases, including the use of mandatory arbitration clauses and the presentation of unique defenses. We recently achieved summary judgment for our client by arguing that it enjoyed derivative sovereign immunity for the acts it undertook on behalf of the U.S. Navy for a text message recruiting campaign. This is the first case of its kind to apply the derivative sovereign immunity doctrine to a TCPA case.

What legislative changes would you make to the TCPA?

We would enact legislation that would prohibit class actions under the TCPA and provide that only individual suits may be brought, preferably in small claims court where Congress intended. Many TCPA class actions take advantage of a loophole or ambiguity in the law and result in damage or settlement amounts that are completely disproportionate to the harm alleged or caused (if any). A great example are cases finding liability against companies for dialing the mobile number of a former customer who provided consent to be contacted on that number only to discover that the customer changed their telephone number without providing notice. The recent surge of consumer class actions threatens to stifle new technology, deter innovation, and interfere with effective means for businesses to communicate with their consumers. If we could make these legislative changes, our practice would change significantly, but it is a price we would be willing to pay for our clients. **LM**

Michael L. Mallow heads Loeb & Loeb's Consumer Protection Defense Department and is a trial lawyer known for handling high stakes litigation cases and defending clients against aggressive consumer protection laws in regulatory and consumer class actions. He represents companies in a variety of areas, including false and deceptive advertising, unfair competition, economic product defect, breach of privacy and unlawful data collection, transmission or usage. Mr. Mallow has been advising clients on TCPA-related issues since 1998. In addition to his litigation practice, he regularly counsels clients on marketing and advertising issues and has particular experience in the automotive, debt collection and settlement, dietary supplement, telemarketing, electronic mail marketing, Internet, and lead generation industries.

Christine M. Reilly is a trial lawyer representing clients in major litigation in a wide variety of areas, including consumer protection, unfair competition, and false and deceptive advertising. Ms. Reilly focuses much of her practice on privacy-related issues and regularly defends clients in consumer class actions and investigations and proceedings initiated by the Federal Trade Commission, Federal Communications Commission, and other federal and state government agencies. She is a regular author and speaker on the TCPA and also administers Loeb & Loeb's Telephone Consumer Protection Act (TCPA) Defense Forum discussion group on LinkedIn.

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