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In The New Landscape of TCPA Litigation, No Industry Is Safe

In recent years, the number of private actions filed under the Telephone Consumer Protection Act (the “TCPA” or the “Act”) has risen sharply, but perhaps more concerning is that litigants are using the Act to target an increasingly broad range of industries. Companies that violate the TCPA’s always-changing and often confusing provisions, which both the FCC and private litigants may enforce, are liable for up to \$500 per violation and up to \$1,500 for each violation found to be willful. Because there is no cap on these statutory fines, the potential damages in a class action based on a less-than-careful, large-scale telemarketing campaign can easily climb into the tens of millions of dollars. In one recent and noteworthy example, Capital One and other defendants agreed to pay \$75 million to settle a class action alleging TCPA violations—the largest settlement of its kind. There are very good reasons to be concerned.

Originally passed in 1991, the TCPA regulates telephone solicitation and restricts the use of automated telephone dialing systems, artificial or prerecorded voice calls, unsolicited faxes, and text messages. As interpreted by the FCC, the primary agency responsible for interpreting and enforcing the Act, the TCPA requires telemarketers to obtain “prior express written consent” before calling or sending text messages to wireless numbers. The consent requirement has been applied strictly, and courts no longer excuse this requirement based on the existence of an established business relationship with the consumer. Further, with some exceptions, any consent associated with a cell phone number does not survive a reassignment of that number.

Traditionally, plaintiffs primarily wielded the TCPA against debt collectors, but as the number of private suits continues to increase (as of May 2014, the publication insideARM.com had measured a 32 percent increase in TCPA suits, year-over-year), so has the number of industries reached. Below is a sampling of recent private actions brought under the TCPA, grouped by industry. As can be seen, no class of business is immune.

Social Networking Sites

- Twitter, Inc. In June, a plaintiff initiated a putative class action against Twitter for allegedly sending text messages to “recycled” mobile numbers—numbers that were reassigned from consenting Twitter users to new, nonconsenting wireless subscribers. See *Nunes v. Twitter Inc.*, No. 14-02843 (N.D. Cal. 2014).
- Path Inc. The social-networking service Path continues to defend a class action filed last year accusing the company of impermissibly sending text messages to numbers obtained from its users’ contact books. See *Sterk v. Path Inc.*, No. 1:13-cv-02330 (N.D. Ill. 2013).

Sports

- The Los Angeles Clippers. The Clippers recently agreed to pay \$5 million to settle a class action alleging that the team violated the TCPA by sending text messages to fans who had previously and voluntarily texted messages to the team to be displayed on the arena’s scoreboard. See *Friedman v. LAC Basketball Club Inc.*, No. 2:13-cv-00818 (C.D. Cal. 2014).

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- The Los Angeles Lakers. Earlier this year, the Lakers settled a class action initiated by fans who had allegedly received confirmatory text messages in response to the text messages the fans sent to the team. See *Emanuel v. The Los Angeles Lakers Inc.*, No. 2:12-cv-09936 (C.D. Cal. 2012).
- Buffalo Bills. The Bills recently agreed to pay \$2.5 million to settle a class action brought by fans who signed up to receive news alerts from the team via text message, but allegedly received more texts per week than represented. See *Wojcik v. Buffalo Bills Inc.*, No. 8:12-cv-02414 (M.D. Fla. 2012).

Pharmacies

- Rite Aid Corp. A putative class action filed in May accuses Rite Aid of violating the TCPA by sending its customers text messages inviting them to sign up for prescription alerts. See *Rooney v. Rite Aid Corp.*, No. 3:14-cv-01249 (S.D. Cal. 2014).
- CVS Pharmacy, Inc. Also in May, plaintiffs initiated a proposed class action against CVS for allegedly making prerecorded calls to customers advertising the pharmacy's flu shot services. See *Lowe v. CVS Pharmacy Inc.*, No. 1:14-cv-3687 (N.D. Ill. 2014).

Travel and Entertainment

- Cosmopolitan Hotels & Resorts, Inc. In April, The Cosmopolitan of Las Vegas was served with a class action alleging that the hotel and casino sent unwanted promotional text messages to individuals who had requested that a representative call them back to complete their reservation. See *Kazerouni v. Cosmopolitan Hotels & Resorts, Inc.*, No. 8:14-cv-00616 (C.D. Cal. 2014).
- Caribbean Cruise Line, Inc. A class action against Caribbean Cruise Line filed late last year alleges that the company placed prerecorded advertising calls to customers across the United States. See *Visser v. Caribbean Cruise Line Inc.*, No. 1:13-cv-01029 (W.D. Mich. 2013).
- Cirque du Soleil, Inc. Cirque du Soleil is currently defending a class action lawsuit accusing the company of sending unsolicited faxes advertising discounted tickets. See *Practice Mgmt. Support Servs. Inc. v. Cirque Du Soleil Inc.*, No. 1:14-cv-02032 (N.D. Ill. 2014).
- Caesars Entertainment Corp. Caesars Entertainment was recently sued by a customer of one of its restaurants, purporting to represent a class. The customer had agreed to be informed via text when the customer's table was ready. The suit alleges that subsequent texts inviting the customer to join a VIP text list and confirming the customer's decision to unsubscribe were violations of the TCPA. See *Rezvanpour v. Caesars Entertainment Corp.*, No. 2:13-cv-01451 (D. Nev. 2013).

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Retailers

- Best Buy Co., Inc. In June, Best Buy agreed to pay \$4.5 million to settle a class action alleging that the company impermissibly placed automated calls encouraging its customers to redeem Best Buy Reward Zone points. See *Chesbro v. Best Buy Co., Inc.*, No. 2:10-cv-00774 (W.D. Wash. 2010).
- J.C. Penney Corp., Inc. J.C. Penney continues to defend a class action lawsuit filed early last year alleging that the company sent unsolicited text messages regarding sales to customers who had signed up for the company's rewards program. See *Maier v. J.C. Penney Corp. Inc.*, No. 3:13-cv-00163 (S.D. Cal. 2013).
- Guess?, Inc. Earlier this year, a plaintiff filed a putative class action against Guess alleging that the clothing store sent unwanted text-message advertisements to its customers. See *Haghayeghi v. Guess?, Inc.*, No. 3:14-cv-00020 (S.D. Cal. 2014).

Education Services

- Peterson's Nelnet, LLC. Peterson's, a higher-education content provider, recently agreed to pay \$2.6 million to settle a class action accusing the company of sending unwanted fax advertisements. See *Bais Yaakov of Spring Valley v. Peterson's Nelnet LLC*, No. 3:11-cv-00011 (D.N.J. 2011).
- myFootpath, LLC. In June, education services company myFootpath was hit with a proposed class action alleging that the company used an auto-dialing program to make unsolicited telephone calls to students. See *LeBlanc v. MyFootpath LLC*, No. 3:14-cv-02994 (N.D. Cal. 2014).

Online Services

- 29 Prime, Inc. Search engine optimization company 29 Prime continues to defend a proposed class action accusing the company of violating the TCPA by making mass phone calls soliciting customers and touting its services. See *Russell v. 29 Prime Inc.*, No. 1:13-cv-12814 (D. Mass. 2013).
- GoDaddy.com, LLC. Earlier this year, a plaintiff filed a proposed class action against GoDaddy accusing the company of sending unsolicited text alerts to its customers offering discounts on its services. See *Nassiri v. GoDaddy.com LLC*, No. 2:14-cv-02141 (C.D. Cal. 2014).

As this brief sampling of recent lawsuits and settlements indicates, any company that engages with current or prospective customers over phone, fax, or by text courts the possibility of incurring significant liability under the TCPA. While bill collectors were once the main target of TCPA suits, the recent spike in private class actions against a wide swath of industries makes clear that every company, regardless of industry, should carefully consider the ever-changing landscape of TCPA law before choosing to send alerts, advertisements, or other communications to consumers by phone, fax, or text.

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This document is intended to provide you with general information regarding TCPA litigation. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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