Recent Developments and New Challenges Under the Telephone Consumer Protection Act

COHEAO Mid-Year Conference

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Overview

• Background on the Telephone Consumer Protection Act of 1991 (“TCPA”)
• Current TCPA Trends
• The Communication Innovators (“CI”) Petition and COHEAO’s Efforts
• New TCPA Requirements on the Horizon
• Petitions for Reconsideration
• Other Pending TCPA Petitions
• Recent FTC Activity
• Recent State Activity
• Issues to Consider
Background on the Telephone Consumer Protection Act of 1991 ("TCPA")

• Congress enacted the TCPA specifically to curb aggressive telemarketing practices.
  – Using automatic dialing equipment to make hundreds of thousands of unsolicited calls to random or sequential telephone numbers.
  – Calling sequential telephone numbers in a way that ties up a block of telephone numbers and creates public safety risks.
  – Concerns about telemarketers shifting calling costs to wireless consumers.
Background on the TCPA (cont’d)

• Imposes a number of restrictions on telemarketing calls, faxes, and other outbound communications.

• Implemented by the Federal Communications Commission (“FCC”).

• FCC rules available at 47 C.F.R. § 64.1200 et seq.
Background on the TCPA (cont’d)

• Two TCPA provisions have become increasingly problematic for companies as more and more consumers rely exclusively or primarily on wireless telephones.

• First, the TCPA prohibits callers from using an “automatic telephone dialing system” (“autodialer”) or a prerecorded or artificial voice message to call, *inter alia*, wireless telephone numbers, absent an emergency or the “prior express consent” of the called party.
  – Applies regardless of the content of the call.
  – The FCC and some courts have determined that this restriction applies to both voice calls and text or short message service (“SMS”) messages.
Background on the TCPA (cont’d)

• Second, the TCPA separately prohibits callers from using a prerecorded or artificial voice message to call residential telephone numbers without prior express consent.

• Several exceptions to this restriction:
  – Calls that do not include a solicitation or constitute telemarketing
  – Calls not made for a commercial purpose
  – Emergency calls
  – Calls made by or on behalf of a tax-exempt nonprofit organization
  – Calls to an individual with whom the caller has an existing business relationship (more on this later)
Background on the TCPA (cont’d)

• The TCPA defines an autodialer 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 FCC has taken the position that (at least some) predictive dialers are “autodialers,” which has created significant confusion over the application of the TCPA to new technologies (more on this later).
Background on the TCPA (cont’d)

TCPA Violations Can Be Costly

- Statutory damages of $500 per call, potentially up to $1,500 per call for knowing or willful violations.
- Injunctive relief also available.
- Class actions allowed, no cap on damages, no de minimis exception:
  - 1,000 calls = at least $500,000, potentially $1.5 million
  - 50,000 calls = at least $25 million, potentially $75 million
  - 250,000 calls = at least $125 million, potentially $375 million
- Even if the call was not answered and no message was left, plaintiffs can still seek damages.
Background on the TCPA (cont’d)

May be vicariously liable for a vendor’s actions

• Federal common law principles on vicarious liability apply . . .
  – Can be liable for the actions of an agent who is acting on the principal’s behalf and subject to the principal’s control.

• . . . including principles of apparent authority and ratification
  – Can be liable if third-party beliefs about an actor’s authority to act as an agent are reasonable and traceable to the principal.
  – Can be liable if one knowingly accepts the benefits of the acts, e.g. accepting payment.
Current TCPA Trends

• There has been a dramatic shift in the use of wireless telephones over the last decade.

• More than one-third (38.2%) of all American homes are wireless-only households.

• Another 15.9% of households receive all or almost all calls on wireless telephones despite also having a landline telephone (“wireless-mostly”).

• Approximately 62% of 25-29 year-olds and 57% of 30-34 year-olds live in wireless-only households (many never had a landline).

• More than half of Americans whose incomes are below the poverty line rely only on wireless services.

• Consumers can easily “port” their landline number to their wireless device.
Current TCPA Trends (cont’d)

Wireless rules increasingly important, particularly when serving younger Americans.

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**Percentages of adults and children living in households with only wireless telephone service or no telephone service: United States, 2003–2012**

- **Children with wireless service only**: 45.0%
- **Adults with wireless service only**: 36.5%
- **Adults with no telephone service**: 1.9%
- **Children with no telephone service**: 1.9%

**NOTE**: Adults are aged 18 and over; children are under age 18.
**SOURCE**: CDC/NCHS, National Health Interview Survey.
Current TCPA Trends (cont’d)

- TCPA claims have increased dramatically in recent years – filings are being made this year at nearly double the rate of 2012.

- Several costly settlements reached:¹

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<tr>
<th>Case</th>
<th>Docket No.</th>
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<tr>
<td>A Fast Sign Co. v. American</td>
<td>No. S11G1708 (Ga.)</td>
<td>$459 million</td>
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<tr>
<td>Home Services, Inc.</td>
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<td>In re Jiffy Lube International Inc.</td>
<td>No. 3:11-MD-02261 (S.D. Cal.)</td>
<td>$47 million</td>
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<td>Addison Automatics, Inc. v. Precision Electronics Glass, Inc.</td>
<td>No. 1:10-CV-06903 (N.D. Ill.)</td>
<td>$16 million</td>
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<td>Ellison v. Steve Madden Ltd</td>
<td>No. 2:11-CV-05935 (C.D. Cal.)</td>
<td>$10 million</td>
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<tr>
<td>Meilleur v. AT&amp;T Inc.</td>
<td>No. 2:11-CV-01025 (W.D. Wash.)</td>
<td>$4 million</td>
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Current TCPA Trends (cont’d)

• Extensive litigation over the meaning of “prior express consent”
  – Do they have to give you the specific telephone number?
  – What happens if they change telephone numbers?
  – Do you have to disclose specifically that you may use autodialers and prerecorded messages?
  – Do you have to disclose specifically that you may engage in telemarketing?
  – Do you have to disclose specifically that you may send text messages (not just voice calls)?
Current TCPA Trends (cont’d)

• Extensive litigation over the meaning of “autodialer”
  – Predictive dialers?
  – Preview dialers?
  – Multiple-mode dialers?
  – Auto-generated text message replies?
  – Representative-assisted IVR systems?
The Communication Innovators ("CI") Petition and COHEAO’s Efforts

• CI filed a Petition for Declaratory Ruling with the FCC in June 2012 regarding the applicability of the TCPA to predictive dialers.
• CI requested confirmation that predictive dialers that are not used for telemarketing and do not have the current ability to general and dial random or sequential numbers are not “autodialers.”
  – If the equipment must be modified to be able to dial random or sequential numbers, it should not be considered an autodialer unless modified.
• FCC sought comment on the petition, but the petition remains pending.
The Communication Innovators Petition and COHEAO’s Efforts

• COHEAO and other leading associations have been engaging with FCC staff to support the CI petition.
  – Several meetings and telephone calls with high-level FCC staff
  – Numerous written advocacy filings
• COHEAO has been highlighting the substantial benefits from using predictive dialers and other new technologies to reach students on their wireless telephone numbers.
• The advocacy is making a difference.
New TCPA Requirements on the Horizon

• FCC compliance deadline approaching soon

• In February 2012, the FCC adopted new prior express written consent requirements for:
  – All autodialed or artificial or prerecorded telemarketing calls to wireless telephone numbers
    • Includes text/SMS messages
  – All artificial or prerecorded telemarketing calls to residential telephone numbers

• Requirements go into effect on October 16, 2013 – 79 days from today
New TCPA Requirements on the Horizon (cont’d)

• To avoid liability, need “prior express written consent”

• Written consent must be signed (can be electronic with E-SIGN Act) and be sufficient to show that the consumer:
  1. Received “clear and conspicuous disclosure” that the consumer will receive prerecorded and autodialed telemarketing calls from a specific seller; and
  2. Agrees unambiguously to receive such calls at a telephone number that the consumer designates

• Consumers can revoke their consent at any time
New TCPA Requirements on the Horizon (cont’d)

• Cannot require consent as a condition of providing any goods or services
• To be clear and conspicuous, the disclosure may not be hidden in the terms & conditions, privacy policies, small font, etc.
• The caller bears the burden of demonstrating that a clear and conspicuous disclosure was provided and that unambiguous consent was obtained
• The FCC also eliminated the exemption for prerecorded telemarketing calls to residential telephone numbers where the caller has an existing business relationship with the called party
New TCPA Requirements on the Horizon (cont’d)

• Paper forms
  – Consumers must provide their actual signature after appropriate disclosures

• Online forms
  – Consumer must take an affirmative action to sign electronically
  – For example, clicking a “I CONSENT” button that is next to the appropriate disclosures on a form used only for this disclosure
  – If the form is multi-purpose, consent may require clicking a separate box next to the appropriate disclosures
New TCPA Requirements on the Horizon (cont’d)

• Email
  – Consumer must include their wireless number
  – Should require consumers to explicitly state their consent and can ask them to type their names as a signature
  – Can also have them click a link to a website with the disclosures and opt-in opportunity
New TCPA Requirements on the Horizon (cont’d)

• Phone call
  – To constitute consent, the consumer must clearly and unambiguously state their consent
  – For example, an affirmative “yes” after having receive the appropriate disclosure
  – Must be recorded (need recording disclosure)
  – Cannot use an autodialer or prerecorded message to obtain consent
• Exception: before October 16, 2013, if you already have consent under the current standard
New TCPA Requirements on the Horizon (cont’d)

Must keep clear records of consent

• Consent given on paper forms:
  – Must retain written agreements with date

• Consent given in online forms:
  – Retain consumer’s info, time/date of consent, IP address if possible (check privacy policy), and copy of consent page

• Consent given by email or over the phone:
  – Retain copies of the e-mails or call recordings
New TCPA Requirements on the Horizon (cont’d)

Other Requirements

• Must implement an automated, interactive opt-out mechanism that allows a consumer to opt out of receiving additional calls immediately during a call

• Must automatically process revoked consent – a single call after withdrawal is a violation

• Other changes to the law include: how parties calculate the call “abandonment” rate; an exemption for certain HIPAA-regulated calls.
Petitions for Reconsideration

• Three parties filed petitions for reconsideration of the FCC decision adopting the new written consent rules.
  – Reconsider the requirement for abandoned calls to include an automated opt-out mechanism.
  – Clarify that companies need not disclose that they will be using “autodialers” if their calls will be connecting consumers to live representatives (e.g., predictive dialers).
  – Eliminate the prior express written consent requirement for calls to consumers who have provided their cellular telephone number as their primary contact number to firms with whom they do business.
• The FCC has not yet acted on the petitions
Other Pending TCPA Petitions

Several parties have also filed petitions for declaratory rulings or clarifications of the FCC’s TCPA rules.

- Communication Innovators (predictive dialers)
- GroupMe (group text messaging and third-party consent)
- Cargo Airline Association (package delivery notifications and third-party consent)
- Revolution Messaging (political campaign robocalls)
- YouMail (mobile app “virtual receptionist”)
FTC Activity

• The Federal Trade Commission also regulates telemarketing through its Telemarketing Sales Rule (“TSR”).
  – Aggressive enforcement
  – Pursuing technological solutions
• FTC does not have general jurisdiction over non-telemarketing calls.
• No private right of action under the TSR
State Activity

- States also regulate telemarketing activities.
- August 2012: NY law imposing new restrictions similar to the FCC’s Robocall Report and Order.
  - Focused on prerecorded voice telemarketing calls.
  - Extends additional telemarketing laws to out-of-state callers, including registration requirements.
  - Already in effect.
Issues to Consider

• Assessing your existing data
  – What level of consent can you demonstrate?
  – How can you obtain any additional consents needed by October 16, 2013?

• Reviewing lead generation forms, telemarketing scripts, and other consent channels
  – Are the disclosures adequate?
  – Is the caller specified?
  – Is your privacy policy sufficient?

• Analyzing the available opt-out mechanisms
Issues to Consider

- Revising company telemarketing policies and manuals
- Preparing training modules for employees
- Analyzing vendor agreements for TCPA compliance and adequate protection (including vicarious liability issues)
- Assessing call monitoring and recording compliance issues
- Ensuring adequate record retention
- Obtaining insurance
- Monitoring TCPA litigation developments and pending FCC proceedings for filings and decisions of interest
Questions?

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