NCHER Winter Legal Meeting
TCPA Litigation Update

Robert G. Cameron
rcameron@pheaa.org
Overall Litigation Trend

• Do not do indirectly what is prohibited directly.
• Consumer protection statutes are being construed even more liberally in favor of the consumer.
Where We Are On Key Issues

• Automatic Telephone Dialing Systems
  - Does the system have the capacity to:
    - produce, store and call telephone numbers using a random or sequential number generator?
    - Dial these numbers without human intervention?
  - Did the system have the capacity at the time of the alleged violation?

• Consent/Revocation
  - Was consent was given?
  - What was the scope of consent?
  - Can consent be revoked?
TCPA

How We Got Here
The Telephone Consumer Protection Act (TCPA)

• Is a federal law, originally enacted in 1991
• Codified at 47 U.S.C. §227
• The regulating authority of the TCPA is the Federal Communications Commission (FCC), with regulations at 47 C.F.R. § 64.1200
• What does it apply to?
  - Automatic telephone dialing systems (ATDs)
  - Artificial or prerecorded messages
  - Calls to cell phones
  - Calls to landlines
• Who does it apply to?
  - Potentially anyone using these technologies to contact consumers
TCPA: ATD and Prohibitions

• Automatic Telephone Dialing System (ATD) is defined as:
  • Equipment which has the **capacity** –
    • to store or produce telephone numbers to be called, using a random or sequential number generator, and
    • to dial such numbers

• Prohibitions:
  • To make **any** call, without prior express consent of the called party (prior express written consent for telemarketing and advertising):
    • to a cellular telephone line using an ATD or prerecorded voice
    • to a residential line using an artificial or prerecorded voice to deliver a message
TCPA: Damages

Monetary damages

- Standard violations: $500 per violation, or actual damages, whichever is greater. Consumers do not have prove they were damaged.
- Willful and knowing violations: up to three times the award for a standard violation
- Potential for class actions

Predominant Sources of Monetary Damages

- Consent
  - Effective October 16, 2013, the FCC has adopted new rules requiring a called party’s prior express written consent for calls that contain telemarketing or an advertisement to:
    - Residential lines using artificial or prerecorded messages and
    - Calls or text messages to cell phones that use ATDs or prerecorded messages
- Consent Revocation
- Usage of Autodialing or Prerecorded Messages
TCPA: Caselaw

The Game Changer


- Supreme Court decision that held federal and state courts have concurrent jurisdiction over TCPA suits
  - The fact that a federal law allows lawsuits to be brought in state courts to enforce the TCPA does not strip federal courts of the ability to hear such cases as well.
- TCPA cases have doubled since this decision.

The Result:


- Federal Rules govern whether a federal TCPA suit may proceed to class action
- Analysis heavily based on Supreme Court decision in *Mims*
TCPA Caselaw: Prior Express Consent

Consent must be clear and specific

*Satterfield v. Simon & Schuster*, 569 F.3d 946 (9th Cir. 2009)
- Consent must be “clearly and unmistakably stated”.

*Soppey v. Enhanced Recovery Co.*, 679 F.3d 637 (7th Cir. 2012)
- Consent must be given by current phone subscriber.

- Voluntary provision of cell number by the called party’s wife was essentially prior *implied* consent to be contacted, rather than the TCPA-required prior *express* consent.

- A person who releases his cell phone number to another party has not consented to be contacted by that party with automated technology.
TCPA Caselaw: Revocation of Prior Consent

Courts are split on whether consent, once given, may be revoked

May Be Revoked:

Gager v. Dell Financial Services, LLC, 727 F.3d 265 (3rd Cir. 2013)
- Consumers may revoke their express consent to receive automated calls on a cell phone at any time under the TCPA.

Beal v. Wyndham Vacation Resorts, 2013 WL 3870282 (W.D.Wis. June 20, 2013)
- Not only does consumer have a right to revoke consent to receive autodialed calls under the TCPA, but they may do so orally or in writing.

May Not Be Revoked:

- Specifically rejected analysis of Mais court, and found that consent was not, and could not effectively be withdrawn, as the TCPA does not provide for withdrawal of consent.

Kenny v. Mercantile Adjustment Bureau, 2013 WL 1855782 (W.D.N.Y. May 1, 2013)
- Finding that there is no provision in the TCPA that allows withdrawal of a voluntarily given, prior express consent to call a cell number.

A Quick Case Study:

- As Plaintiff had voluntarily provided his cell phone number, and had specifically completed forms that included consent to be contacted via ATD, Plaintiff’s case was dismissed.
TCPA Caselaw: The Capacity Issue

Capacity:

*Meyer v. Portfolio Recovery Associates, LLC, 707 F.3d 1036 (9th Cir. 2012)*
- The focus is whether the system has the *capacity* to perform as an ATD, not whether calls were placed using one.

*Nelson v. Santander Consumer USA, 931 F.Supp.2d 919 (W.D. Wis. 2013)*
- In using a system that was capable of both predictive dialing and preview dialing, the system was still subject to TCPA liability because it had the *capacity* to make automated calls.

Present Capacity

*Hunt v. 21st Mortgage Corp, 2013 WL 5230061 (N.D. Ala, Sept. 17, 2013)*
- To meet the TCPA definition of an ATD, a system must have the *present capacity*, at the time the calls were made, to perform as an ATD. If the system would require serious modification or alteration to achieve ATD capability, it does not qualify.

- Equipment did not qualify as an ATD because the equipment did not have a number generator at the time the call was placed.
TCPA Caselaw: Text Messages

General:
*Satterfield v. Simon & Schuster*, 569 F.3d 946 (9th Cir. 2009)
- An SMS text message is a “call” within the meaning of the TCPA.

Confirmatory Opt-Out Texts
- A single confirmatory opt-out text message does not appear to be invasion of privacy as contemplated by Congress in enacting the TCPA.

- Non-commercial text messages promptly sent to confirm the revocation of prior consent do not violate the TCPA, as long as they do not include additional marketing materials.

Consent
- Plaintiff’s voluntary provision of his cell phone number for the purpose for which he was then contacted constitutes consent.
The Challenges

The TCPA currently does a poor job of

- Keeping pace with technology
- Keeping pace with demographic trends
- Accounting for businesses that have established relationships with customers

Emerging Areas - “The cutting edge of technology.”

- Voice drop messages
- Text messages
Best Practices

• How do we comply with current standards?
  • Receive express consent for calling cell phone numbers
    - Consent must be written if the message contains advertising or telemarketing
    - Ensure that consent has not been revoked
    - Develop mechanisms to capture and promptly act on consent that has been revoked
  • Manual dialing
  • Create situations where there are easy facts to support a motion to dismiss
How to make it better

- Encourage statutory and regulatory change
- Any solution should flexibly address
  - Keeping up with changing technology
  - Keeping pace with demographic trends
  - Established business relationships with consumers
Conclusion

Questions?