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Some Sanity Amid Skyrocketing TCPA Litigation

Law360, New York (April 11, 2014, 6:46 PM ET) -- Like the Fair and Accurate Credit Transaction Act before it, the Telephone Consumer Protection Act has become the latest federal statute on which entrepreneurial plaintiffs' lawyers have staked their fortunes. The number of lawsuits under the TCPA is skyrocketing. According to the U.S. Chamber of Commerce, the first nine months of 2013 saw over 1,332 TCPA lawsuits — 62 percent more than in all of 2011.

The TCPA prohibits businesses from using an automatic telephone dialing system ("ATDS") to call or text people without their prior express consent. The statute defines an ATDS as "equipment which has the capacity to: (1) store or produce telephone numbers to be called, using a random or sequential number generator; and (2) dial such numbers."

If a business violates the TCPA, a plaintiff can seek to recover statutory damages of $500 per call or text, which can be trebled if the violation is willful. In addition, a plaintiff bringing a TCPA class action under Rule 23 can seek to recover $500 for every call or text sent in violation of the statute. Depending on the number of calls or texts at issue, the potential damages may be staggering.

Fortunately, federal courts have recently brought some sanity to TCPA litigation and, specifically, what constitutes an ATDS.

In Hunt v. 21st Mortgage Corp. (2013), the plaintiff argued that any equipment constitutes an ATDS so long as it is capable of automatic dialing. The problem, as the U.S. District Court for the Northern District of Alabama recognized, was that the plaintiff's interpretation would stretch the meaning of the statute too far.

Under the plaintiff's interpretation, virtually every modern telephone or electronic device would constitute as an ATDS because an application could be downloaded, or software written, that would allow the device to automatically dial numbers. "Are the roughly 20 million American iPhone users subject to the mandates of § 227(b)(1)(A) of the TCPA?" the court asked. "More likely," the court answered, "only iPhone users who were to download this hypothetical 'app' would be at risk." The court held that to "meet the TCPA definition of an [ATDS], a system must have a present capacity, at the time

the calls were being made, to store or produce and call numbers from a number generator."

More recently, the U.S. District Court for the Western District of Washington reached a similar result in Gragg v. Orange Cab Company Inc. (2014). In Gragg, the court rejected plaintiff's position that "any technology with the potential capacity to store or produce and call telephone numbers using a random number generator constitutes an ATDS." Rather, the court held that the equipment must have the present capacity to store, produce or call randomly or sequentially generated telephone numbers.

As in Hunt, the court recognized that the plaintiff's position would lead to an "absurd result" under which "many of contemporary society's most common technological devices" fit "within the statutory definition." Under plaintiff's interpretation, an individual who placed a call or text from a smartphone without the recipient's prior express consent could be found liable because their phone has the "potential" capacity to store, produce or call randomly or sequentially generated telephone numbers — regardless of whether the phone has a presently installed application that permits it do so. See also Echevvaria v. Diversified Consultants Inc. (2014) (recognizing the distinction between systems that have the "potential" capacity to function as an ATDS and those that have the "present" capacity).

Finally, the U.S. District Court for the Eastern District of Pennsylvania reached a similar result in Dominguez v. Yahoo Inc. (2014). In Dominguez, the plaintiff purchased a cell phone and was assigned a phone number. The previous owner of the telephone number had enrolled the number in a text message system of Yahoo's. After plaintiff received a text message from Yahoo, he brought a class action lawsuit under the TCPA on the grounds that he did not consent to receive such messages.

Yahoo moved for summary judgment on the grounds that its text-messaging system did not have the capacity to use a random or sequential number generator to store, produce and text numbers. Because neither the plaintiff nor his expert was able to raise a genuine issue of material fact on whether Yahoo's system was an ATDS, the court granted the company's motion for summary judgment. The decision is currently on appeal to the Third Circuit.

Gragg, Hunt and Dominguez are important because they support the position that, in order to constitute an ATDS, a system must have the present capacity to store, produce and dial random or sequential numbers. It is not enough that the system can be configured or modified to do so.

Fortunately, the Federal Communications Commission may weigh in on this issue in the near future. Since June 2013, the FCC's Consumer and Governmental Affairs Bureau has issued three public notices seeking comment on whether a dialing system's "capacity" is limited to what the system is capable of doing, without further modification, at the time the call or text is placed.

Until the FCC issues its decision, defendants facing TCPA class actions may cite Gragg, Hunt and Dominguez for support. Alternatively, defendants may seek a stay of proceedings. In Mendoza v. UnitedHealth Group Inc. (2014), the U.S. District Court for the Northern District of California stayed proceedings, at the defendant's request, pending the FCC's determination of whether a dialing equipment's present capacity is the determinative factor in classifying it as an ATDS.

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