

# TCPA Update:

## The Year in Review and Trends for 2015

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# Introduction



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# What is the TCPA?

- Federal statute that restricts the making of telemarketing calls and the use of automatic telephone dialing systems and artificial or prerecorded voice messages



# What is the TCPA?

- The statute makes it unlawful for a person, except in certain limited circumstances, “to make any call [or send any text message] (other than ... with the prior express consent of the called party) using any automatic telephone dialing system ... to any telephone number assigned to a ... cellular telephone service ....” 47 U.S.C. § 227(b)(1)(A)(iii).

# Why should we care?

- Companies can be on the hook for statutory damages of \$500 or more per violation.
- **Think** about the exposure for a minute...



# This is why we care

Jurisdiction	Case	Class Size	Total Settlement	Attorneys' Fees
N.D. Ill.	In re Capital One TCPA Litig.	17M customers called	<b>\$75.5M</b>	\$15.7M
W.D. Wash.	Arthur v. Sallie Mae	8M customers called	<b>\$24.1M</b>	\$4.8M
N.D. Cal.	Rose v. Bank of America Corp.	1.7M customers called	<b>\$32M</b>	\$2.4M
N.D. Cal.	Kramer v. Autobytel, Inc.	5.5M customers called	<b>\$12.2M</b>	\$3M
S.D. Cal.	Malta v. Freddie Mac/ Wells Fargo	5.9M customers called	<b>\$17M</b>	\$4.3M

# Why are these damages allowed?

- 11<sup>th</sup> Circuit says TCPA is a “bounty hunter statute”
- Encourages businesses to behave

# Perhaps A Little Overstated

“Computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall.”

-Former US Senator **Fritz Hollings** (D-SC),  
quoted in *Mims v. Arrow*, 132 S. Ct. at 752.



# What is an Auto-dialer?

- The TCPA defines an ATDS as equipment that has “the **capacity** to store or produce telephone numbers, to be called, using a **random or sequential number generator** and to dial those numbers.” 47 U.S.C. § 227(a)(1).

## What is an Auto-dialer? (continued)

- Is it enough that systems have the *potential* capacity to store and dial numbers? **No.**
  - *Hunt v. 21<sup>st</sup> Mortg. Corp.*, 2013 WL 5230061 (N.D. Ala. Sept. 17, 2013)
  - *Gragg v. Orange Cab Co., Inc.*, 2014 WL 494862 (W.D. Wash. Feb. 7, 2014)
  - *Marks v. Crunch San Diego, LLC*, 2014 WL 5422976 (S.D. Cal. Oct. 23, 2014)
  - *Glauser v. GroupMe, Inc.*, 2015 WL 475111 (N.D. Cal. Feb. 4, 2015)

# What is an Auto-dialer? (continued)

- Must systems be used in such capacity?
  - *Glauzer* says no. Focus is on the equipment's present capacity rather than present use.

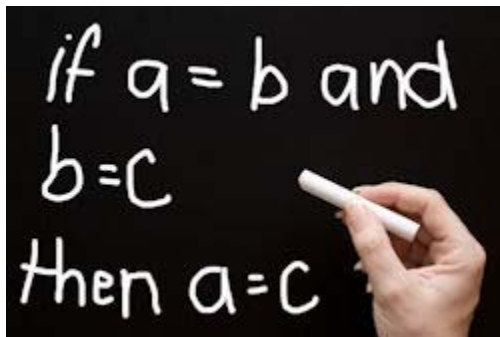
# What is an Auto-dialer? (continued)

- Must systems dial numbers?
  - *Fried v. Sensia Salon, Inc.*, 2013 WL 6195483 (S.D. Tex. Nov. 27, 2013)
  - *Meyer v. Bebe Stores, Inc.*, No. 14-00267 (N.D. Cal. 2014)

# What about vicarious liability?

- Am I on the hook if a vendor I hire sends text messages or faxes on my behalf?

–Short answer: **maybe**



# Liability (continued)

- A 2008 FCC Order previously held that the party “on whose behalf” a telephone solicitation is made bears ultimate responsibility for TCPA violations.
- A 2013 FCC Ruling held that the “prohibitions contained in Section 227(b) incorporate the federal common law of agency and that such vicarious liability principles reasonably advance the goals of the TCPA.” 2013 FCC Order at § 35.

# 2013 FCC Order

“The classical definition of “agency” contemplates “the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control. Potential liability under general agency related principles extends beyond classical agency, however. A principal may be liable in circumstances where a third party has apparent (if not actual) authority . . . [and] a seller may be liable for the acts of another under traditional agency principles if it ratifies those acts by knowingly accepting their benefits.”

# Recent Decisions

- *Thomas v. Taco Bell Corp.*, 2014 WL 2959160 (9th Cir. Cal. 2014)
- *Gomez v. Campbell-Ewald*, 2014 WL 4654478 (9th Cir. Sept. 19, 2014)



# What about faxes?

- *Creative Montessori Learning Center v. Ashford Gear, LLC*, 2014 WL 865963 (N.D. Ill. Mar. 3, 2014): Yes. Agency principles apply.
- “Nothing in [the statute] indicates that notions of agency law are not applicable.”



## Faxes (continued)

- Eleventh Circuit says “No” – agency principles do not apply.
- *Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, No. 13-14013, 2014 WL 5471916, at \*5 (11th Cir. Oct. 30, 2014) (also - remember to include opt-out notices on faxes)

# Corporate Officer/Individual Liability

- Believe it or not, a body of case is developing on the issue of personal liability.
- Each case is different and each relies upon the individual facts of the particular case and marketing campaign.
- Bottom line: **beware.**

# What have courts said?

- “Corporate actors may be held individually liable for violating the TCPA where they had direct, personal participation in or personally authorized the conduct found to have violated the statute.”
  - *Ott v. Mortgage Investors Corp. of Ohio, Inc.*, 2014 WL 6851964 (D. Or. Dec. 3, 2014)
- “Numerous district courts have concluded that individuals acting on behalf of a corporation may be held personally liable for violations of the TCPA where they had direct, personal participation in or personally authorized the conduct found to have violated the statute.”
  - *City Select Auto Sales, Inc. v. David Randall Associates, Inc.*, 2014 WL 4755487 (D.N.J. Sept. 24, 2014)
- “If an individual acting on behalf of a corporation could avoid individual liability, the TCPA would lose much of its force.”
  - *Maryland v. Universal Elections*, 787 F. Supp. 2d 408 (D. Md. 2011)

## What have the courts said? (continued)

- Fortunately, some courts have refused to hold individual officers or owners personally liable.
- Plaintiffs failed to show individuals failed to take efforts to comply with the statute or that the individual authorized or personally engaged in conduct that clearly violated it.

# Common Class Certification Issues

- Ascertainability
- Superiority
- Predominance

# Class Certification Issues

- Identifying the subscribers
  - Historical information from carriers
  - Reverse lookups
  - Affidavits

# Class Certification

- Identifying the Subscribers
  - *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240 (N.D. Ill. 2014)
  - *Balschmitter v. TD Auto Finance, LLC*, 2014 WL 6611008 (E.D. Wisc. 2014)
  - *Smith v. Microsoft*, 297 F.R.D. 454 (S.D. Cal. 2014)



# Class Certification Issues

- Sent v. Received
  - 47 U.S.C. § 227(c)
    - It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States ... to send, to a telephone facsimile machine, an unsolicited advertisement ...

# Class Certification Issues

- Sent v. Received
  - *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012)
  - *Ira Holtzman, C.P.A., v. Turza*, 728 F.3d 682 (7th Cir. 2013)
  - *Palm Beach Golf Center-Boca, Inc. v. Sarris*, 771 F.3d 1274, at 1281-82 (11th Cir. 2014)
  - *American Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*, 757 F.3d 540, 545 (6th Cir. 2014)

# Class Certification Issues

- Sent v. Received
  - *Spine and Sports Chiropractic, Inc. v. ZirMed, Inc.*, 3:13-CV-004989, 2014 WL 2946421 (W.D. Ky. June 30, 2014)
  - *Chapman v. Wagener Equities, Inc.*, 2014 WL 540250 (N.D. Ill. 2014)
  - *Smith v. Microsoft*, 297 F.R.D. 454 (S.D. Cal. 2014)

# Class Certification Issues

- Prior Express Consent: Burden of Proof
  - Element or affirmative defense?
    - *Grant v. Capital Mgmt. Servs., L.P.*, 449 Fed App'x 598, 600 n.1 (9th Cir. 2011)
    - *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036 (9th Cir. 2012)

# Class Certification Issues

- Prior Express Consent: Burden of Proof
  - Split in 9<sup>th</sup> Circuit District Courts
    - Affirmative Defense
      - *Ott v. Mortgage Investors Corp. of Ohio*, \_\_\_ F. Supp. 3d \_\_\_ (D. Or. 2014)
      - *Sailola v. Mun. Servs. Bureau*, 2014 WL 3389395, at \*7 (D. Haw. July 9, 2014)
      - *Gaines v. Law Office of Patenaude & Felix, A.P.C.*, 2014 WL 3894348, at \*4 (S.D. Cal June 12, 2014)
      - *Heinrichs v. Wells Fargo Bank, N.A.*, 2014 WL 985558, at \*2-3 (N.D. Cal. Mar. 7, 2014)
      - *Shupe v. JPMorgan Chase Bank of Ariz.*, 2012 WL 1344820, at \*4 (D. Ariz. Mar. 14, 2012).

# Class Certification Issues

- Split in 9th Circuit District Courts (continued)
  - Element
    - *Smith v. Microsoft*, 297 F.R.D. 454 (S.D. Cal. 2014)
    - *Fields v. Mobile Messengers America, Inc.*, 2013 WL 6073426, at \*4 (N.D. Cal. Nov. 18, 2013)

# Class Certification Issues

- Prior Express Consent: Burden of Proof
  - Does it matter?
    - *Gene & Gene LLC v. BioPay*, 541 F.3d 318 (5<sup>th</sup> Cir. 2008)
    - *Fields v. Mobile Messengers America, Inc.*, 2013 WL 6073426, at \*4 (N.D. Cal. Nov. 18, 2013)
    - *Hicks v. Client Servs., Inc.*, 2008 WL 5479111, at \*8 (S.D. Fla. Dec. 11, 2008)

# Scope of Consent

- Consent “not unlimited”
  - *Nigro v. Mercantile Adjustment Bureau, LLC*, 769 F.3d 804 (2d Cir. 2014)
  - *Kolinek v. Walgreen Co.*, No. 13 C 4806, 2014 WL 3056813 (N.D. Ill. 2014)
    - “Consent for one purpose does not equate to consent for all purposes.”



## Scope of Consent (continued)

- But calls using an ATDS or artificial or prerecorded voice are permissible when made “to wireless numbers provided by the called party in connection with an existing debt.” In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 23 FCC Rcd. 559, 564 (2008)
  - *Sartori v. Susan C. Little & Assocs., P.A.*, 571 F. App’x 677 (10th Cir. July 9, 2014)

# Revocation of Consent?

- Revocation of Consent Allowed under FCC Guidance and Common-law Contract Principles
  - *Gager v. Dell Fin. Servs.*, 727 F.3d 265 (3d Cir. 2013)
- Is the Consent Effective?
  - *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014)
  - *Munro v. King Broadcasting Co.*, No. C-13-1308JLR, 2013 WL 6185233 (W.D. Wash. Nov. 26, 2013)
  - *Buchholz v. Valarity, LLC*, No. 4:13CV362 TIA, 2014 WL 5849434 (E.D. Mo. Nov. 12, 2014)

# FCC Petition Backlog

- The problem
  - TCPA dates from 1991
  - Since enactment of the TCPA, the telecommunications landscape has dramatically changed

# FCC Petition Backlog (continued)

- Feb. 2, 2015 letter of 35 industry and trade associations urging FCC to address backlog of petitions raising issues and seeking clarification under the TCPA
  - 90% of Americans own cell phones
  - 58.8% of households are entirely or predominantly “wireless-only”
  - Explosion in TCPA litigation: 560% increase from 2010 to 2014, including high-stakes class actions
  - Without FCC action, the risk of TCPA lawsuits over wireless calls and texts may prevent consumers from receiving timely and useful financial and other information

# FCC Petition Backlog (continued)

- Commissioner O’Rielly’s March 25, 2014 blog post
  - Recognizes similar concerns and the need for the FCC to provide guidance
  - Notes that the FCC “also needs to take a hard look at its own precedent,” because some “prior interpretations of the TCPA, while well-meaning, may have contributed to the complexity by enlarging the scope of potential violations.”

# FCC Petition Backlog (continued)

- The backlog
  - Currently nearly 30 petitions seeking clarification or rulings relating to key issues under the TCPA
    - What is an ATDS
    - What constitutes “prior express written consent”
    - Other issues, including junk fax rules and opt-out notices in text messages

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