VENABLE® LLP

2nd Annual Venable Advertising Law Symposium

Minding Your TCPAs

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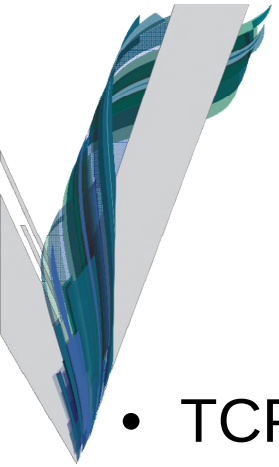

Agenda

- TCPA Overview – Focus on Calls/Texts to Cell Phones
- Non-Marketing Calls: The “Prior Express Consent” Standard
- Marketing Calls: “Prior Express Written Consent” Standard
- “What Is an Autodialer” and Other Hot Topics

TCPA Overview

- Section 227(b)(1)(A) makes it unlawful for any person within the U.S. to make *any* call (other than a call made for emergency purposes or made with prior express consent) using any **automatic telephone dialing system ("autodialer")** to any:
  - i) emergency line
  - ii) hospital or health care facility
  - iii) any cellular telephone or service for which called party is charged for the call
- The FCC does not define "call" but has stated the term includes both voice and text calls (2003 TCPA Report)
- Extends not only to telemarketing calls but to "any call"
- Only exemptions: calls made in emergency situations and calls made with proper consent

TCPA Remedies

- Remedies available under TCPA
  - Enforcement by FCC and state attorneys general
  - Private right of action for consumers (enjoin violations and recover actual damages up to $500 per violation, or up to $1500 per violation if the defendant acted willfully or knowingly)

- Class action lawsuits are abundant
  - Generally seek to enforce the do-not-call requirements of the TCPA and the rule restricting the use of autodialers and prerecorded voice messages

Non-Marketing Calls
The "Prior Express Consent" Standard

- What calls does the standard apply to?
  - Until October 16, 2013 this standard applied to all calls to cell phones made using an autodialer or prerecorded voice
  - Now applies only to
    - autodialed or prerecorded calls to cell phones for informational or other non-marketing purposes;
    - calls made on behalf of a tax-exempt nonprofit organization; and
    - calls that deliver a "health care" message under the HIPAA Privacy Rule

- What does "prior express consent" mean?
  - The TCPA and FCC do not define "prior express consent" and are silent on what form of express consent – oral, written, or some other kind – is required
  - After enactment, FCC indicated that persons who knowingly give their phone numbers have given prior express consent to be called at that number
    - Telemarketers did not violate rules by calling a number which was provided to them
  - Questions remain about whether the FCC's interpretation of "express" consent is valid

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Interpreting the "Prior Express Consent" Standard

- 2008 TCPA Order: FCC found debt collectors had "prior express consent" to make calls to wireless numbers in connection with existing debt
- *Leckler v. Cashcall Inc.* (N.D. Cal. 2008): Court held FCC's ruling was unreasonable and contrary to plain language of the TCPA, which required *express* consent (vacated)
- *Satterfield v. Simon & Schuster* (9th Cir. 2009)*:* "Express consent" is "consent that is clearly and unmistakably stated"
- *Pinkard v. Wal-Mart Stores* (N.D. Ala. 2012): Plaintiff who voluntarily provided her cell phone number to a Wal-Mart pharmacy consented to receive text messages from Wal-Mart (rejecting *Satterfield)*
- These cases demonstrated a clear need for a new FCC rule that brings more certainty to "consent" requirements

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Marketing Calls: "Prior Express Written Consent"

- What does prior express written consent mean?
  - Agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver advertisements or telemarketing messages using an autodialer or an artificial or prerecorded voice

- What must written agreement include?
  - i) shall include a **clear and conspicuous** disclosure informing the person signing that
    - By executing the agreement, person authorizes seller to deliver telemarketing calls using an autodialer or prerecorded voice
    - The person is not required to sign the agreement or agree to enter into the agreement as a condition of purchasing any property, goods or services
  - ii) term "signature" shall include an **electronic or digital form of signature** recognized as valid under the applicable federal or state contract law

- What calls does the standard apply to?
  - Only marketing calls
  - For informational and other non-marketing calls, the "prior express consent" standard still applies and oral consent is permissible

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FCC Petitions

- Until the October 13, 2013 effective date of new rule, FCC allowed telemarketers to rely on consent obtained under old "prior express consent" rule
  - Now, entities are no longer able to rely on the non-written forms of express consent for marketing messages

- **Direct Marketing Association Petition (2013)**
  - Requested the FCC to allow businesses to continue to market to customers who agreed at some point in writing, prior to effective date of the new rules, to receive autodialed calls or texts, but might not have received the specific disclosures required under new rule
  - Direct Marketing Association argued that requiring businesses to go back and "amend" existing written agreements to incorporate the new disclosure requirements would result in confusion among consumers and result in exorbitant costs to the marketers

- **Coalition of Mobile Engagement Providers (2013)**
  - The Coalition petitioned the FCC to declare that the new written consent rules do not nullify previous written consents obtained from consumers
  - The Coalition argued that previous written consent is verifiable and documented, and thus there is no need to obtain consent again
    - Further, retroactive application of the new rules would be inconsistent with prospective nature of rules

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"How am I supposed to know if the number I'm calling is a cell phone?"

- Telemarketers and other callers subject to the TCPA bear responsibility for determining whether a number is a landline or cellular number

- Limited safe harbor of 15 days for numbers that have been recently ported from wireline service to wireless service
  - Automated or prerecorded calls made within these 15 days will not be violations of the consent rules

"What if the person threating to sue me wasn't the person I meant to call?"

- TCPA prohibits calls made without the prior express [written] consent of the "called party"

- Two schools of thought:
  - "Called party" means individual who received the call because consent must from the "current subscriber"
    - *Ybarra v. DISH Network LLC (N.D. Tex. Nov 2014)* and other courts have followed this interpretation
  - Standing to pursue a claim under the TCPA limited to intended recipients
    - *Leyse v. Bank of Am., Nat'l Ass'n (D.N.J. Sept 2014):* "When unintended recipients of a communication have standing, a business could face liability even when it intended in good faith to comply with the provisions of the TCPA."
- *Consumers Bankers Association, Petition for Declaratory Ruling (Sept. 2014)*
  - Asks FCC to clarify that "called party" refers only to the "intended recipient" of the call

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"What if the cell phone number of a person from whom I received consent is assigned to someone else?"

- *Soppet v. Enhanced Recovery Company (*7th Cir. 2012*)*
  - Two customers incurred a debt to AT&T; debt collection company attempted to collect the debt by calling them at the numbers they provided
  - "Consent to call a given number must come from its current subscriber"

- *Breslow v. Wells Fargo Bank* (11th Cir. 2014)
  - Wells Fargo called the cell phone of plaintiff's minor child for debt collection purposes
  - Wells Fargo claimed the number had been provided by a former customer and did not know it had been reassigned
  - Court: the "called party" is the subscriber to the cell phone service, regardless of who the intended recipient is

- Pending FCC petitions
  - *Stage Stores (June 2014)*: Seeks "an exception to liability" for marketing texts sent when sender had obtained prior express written consent but number was subsequently re-assigned without sender's knowledge
  - *United Healthcare Services (Jan 2013):* Seeks ruling that parties are not liable under the TCPA for "information, non-telemarketing calls, especially healthcare-related calls" to reassigned wireless telephone numbers if the caller had previously obtained prior express consent and did not know the number was reassigned

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"Can someone who gave me consent to call later revoke that consent?"

- The TCPA and FCC rules are silent about whether a person can revoke consent

- Courts have said that consumers have the right to revoke consent and there is no temporal restriction on that right
  - *Gager v. Dell Financial Services (*3rd Cir. 2013*)*
  - *See also Osorio v. State Farm Bank (*11th Cir. 2014*)* – Consent could be orally revoked, by the person who gave consent or by the person who subscribes to the number (if different)

- Other courts have disagreed
  - *Saunders v. NCO Fin. Sys. (*E.D.N.Y. 2013*):* "There is no provision in the TCPA that allows for withdrawal of a voluntarily-given, prior express consent to call a cell phone number."

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"What the heck is an Autodialer?"

- "Automated telephone dialing system" defined 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."

- What types of equipment are autodialers?
  - Predictive dialers: dial numbers and, when certain computer software is attached, also assist telemarketers in predicting when a sales agent will be available to take calls
  - Lack of specific guidance from FCC
- What is not an autodialer?
  - Manually dialing calls
- Everything else is subject to court interpretation
- Several FCC Petitions asking for clarification

Autodialer Court Decisions

- Issue: What equipment has the "capacity to store or produce telephone numbers to be called, using a random or sequential number generator?"

- *Hicks v. Client Services (*S.D. Fla. 2008*)*
  - Device in question had non-sequential and non-random dialing capabilities
  - Court concluded that it likely was an autodialer because "FCC interprets 'automated dialing systems' as including any type of automated dialing technology"

- *Satterfield v. Simon & Schuster* (9th Cir. 2009)
  - Focus of the inquiry must be whether equipment has *capacity* to store or produce numbers to be called using a random or sequential number generator rather than whether equipment actually did perform that function

- *Kazemi v. Payless Shoesource Inc. et al* (N.D. Cal. 2010)
  - Plaintiff's description of messages as being formatted in SMS short code, scripted in an impersonal manner, and sent in bulk supports a reasonable conclusion that defendants sent them using an autodialer

Autodialer Court Decisions (cont.)

- Courts have considered other equipment and calling technology alleged to be autodialers, including "preview dialing," which requires an operator to choose a number from a computer screen for the system to call

- *Nelson v. Santander Consumer USA* (W.D. Wis. 2013)
  - Case involved a defendant who attempted to collect plaintiff's debt by calling her cell phone over 1000 times in a year using preview dialing by an operator
  - Defendant argued that "human intervention" prevented the equipment from being properly classified as an autodialer
  - Court held this dialing technology fell within scope of TCPA because "the question is not how the defendant made a particular call, but whether the system had the capacity to make automated calls"

Autodialer Court Decisions (cont.)

- *Hunt v. 21st Century Mortgage Corp.* (N.D. Ala. 2013)
  - Plaintiff alleged he had received an autodialed call, and defendant claimed that it did not use an autodialer, but rather dialed calls manually. The device allegedly was capable of automatic dialing, which the plaintiff contended made it an autodialer under TCPA.
  - Court held this was not an autodialer, as to meet the TCPA definition, a system must have a present capacity, at the time the calls are being made, to store or produce numbers and call numbers from a number generator.

- *Stockwell v. Credit Management L.P.* (Cal. Super. Ct. 2013)
  - Court dismissed part of TCPA claim when declaration by employee stated the technology did not have a number generator (as the definition of automatic telephone dialing system requires).

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Autodialer Court Decision (cont.)

- *Gragg v. Orange Cab Co.* (W.D. Wash. 2014)
  - Court focused on capacity to **randomly or sequentially generate telephone numbers** to be stored, produced, or called.
  - Random number generation means random sequences of 10 digits, and sequential number generation means (111) 111-1111, (111) 111-1112 and so on.

- *Dominguez v. Yahoo!, Inc.* (E.D. Pa. 2014)
  - Strategy similar to that used in *Stockwell*, where defendants offered a declaration of an employee that its text system did not have the capacity to act like an autodialer and plaintiff failed to offer evidence to dispute the declaration.
  - Citing *Gragg*, the court rejected plaintiff's argument that the definition of autodialer included systems that can dial numbers randomly or sequentially from a stored list.
  - Appeal pending before 3rd Cir.

Autodialer Court Decision (cont.)

- *Glauser v. GroupMe* (N.D. Cal. Feb. 2015)
  - "[R]elevant inquiry under the TCPA is whether a defendant's equipment has the present capacity to perform autodialing functions, even if those functions were not actually used."
  - Deferred to FCC's broad definitions of autodialer (including that predictive dialers are autodialers) and stated that "while the capacity for random/sequential dialing is not required for TCPA liability, the capacity to dial numbers without human intervention is required."
  - Held that GroupMe platform for sending group text messages was not an autodialer because text messages were sent with human intervention. Text messages were either sent by group members themselves, and merely routed through defendant's application, or triggered by the group creator's addition of a recipient to the group.

FCC Petitions Relating to Autodialers

- Professional Association for Consumer Engagement (2013)
  - Petitioned the FCC to clarify that a system is not an autodialer unless it has capacity to dial numbers *without human intervention* and its capacity is limited to what it is capable of doing, without further modification, *at the time the call is placed.*
  - Emphasized that this definition is needed to prevent future class actions and because without prior consent, the only way a business can call consumers is to use equipment that does not constitute an autodialer.

- Milton H. Fried, Jr. and Richard Evans (2014)
  - Asked for a declaratory ruling that "one or more pieces of equipment that together have the capacity to 'read' telephone numbers stored in a list … and to direct messages to those phone numbers without human intervention" is an autodialer.

Vicarious Liability

- *Agne v. Papa John's Int'l, Inc.* (W.D. Wash. 2012)
  - The court granted class certification against Papa John's International (franchisor), local Papa John's franchisees, and OnTime4U, a marketing company, for allegedly sending customers text messages in violation of the TCPA.
  - The plaintiffs argued that Papa John's should be held liable for the illegal messages because it directed or encouraged its franchisees to contract with OnTime4U and because Papa John's was vicariously liable, under general agency law theory, for the conduct of its franchisees.
  - The court allowed the case to proceed against Papa John's, noting evidence in the record showing that the franchisor had at least a minor role in the franchisees' decisions to enlist OnTime4U to send the text messages. Though there was not any evidence that Papa John's contracted directly with OnTime4U, evidence did indicate that Papa John's encouraged or authorized its franchisees to use OnTime4U's services.

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Vicarious Liability

- *Thomas v. Taco Bell Corp.* (C.D. Cal. 2012)
  - The plaintiff alleged that she received a text message sent as part of a marketing campaign conducted by an association of local Taco Bell franchisees (the "Association") in violation of the TCPA. The Association had engaged an advertising firm, which, in turn, hired a vendor to actually send the text messages. These messages were sent to local residents and were not connected to any national Taco Bell campaign, except by virtue of being timed coincidentally to overlap with a national advertising campaign.
  - While the court agreed that vicarious liability was available under the TCPA, the court read the scope of this liability to presume that Congress intended to apply the traditional standards of vicarious liability, including alter ego and agency doctrines. Thus, the court rejected the position urged by the plaintiff, which was to apply a broader standard of secondary liability under the TCPA.
  - The court noted that plaintiff must allege an agency relationship between the potentially liable entity and the sender of the message, or allege that the entity controlled or had the right to control the sender of the message, specifically, the manner and means in which they conducted the text campaign. The plaintiff was unable to establish these factual allegations regarding Taco Bell's involvement with the local campaign.

Vicarious Liability

- *FCC Declaratory Ruling* (2013)
  - The FCC addressed three petitions originating from *Charvat v. EchoStar Satellite, LLC* (6th Cir. 2010) and *United States et al. v. DISH Network, LLC* (C.D. Ill. 2011).
  - The FCC clarified that "while a seller does not generally 'initiate' calls made through a third-party telemarketer within the meaning of the TCPA, it nonetheless may be held vicariously liable under federal common law principles of agency for violations of either section 227(b) or section 227(c) that are committed by third-party telemarketers."

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