SUTHERLAND

REDIAL: 2014 TCPA YEAR IN REVIEW

Telephone Consumer Protection Act: Analysis of Critical Issues and Trends

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Sutherland is pleased to present REDIAL, an in-depth analysis of key TCPA issues and developing trends. REDIAL also reports on the industries that are regularly and increasingly facing TCPA class action liability.

DID YOU KNOW?

2nd

TCPA cases are the **second most filed** type of case in federal courts nationwide.

$175M

The **top 4 TCPA class action settlements** in 2014 totaled over $175,000,000.

3X

The TCPA imposes liability of $500 per call, text or fax, **trebled to $1,500** if the sender's conduct is deemed willful.

SUTHERLAND INDUSTRY KNOWLEDGE AND FOCUS

Few industries are immune from TCPA liability, making TCPA compliance all the more important for our clients in every industry sector. Sutherland understands our clients' businesses, allowing us to spot issues before they result in litigation.

In 2014, the insurance and financial services sectors were uniquely affected by TCPA litigation and saw some of the highest dollar TCPA class action settlements. Included in REDIAL are several articles focused on the key legal issues affecting the insurance and financial services industries.

WHY SUTHERLAND?

STRENGTH in representing the country's and the world's leading companies

STRENGTH in knowing our clients' businesses

STRENGTH in advising and counseling our clients on TCPA compliance

STRENGTH as trial lawyers in efficiently and zealously representing our clients in state and federal courts across the country

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REGULATORY DEVELOPMENTS

NEW TCPA RULES TAKE EFFECT FOR TELEMARKETING CALLS

Significant regulatory changes took effect under the Telephone Consumer Protection Act (TCPA) on October 16, 2013, due to a revision of the Federal Communications Commission's (FCC) TCPA rule. The amended rule requires that consent be in writing for autodialed or prerecorded telemarketing calls to cell phones. The amended rule also eliminates the exception for prerecorded telemarketing calls to landlines where there is an established business relationship. Instead, under the new rule, written consent is required for prerecorded telemarketing calls to landlines.

The FCC's TCPA Rule and Revision

The TCPA regulates certain telemarketing and informational calls, texts, and faxes that are made using an automatic dialer or prerecorded message.[1] The FCC adopted a rule under the TCPA that generally prohibits making telephone calls to cell phones using an automatic dialer or prerecorded message without the "prior express consent" of the party receiving the call. This rule applies to both telemarketing calls and non-telemarketing calls such as debt collection calls or informational calls. The rule also prohibits telemarketing calls to landlines using a prerecorded message without prior express consent, except that prior express consent has not been required where the caller has an established business relationship with the call recipient.[2] The rule does not apply to non-telemarketing calls to landlines, or to calls that are manually dialed using an in-person caller.

The amended rule that took effect on October 16, 2013, requires "prior express written consent" for many telemarketing calls.[3] Specifically, "prior express written consent" is required for autodialed or prerecorded calls or texts to cell phones. The new "prior express written consent" requirement also applies to prerecorded telemarketing calls to landlines, and there is no longer any exception for established business relationships. For non-telemarketing calls to cell phones, the standard remains "prior express consent" and does not introduce the requirement that the consent be in writing. As before, the new rule does not cover non-telemarketing calls to landlines or calls that are manually dialed using a live operator.

For purposes of the new rule, the term "prior express written consent" means an agreement in writing, with a "signature" that "clearly authorizes" the seller to make telemarketing calls or texts using an autodialer or prerecorded voice. The agreement must contain the specific telephone number or numbers to which calls can be made, and the person giving consent cannot be required to give consent as a condition of purchase. Significantly, consent obtained pursuant to the E-SIGN Act satisfies the requirement of the revised rule.[4] Therefore, consent obtained via an email, a website form, a text message, a telephone keypress or a voice recording is sufficient under the new rule.

THE TCPA ESTABLISHES A PRIVATE RIGHT OF ACTION FOR CONSUMERS TO BRING CLAIMS FOR $500 PER VIOLATION ($1500 IF WILLFUL) CAUSED BY CERTAIN AUTODIALED CALLS, PRERECORDED CALLS AND FACSIMILES RECEIVED WITHOUT CONSENT. THE STATUTE ALSO CREATES A PRIVATE RIGHT OF ACTION FOR UP TO $500 PER VIOLATION FOR CERTAIN TELEMARKETING CALLS MADE IN VIOLATION OF A CONSUMER'S STATUS ON THE FEDERAL DO NOT CALL LIST.

Developments in TCPA Class Action Settlements

The TCPA provides a private right of action and continues to spawn class action litigation and settlements. The TCPA provides for minimum statutory damages of $500 per violation without any total damages cap in a class action.[5] There have been a number of large TCPA settlements in recent months. At the end of September 2013, Bank of America agreed to settle a putative class action under the TCPA for a reported amount of $32 million, which was reported as the largest TCPA settlement to date.[6] Another pending settlement this year includes a class action against Papa John's, in which the parties announced a $16.5 million settlement in May.

With the new FCC rules and ongoing litigation risk, companies will need to adopt procedures to obtain written consent where appropriate and to maintain adequate records of the specific details of that consent.

[1] 47 U.S.C. § 227.

[2] 47 C.F.R. § 64.1200.

[3] 47 C.F.R. § 64.1200; *see also* Federal Register, Vol. 77, No. 112.

[4] Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 (2000).

[5] 47 U.S.C. § 227(b)(3) (A court may award up to $1500 per violation for willful or knowing violations.).

[6] The settlement resolved several pending cases, including *Rose v. Bank of America*, No. 11-CV-2390 (N.D. Cal.).

JUST THE FAX: RECENT TCPA DEVELOPMENTS ON LIABILITY FOR UNSOLICITED FAXES AND FAX OPT-OUT NOTICES

The end of October 2014 saw two significant developments for Telephone Consumer Protection Act (TCPA) rules governing facsimile transmissions, fax opt-out notices and liability for faxes sent by third parties.

On October 30, 2014, the Federal Communications Commission (FCC) ruled that opt-out notices, giving the recipient the right to decline receipt of further fax communications, are required on facsimile advertisements regardless of whether the recipient provided prior consent.[1] The FCC's order was in response to petitions seeking a declaratory ruling that opt-out notices are not required on fax advertisements sent with the recipient's prior express consent. In denying the Application for Review and numerous other petitions on the same issue, the FCC confirmed its prior position that senders of *any* fax advertisement must include instructions that clearly and conspicuously explain to recipients how to opt out of future communications, "even if [recipients] previously agreed to receive fax ads with the recipient's prior express consent."

In addition to clarifying the opt-out rules for faxes, the FCC also acted on several individual requests for waivers, granting retroactive relief to parties that were reasonably uncertain about whether the opt-out notice requirement applied to faxes sent with the recipient's prior permission. The FCC provided a six-month window starting on October 30, 2014, for the waiver recipients to come into full compliance with the order. Lastly, the FCC noted that parties similarly situated may apply for waiver requests, which must be filed by April 30, 2015. If a waiver is not received, however, full compliance is expected, and past or future failure to comply with the order could subject entities to private litigation or enforcement sanctions, such as forfeitures and fines.

On the same day, in *Palm Beach Gold Center of Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 13-14013 (11th Cir. 2014), the U.S. Court of Appeals for the Eleventh Circuit issued a decision regarding the standard for liability when a fax transmission is sent on behalf of a defendant by a third-party marketer. In 2005, plaintiffs received a one-page unsolicited fax advertisement promoting the defendant's dental practice. The fax was sent by a hired marketing manager with "free rein" to market the defendant's practice. Plaintiffs filed suit under the TCPA. The district court granted the defendant's motion for summary judgment on the ground that the fax was sent by a third party and not by the defendant. The district court reasoned that per the FCC's 2012 declaratory ruling in *In Re Dish Network, LLC (Dish Network)*, direct liability exists under the TCPA only by the "person actually transmitting the fax itself." And although vicarious liability can exist against a person who delegates to another, the district court determined that the plaintiffs had failed to plead "a theory of vicarious liability in its complaint, a heightened pleading requirement under Florida law," such that the "claim was defective."

SENDERS OF ANY FAX ADVERTISEMENT MUST INCLUDE INSTRUCTIONS THAT CLEARLY AND CONSPICUOUSLY EXPLAIN TO RECIPIENTS HOW TO OPT OUT OF FUTURE COMMUNICATIONS.

In reversing and remanding the trial court's decision, the Eleventh Circuit set a broad standard that direct liability for an unsolicited fax can be applied to a company on whose behalf an advertisement is sent, even if the company did not send the fax itself. In so holding, the court agreed with plaintiffs' argument that *Dish Network* did not apply because it did not specifically "construe the TCPA provision related to" faxes. The court also relied on an FCC letter brief, filed at the court's request, which argued that *Dish Network* should not be extended to fax cases. And the court held that an advertisement sent on behalf of a company whose services are advertised in an unsolicited fax transmission can lead to direct liability of the company under the TCPA.

The FCC's fax order and the Eleventh Circuit's decision in *Palm Beach Gold Center* highlight two of the significant TCPA issues in fax cases: required opt-out notices on faxes and the potentially broad standard for direct liability for fax transmissions sent by third parties. As TCPA litigation continues to increase, it is essential for companies transmitting fax messages to maintain a focus on TCPA compliance.

[1] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (Oct. 30, 2014).

COMPLIANCE ISSUES

TCPA BEST PRACTICES: CONSENT, COMPLIANCE, COMMUNICATION

Sutherland's Three Cs: Consent, Compliance, Communication

What is the TCPA?

The Telephone Consumer Protection Act of 1991 (TCPA) protects consumers from unwanted telemarketing calls, prerecorded or autodialed calls, fax transmissions, and text messages.

What are the penalties for violating the TCPA?

Violations of the statute can lead to significant financial consequences: a $500 penalty per communication (or $1,500 if willful).

How can a company protect itself from TCPA lawsuits?

Sutherland's Three Cs approach provides an overview of best practices for reducing litigation risk.

CONSENT: Understand and obtain the appropriate consent

Get written consent for marketing communications

For automated marketing calls, obtain written consent. Under TCPA regulations, "prior express written consent" requires a written agreement, signed by the consumer, that includes, among other things, the telephone number, that specifically authorizes telemarketing by automatic dialing/texting or prerecorded voice, and that is not required as a condition of purchase.

Get consent for non-marketing communications

A consumer has generally consented to receive non-marketing communications if they have given their number for a specific purpose or in connection with a specific transaction.

- The scope of the consent extends to communications related to the transaction or purpose for which the consumer provided the number.

Check the Do Not Call registry

Consumers who do not want to receive telemarketing calls can register their numbers on the National Do Not Call registry.

- Maintain written procedures for checking the Do Not Call registry.
- Also maintain a company-specific do-not-call list for consumers who have requested not to be contacted.

COMPLIANCE: Strict compliance with TCPA regulations is essential

Maintain a record of consent

Keep a current record of consumers who have consented to receiving communications and the type of communications to which they have consented.

- Create internal procedures for referring to the record before initiating communications.

Offer an opt-out

Include an opt-out mechanism for consumers who do not wish to receive further marketing communications.

- Ensure that opt-out notices meet the specific and detailed requirements set forth in TCPA regulations, which vary by the type of communication.

Honor requests to stop calling

Maintain a procedure for ceasing calls to a number at recipient's request.

COMMUNICATION: Best practices

Limit the number of repeat calls

A consumer who receives only a few calls is much less likely to complain or bring suit.

- Avoid making multiple calls or leaving multiple pre-recorded messages on the same day, and limit the total number of calls to the same number.
- Most TCPA litigation is initiated by consumers who have received numerous automatic calls.

Avoid calling at inconvenient hours

This is a best practice for all types of communications.

- TCPA regulations expressly prohibit telemarketing calls before 8 a.m. or after 9 p.m. (local time at the called party's location).

Be respectful of the consumer

Even if a consumer has consented to the communications, use common sense, and be courteous to the called party.

This outline does not constitute legal advice. ***The best practices listed above provide only a general overview of TCPA requirements and do not reflect all details needed for compliance.***

TCPA HOT ISSUES: IS THE SCOPE OF CONSENT UNLIMITED?

What constitutes valid consent under the Telephone Consumer Protection Act? A hot issue in TCPA litigation is the scope of consent necessary to place automated calls to consumers, where the consumer has provided a cell phone number to a company in connection with a specific transaction or application. Guidance from the Federal Communications Commission (FCC) and several recent court decisions emphasize that a consumer's consent is not unlimited; where a consumer provides a cell phone number in connection with a specific transaction, thereby giving consent to be contacted, the FCC and some courts take the position that the scope of the consent is limited to communications directly related to the specific transaction for which the consent was provided.

In an amicus brief filed in the Second Circuit on June 30, 2014, in support of a plaintiff-appellant, the FCC has taken the position that a consumer's consent to be contacted by cell phone is not unlimited. The Second Circuit ultimately followed the FCC's view and reversed the district court's decision, which took a broader view of the scope of consent. *Nigro v. Mercantile Adjustment Bureau, LLC*, 769 F.3d 804 (2nd Cir. 2014). In *Nigro*, the plaintiff contacted the power company to request termination of electric service in the apartment of his recently deceased mother-in-law, and he provided a cell phone number where he could be contacted. More than a year later, a collection agency made several calls to the plaintiff's cell phone using an autodialer in an effort to collect on the mother-in-law's delinquent account. The plaintiff claimed that he had not consented to the collection calls. The district court disagreed and granted summary judgment in favor of the defendant. The district court relied on the FCC's statement in its 1991 Rulemaking Order for the proposition that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." 7 FCC Rcd at 8769 (¶ 30). The district court reasoned that the plaintiff "consented to calls regarding the subject of the transaction, namely the termination of [the] account," which included any effort to collect on any account delinquency.

The FCC, however, has taken a narrower view of consent and disagrees with the lower court's analysis. In its amicus brief filed in support of the plaintiff's appeal, the FCC's position is that although the plaintiff "presumably consented to receive calls regarding the termination of service… by providing his cell phone number," the scope of that consent "did not extend to debt collection calls with respect to debts that did not arise 'during the transaction' in which [the plaintiff] provided his number." The FCC emphasized that consent is "not unlimited."[1] Where a consumer has provided a cell phone number "for a limited purpose," such as for "service calls only," the scope of consent, according to the FCC, does not go "beyond that limited purpose." The FCC relied principally on a 2005 Administrative Order regarding debt collection in which it ruled that prior express consent to be contacted by a creditor or a debt collector was deemed granted only if the number was provided "during the transaction that resulted in the debt owed." ACA Order, 23 FCC Rcd at 563 (¶ 8) (2005). The FCC appears to be taking the position that a similar limitation on scope should apply in other circumstances as well.

THE TYPE OF CONSENT REQUIRED UNDER FEDERAL LAW—EXPRESS WRITTEN CONSENT OR PRIOR EXPRESS CONSENT—WILL VARY DEPENDING ON THE TECHNOLOGY USED, THE TYPE OF DEVICE RECEIVING THE CALL AND THE MESSAGE CONTENT.

Several lower courts have adopted the FCC's position and have held that consent is context-limited. For example, in *Kolinek v. Walgreen Co.*, 2014 WL 3056813 (N.D.Ill. 2014), a federal district court in Illinois reconsidered its earlier dismissal of a TCPA case and stated that the scope of a consumer's consent "is dependent on the context in which it is given." In that case, the plaintiff provided his cell phone number to a pharmacy for "identity verification purposes." The court found that this did not constitute consent to receive automated calls regarding prescription refills. *Id.* In so holding, the court relied on the FCC's ruling in *In re Group Me/ Skype Communications S.A.R.L. Petition for Expedited Declaratory Ruling*, FCC Rcd. 14–33, 2014 WL 126074 (Mar. 27, 2014) (*GroupMe*). In that Order, the FCC stated that a consumer gives "prior express consent" when she provides her cell phone number to the private organizer of a text messaging group "agree[ing] to receive associated calls and texts." While this constituted consent to receive text messages from both the provider and the group members, the scope of the consent was limited to texts "only regarding that particular group." *Id.* Based on *GroupMe*, the court in *Kolinek* concluded that "the scope of a consumer's consent depends on its context and the purpose for which it is given" and that "[c]onsent for one purpose does not equate to consent for all purposes."

Where a customer has given a phone number as contact information for a particular account, a number of courts have held that providing the phone number constitutes consent to be contacted for all purposes regarding that account. That is not to say the consent is unlimited for any and all purposes, but that the consent is not limited to a specific purpose and applies more broadly to calls made in relation to the account or transaction at issue. In *Sartori v. Susan C. Little & Associates, P.A.*, 2014 WL 3302588 (10th Cir. July 9, 2014), the Tenth Circuit affirmed the lower court's dismissal of TCPA allegations where the evidence established that the plaintiff provided a creditor with his cell phone number as a contact number for his account. According to the court, this scenario falls cleanly within the FCC rule that automated or prerecorded calls 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) (2008 Order). The court also rejected the plaintiff's argument that consent for collection calls must be in writing.

Similarly, a plaintiff was deemed to have consented to receive automated calls from a debt collector when he provided a cell phone number to a hospital in connection with medical services. *Penn v. NRA Group, LLC*, 2014 WL 2986787 (D.Md. 2014). The court rejected the plaintiff's argument that he did not consent to debt collection calls when he provided the number to his doctor. Instead, the court relied on the FCC ruling stating that providing a cell phone number to the service provider/doctor is the same as providing it to a third-party collector working on behalf of the service provider. 2008 Order, 23 FCC Rcd. 559. The plaintiff's provision of his cell phone number in conjunction with patient registration, therefore, constituted prior express consent for the debt collector operating on the hospital's behalf to contact the plaintiff on his cell phone in an effort to collect on the related debt.

Conclusion

Is consent unlimited? According to the FCC, the answer is no. According to some courts, the answer is broader but depends on the facts. The issue of consent has and will continue to develop in TCPA litigation and before the FCC. The cases highlighted above illustrate that the scope of any consent will continue to be a contested issue and is largely fact-dependent. Another unresolved issue is the question of the consumer's right to revoke consent. (See Sutherland's Legal Alert: If Consent is Not Forever, What Constitutes Revocation.) More broadly under the TCPA, companies are continuing to adjust to new FCC rules that went into effect in late 2013, which set a high standard for the type of consent required for marketing calls made to cell phones. With the new FCC rules and ongoing litigation risk, companies should obtain written consent where appropriate and maintain adequate records of the specific details of that consent.

[1]*See also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling, 27 FCC Rcd 15391, 15397 (¶11) (2012) (consent "not unlimited").

TCPA HOT ISSUES: IF CONSENT IS NOT FOREVER, WHAT CONSTITUTES REVOCATION?

One of the hot issues in pending litigation under the Telephone Consumer Protection Act (TCPA) is whether a consumer can revoke consent to receive calls on a cell phone. A number of courts have recently held that a consumer can revoke consent to be contacted by cell phone. Generally, the TCPA requires prior express consent before a consumer can be contacted on a cell phone using an automatic dialer or prerecorded message, but the statute is silent on the right to revoke. If consent is not forever, that begs the question: what constitutes valid revocation? Several courts have recently addressed this issue under a variety of scenarios.

Can Prior Express Consent Be Revoked?

There is a split in authority on whether consent can be revoked under the TCPA. A number of courts are trending toward the conclusion that consent is revocable.

The Third Circuit was the first federal appellate court to address this issue. In *Gager v. Dell Fin. Servs.*, LLC, 727 F.3d 265, 270-72 (3d Cir. 2013), the court held that a consumer has a right to revoke consent notwithstanding the absence of a statutory provision specifically authorizing revocation. The court reasoned that the common law concept of consent should be applied, and that a right to revoke is not inconsistent with prior Federal Communications Commission (FCC) decisions. Accordingly, silence in the statute should be interpreted in favor of consumers, consistent with the overall judicial trend toward interpreting the TCPA in consumers' favor. The court also stated that there should not be a temporal restriction on the right to revoke. After *Gager,* most courts appear to be following the Third Circuit's lead.

Prior to *Gager,* however, a number of courts issued decisions holding that the lack of a revocation provision in the TCPA meant that the right to revoke does not exist, and these cases remain good law in other jurisdictions. See *Kenny v. Mercantile Adjustment Bureau, LLC*, 10-CV-1010, 2013 WL 1855782 (W.D.N.Y. May 1, 2013); *Saunders v. NCO Fin. Sys., Inc.*, 910 F. Supp. 2d 464, 468-69 (E.D.N.Y. 2012).

What Constitutes Revocation?

If a consumer has a right to revoke consent, what must the consumer do to exercise that right? In *Gager*, the plaintiff sent a letter attempting to revoke her consent in writing. While the parties disputed whether there was a right to revoke, there was no factual dispute about whether the written letter was sufficient to trigger the alleged right. Courts following the *Gager* rule on revocation are now confronting a variety of factual situations where the consumer's exercise of the right to revoke is less clear cut.

The Eleventh Circuit recently addressed revocation in a case that presented a factual issue for a jury on the issue of the sufficiency of oral revocation. *Osorio v. State Farm Bank, F.S.B.*, 2014 WL 1258023 (11th Cir. Mar. 28, 2014). The case involved automated debt collection calls made by a creditor's agent. On the legal question of whether there is a right to revoke consent, the court followed *Gager* and reasoned that "the TCPA's silence regarding the means of providing or revoking consent [implies] that Congress sought to incorporate the common law concept of consent." The court also stated that "[c]ommon-law notions of consent generally allow oral revocation." The case presented a factual issue for a jury to to decide, however, because the plaintiff claimed that he told the defendant to "stop calling" twice, while the defendant said he did no such thing. The court held that "[t]his is exactly the kind of factual dispute that cannot properly be resolved on summary judgment." The Eleventh Circuit remanded the case to the district court for further proceedings.

THE ISSUE OF REVOKING CONSENT ARISES FREQUENTLY, AND SUTHERLAND CONTINUES TO MONITOR THE EVOLVING STANDARD FOR WHAT CONSTITUTES REVOCATION.

A Wisconsin federal district court, facing a different set of facts, recently granted summary judgment in favor of a TCPA defendant, holding as a matter of law that the plaintiff had not revoked his consent through a generalized voicemail greeting. *Andersen v. Harris & Harris, Ltd.*, 13-cv-867, 2014 WL 1600575 (E.D. Wis. Apr. 21, 2014). The defendant allegedly made 163 autodialed collections calls to the plaintiff's cell phone and left prerecorded voicemail messages. The plaintiff claimed that he revoked his consent to be contacted by cell phone through his voicemail greeting, which stated that "any and all automated calls and automated voicemail messages to this cell phone are strictly forbidden and any and all consent…has been and is hereby revoked." The court held that "even if consent is revocable, [the plaintiff's] voicemail is not enough to have done so," reasoning that the plaintiff's argument would create a "totally unworkable rule" that would "undermine" the entire notion of consent by creating a "trap" for all debt collectors that use autodialers.

In a third case, a Florida district court held that a plaintiff adequately pleaded a violation of the TCPA by alleging that he sent a text message revoking consent, which the entity sending the text messages failed to honor. According to the complaint, the plaintiff received instructions to send the message "STOP ALL" if he wished to stop receiving text messages from the defendant. He further alleged that he sent the message "STOP ALL" and thereby "took the steps [the defendant] had established for consumers to communicate a desire to stop receiving messages." On these facts, the court denied a motion to dismiss, holding that the plaintiff had adequately alleged that he revoked his consent to receive text messages and that messages postdating the revocation were sent without his consent. *Legg v. Voice Media Grp., Inc.*, 13-cv-62044, 2014 WL 29594 (S.D. Fla. Jan. 3, 2014).

Conclusion

The issues of consent and revocation will continue to develop in TCPA litigation. The issue of revocation arises frequently, and there is still a split in authority on whether consent can be revoked. More broadly under the TCPA, companies are continuing to adjust to new FCC rules that went into effect in late 2013, which set a high standard for the type of consent required for marketing calls made to cell phones. With the new FCC rules and ongoing litigation risk, it would be prudent for companies to attempt to obtain written consent where appropriate and maintain adequate records of the specific details of that consent.

SIGNIFICANT CASES

MULTI-MILLION DOLLAR SETTLEMENTS PROMPT RECORD FILING OF TCPA LAWSUITS

High-dollar settlements of class actions filed under the Telephone Consumer Protection Act appear to have prompted the filing of a record number of new TCPA cases in federal courts nationwide. In the largest TCPA settlement announced to date, on July 29, 2014, a federal court in Illinois preliminarily approved a $75 million settlement in a case against Capital One alleging the company made automated calls to cell phones without first obtaining the recipients' consent. Because the TCPA provides for statutory damages of $500 per violation (and up to $1,500 per willful violation) with no maximum cap on recovery, potential exposure in a TCPA class action can quickly escalate into the millions. As highlighted below, there have been a number of recent seven- and eight-figure TCPA settlements. The trend of high-dollar TCPA settlements may spur a further uptick in TCPA class actions and related individual cases.

Below is a summary of recent class action settlements under the TCPA. Given the large potential exposure in TCPA cases, and particularly in light of 2013 amendments to FCC rules heightening the standards for consumer consent, companies engaging in automated communications with consumers will need to be increasingly focused on TCPA compliance to mitigate the potential litigation risk.

***In Re: Capital One TCPA Litigation*,** No. 1:12-cv-10064 (N.D. Ill.)
Settlement: $75.5 million.
Date: July 29, 2014 (Preliminary Approval)

This is the largest settlement to date under the TCPA. This multidistrict class action litigation, combining three complaints, asserted that the defendants violated the TCPA when they used an automatic telephone dialing system (ATDS) to call customers' cellular telephones without prior express consent. The defendants argued that the terms of its customer agreement constituted prior express consent, making the calls permissible. In addition to money damages, the defendants agreed to change their practices for cold calling customers' cellular telephones. On July 29, 2014, the court granted preliminary approval of the parties' nearly $75.5 million settlement ($75,455,098.74). The final Approval Hearing was scheduled for December 9, 2014.

***Benzoin v. Vivint Home Security, Inc.*,** No. 12-cv-61826 (S.D. Fla.)
Settlement: $6 million
Date: June 9, 2014 (Preliminary Approval)

Plaintiffs alleged that the defendant violated the TCPA when it used an ATDS to call cellular phone numbers that were registered on the National Do Not Call Registry for the purposes of generating sales leads for a home security company. Defendant Vivint maintained that it was not liable for the alleged violation because it was not the entity that made the calls. The parties settled for a reported $6 million plus injunctive relief. If finally approved by the court, each of the possible 602,810 class members may receive up to $500. The court granted preliminary approval of the settlement agreement on June 9, 2014, and the final fairness hearing was scheduled for August 25, 2014.

***Rose v. Bank of America*,** No. 11-cv-2390 (N.D. Cal.)
Settlement: $32 million
Date: April 4, 2014 (Final Approval Hearing)

This settlement resolved six separate TCPA lawsuits against Bank of America. At the time, it was reported as potentially the largest cash payment for settlement of a TCPA class action. In total, the complaints alleged that Bank of America made unauthorized ATDS and prerecorded voice collection calls to 7.7 million mortgage loan and credit card customers. The court preliminarily approved the parties' $32 million settlement on December 6, 2013 and held a final approval hearing on April 4, 2014. The plaintiffs filed unopposed motions for final approval on August 1, 2014.

***Steinfeld v. Discover Financial Services, et al.*,** No. 3:12-cv-1118 (C.D. Cal.)
Settlement: $8.7 million
Date: March 31, 2014 (Final Approval)

Plaintiffs alleged that the defendant violated the TCPA when it called the class members on their cellular telephones using an ATDS and/or using an artificial or prerecorded voice without obtaining their prior express consent. The named plaintiff was a cardholder and provided the defendant with his phone number. Despite defendant's defenses, the parties settled the claims for monetary damages and injunctive relief. On March 31, 2014, the court granted final approval of the parties' $8.7 million settlement.

Hanley v. Fifth Third Bank, No. 1:12-cv-1612 (N.D. Ill.) Settlement: $4.5 million
Date: December 23, 2013 (Final Approval)

The plaintiff's class action complaint alleged that defendant Fifth Third violated the TCPA when it placed calls to cellular telephones using an ATDS or using an artificial or prerecorded voice after the plaintiff and putative class members revoked consent for such calls. Fifth Third denied the allegations. On December 23, 2013, the Court granted final approval of the parties' $4.5 million settlement agreement.

Toni Spillman v. Domino's Pizza LLC and RPM Pizza, LLC, No. 10-cv-349 (M.D. La.)
Settlement: $9.75 million
Date: May 24, 2013 (Final Approval)

The plaintiffs alleged that the defendants caused the transmission of multiple unsolicited, pre-recorded advertising telephone calls and text messages to their home and cellular telephones over a four-year period without prior consent and in violation of the TCPA. The $9.75 million settlement covered customers in Louisiana, Alabama and Mississippi, and settlement payments were to be in the form of cash and merchandise vouchers. On May 24, 2013, the court granted final approval of the parties' settlement.

Ellison v. Steve Madden Ltd, No. 2:11-cv-05935 (C.D. Cal.)
Settlement: $10 million
Date: May 7, 2013 (Final Approval)

The nationwide class action complaint alleged violations of the TCPA when class members received unsolicited text message advertisements. The texts were allegedly sent to more than 203,000 consumers advertising the defendant's products and events. The court granted final approval of the settlement on May 7, 2013. The defendant was to pay up to $10 million into a settlement fund, beginning with an initial funding of $5 million and contributing additional $1 million increments as needed to pay claims up to the $10 million cap.

Meilleur v. AT&T Inc., No. 2:11-CV-01025 (W.D. Wash.)
Settlement: $4 million
Date: March 13, 2013 (Final Approval)

The plaintiff brought this class action alleging that an automated call from AT&T to his residential phone violated the federal Do Not Call regulations and, therefore, the TCPA. The automated call notified the plaintiff that someone in his household made an international call, for which he would be billed. The plaintiffs alleged that this type of automated call, using an artificial or prerecorded voice, was made to an estimated class of 15,000 people. AT&T took the position that the calls did not violate the TCPA or state law because it was not soliciting business but merely notifying a customer of the call and the charges incurred. The court denied a Motion to Dismiss on February 3, 2012, and the case was settled several months later. On March 13, 2013, the Court granted final approval of the parties' $4 million class action settlement.

***In re Jiffy Lube International Inc.*,** No. 3:11-MD-02261 (S.D. Cal.)
Settlement: $35 million to $47 million
Date: February 20, 2013 (Final Approval)

According to the complaint, defendant Heartland Automotive Services, Inc., a Jiffy Lube franchisee, and its telemarketing vendor allegedly violated the TCPA with a text-message promotional campaign that was transmitted to more than 2.3 million consumers' cellular telephones without their consent. The defendants unsuccessfully moved to dismiss based on First Amendment and vicarious liability grounds, and were also unsuccessful on a motion to compel arbitration. The settlement, reportedly valued at $35-$47 million in cash and customer discounts, also included an injunctive relief component prohibiting the defendants from sending further commercial text messages without written consent from the recipient, the proof of which the defendants must maintain for two years. The court granted final approval of the parties' settlement on February 20, 2013.

***Addison Automatics, Inc. v. Precision Electronics Glass, Inc. and Philip Rossi*,**
No. 1:10-cv-06903 (N.D. Ill.)
Settlement: $16 million
Date: December 14, 2012 (Final Approval)

The plaintiffs claimed that, during a six-month period, they received 31,751 unsolicited fax advertisements from the defendants, with whom they had no established business relationship. The plaintiffs alleged that the faxes violated the TCPA and state law. The defendants' commercial general liability insurance and umbrella policy providers denied coverage and refused to defend under the various policies. The parties settled the matter for nearly $16 million ($15,875,500). The court granted final approval of settlement on December 14, 2012.

***Arthur et al. v. SallieMae et al.*,** No. 10-cv-00198 (W.D. Wa.)
Settlement: $24 million
Date: September 17, 2012 (Final Approval)

Plaintiffs alleged that SLM Corp., the parent company of Sallie Mae Inc., violated the TCPA when it called or texted approximately eight million borrowers' cellular telephones using an ATDS and seeking to collect debt payments. In addition to the monetary settlement, the parties agreed to injunctive relief restricting future calls to class members. On September 17, 2012, the court granted final approval of the parties' $24.15 million nationwide class action settlement. At the time, this was the largest TCPA settlement ever approved.

ELEVENTH CIRCUIT REVERSES OUTLIER DECISION ON TCPA PRIOR EXPRESS CONSENT STANDARD

The U.S. Court of Appeals for the Eleventh Circuit has clarified the standard for "prior express consent" under the Telephone Consumer Protection Act (TCPA) in a September 29, 2014 decision reversing an outlier ruling by a lower court. In Mais v. Gulf Coast Collection Bureau, Inc., 13-14008 (11th Cir. Sept. 29, 2014), the appellate court held that the district court erred in diverging from the standard set by the Federal Communications Commission (FCC) in a 2008 ruling. The FCC ruling stated that providing a cellular phone number to a creditor as part of a credit application constituted prior express consent to be contacted at that number regarding the debt. The decision in the lower court, which rejected the FCC standard in a case involving a medical debt, had created significant uncertainty over the appropriate standard for determining what constitutes prior express consent.

The case arose out of automated debt collection calls made to the plaintiff on behalf of a hospital-based radiology provider in an effort to collect payment for medical treatment. At the time of his admission to the hospital, the patient's wife completed and signed admission forms on his behalf and provided his cell phone number. After the plaintiff failed to pay for the treatment, the hospital and its debt collector made several dozen automated calls to the cell number in an effort to collect payment for the unpaid bills. The plaintiff filed a putative class action alleging that the automated calls violated the TCPA because he had allegedly not consented to the communications.

The hospital and the debt collector moved for summary judgment on the affirmative defense that the calls did not violate the TCPA because they had received "prior express consent" when the wife provided the plaintiff's cell phone number on the hospital admission forms. The defendants relied on a 2008 FCC ruling, which concluded that "the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559, 564. Prior to *Mais*, district court decisions had uniformly followed the FCC standard.

The district court in *Mais*, however, rejected the FCC standard and granted summary judgment to the plaintiff. *Mais v. Gulf Coast Collection Bureau, Inc.*, 944 F. Supp. 2d 1226 (S.D. Fla. 2013). The district court stated that the FCC interpretation was not entitled to deference because, from the court's perspective, it was inconsistent with the TCPA statutory language. According to the district court, implying consent from the provision of a cell phone number to a creditor impermissibly expanded the statutory exception to cover prior implied consent, when the statutory language required express consent. *Id.* at 1239.

THE ISSUE OF CONSENT WILL CONTINUE TO DEVELOP IN TCPA LITIGATION AND BEFORE THE FCC. CLIENTS LOOK TO SUTHERLAND FOR CONTINUED ANALYSIS ON THIS ISSUE.

On appeal, the Eleventh Circuit reversed. The Eleventh Circuit held that the issue was resolved by the Hobbs Act, which delegates exclusive jurisdiction to the courts of appeals to determine the validity of FCC orders. 47 U.S.C. §402(a); 28 U.S.C. §2342. Under the Hobbs Act, the district court exceeded its powers by refusing to apply the FCC interpretation. Accordingly, the FCC standard was controlling and should have been applied by the district court.

This Eleventh Circuit decision, which reverses the most prominent outlier case on the standard for prior express consent, may help to bring much needed clarity to this area of the TCPA. Although most courts have rejected the district court's decision in *Mais*, a few courts have followed *Mais* and have diverged from the FCC standard. *See Zyburo v. NCSPlus, Inc.*, 12-CV-6677, 2014 WL 4536932 (S.D.N.Y. Sept. 15, 2014) (agreeing with district court in *Mais*). A number of plaintiffs had relied on the district court's decision in *Mais* in support of their argument that the FCC's interpretation was not entitled to deference.

The issue of consent will continue to develop in TCPA litigation and before the FCC. Another contested issue is the scope of the consent provided by the consumer. More broadly under the TCPA, companies are continuing to adjust to new FCC rules that went into effect in late 2013, which set a higher standard for the type of consent required for marketing calls made to cell phones. For marketing calls, unlike the collection calls at issue in *Mais*, the FCC rules now require prior express written consent.

TCPA HOT ISSUES: TCPA RESTRICTS AUTODIALED CALLS, BUT COURTS SPLIT ON MEANING OF AUTODIALER

To autodial or not autodial, that is the question. The Telephone Consumer Protection Act (TCPA) defines autodialer 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." 47 U.S.C. § 277(a)(1). Courts have split on the meaning of the term "automatic telephone dialing system" (ATDS) under the TCPA, and the Federal Communications Commission (FCC) has yet to rule on several pending petitions seeking clarification on this issue. The uncertainty over the definition of ATDS creates uncertainty over the scope of the TCPA and makes it difficult for businesses using automated communications to ensure compliance and manage litigation risk.

The FCC and some courts have taken an expansive view of the term ATDS. The FCC has stated that the definition "covers any equipment that has the specified capacity to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists." *In re Soundbite Communications, Inc. Declaratory Ruling*, CG Docket No. 02-278 (Nov. 29, 2012).

According to the FCC, the definition of ATDS encompasses a predictive dialer where "hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers." *Id.*

Some courts have appeared to go beyond the FCC's expansive view, focusing on the equipment's capacity to store numbers rather than its capacity to actually dial the numbers at random. In one recent case, a Massachusetts district court found that a calling system was an ATDS based on its capacity to store numbers. *Davis v. Diversified Consultants, Inc.*, CV13-10875, 2014 WL 2944864 (D. Mass. June 27, 2014). The court made the decision as a matter of law, even though there was disputed testimony over whether the system had the capacity to generate random or sequential numbers. In the court's view, the capacity to generate random or sequential numbers was irrelevant as long as the system had the capacity to store numbers and dial them from a list.

PARTIES HAVE CHALLENGED THE MEANING OF AUTODIALER IN THE COURTS, AND SOUGHT GUIDANCE AND CLARIFICATION THROUGH PETITIONS TO THE FCC

Other courts, however, have taken a narrower view of what constitutes an ATDS. For example, in March 2014 a federal court in Pennsylvania held that a text message system did not constitute an ATDS where the plaintiff had not offered any evidence to show that the company's message system had the capacity to randomly or sequentially generate numbers. *Dominguez v. Yahoo!, Inc.*, CV13-1887, 2014 WL 1096051 (E.D. Pa. Mar. 20, 2014). It was not sufficient that the system in question could store numbers and send text messages to a list. Therefore, the court granted summary judgment in favor of the defendant.

The lingering uncertainty over the meaning of ATDS, and with it the broader issue of the scope of the TCPA, creates uncertainty and compliance burdens on companies that want to send automated communications to their customers. At least six petitions have been filed with the FCC seeking clarification on these issues. The FCC has accepted comments on several of these petitions but has yet to rule. Disputes over the meaning of ATDS are likely to continue until the FCC provides some clarity on this issue.

MY BROTHER'S TCPA KEEPER? RECENT CASES HIGHLIGHT THIRD-PARTY RISK UNDER THE TELEPHONE CONSUMER PROTECTION ACT

Early 2014 produced a series of court decisions highlighting third-party liability issues under the Telephone Consumer Protection Act (TCPA). In February 2014, the U.S. Supreme Court declined to hear a case about liability for junk faxes made by an alleged agent, and other recent cases have addressed third-party issues, such as vicarious liability for third-party contractors, the extension of consent from primary parties to independent contractors, indemnification agreements, and the role of VoIP providers. These cases serve as reminders that companies must be alert to the indirect ways in which they could be pulled into TCPA litigation.

U.S. Supreme Court Declines to Review Defense Win Regarding "On Behalf Of" Liability Under the TCPA

The Supreme Court declined to review an Illinois appellate court's decision that a company is not vicariously liable for spam faxes sent by its third-party advertising agent, where the company had not given the agent permission to send faxes specifically to the plaintiff. On February 24, 2014, the U.S. Supreme Court denied certiorari in *Uesco Industries, Inc. et al. v. Poolman of Wisconsin, Inc.*, No. 13-771, a case in which the plaintiff alleged that the defendant was vicariously liable under the TCPA for spam faxes that a third-party advertising firm had allegedly sent to the plaintiff. The defendant had hired the advertising firm to send advertising faxes; however, it had not granted the firm permission to send faxes specifically to the plaintiff. The lower court denied class certification on the grounds that the advertising firm had acted outside the scope of its agreement with the defendant. Therefore, under the TCPA, the firm could not have sent the faxes "on behalf of" the defendant.

In its petition to the Supreme Court, the plaintiff argued that the lower court's decision was in conflict with the Federal Communications Commission's (FCC) interpretation of "on behalf of" under the TCPA. The plaintiff contended that the FCC has not differentiated between grants of permission when determining vicarious liability and did not require proof of authority or agency for liability to attach. Thus, the plaintiff argued that the lower court did not have jurisdiction to interpret the TCPA differently from the FCC and that the Supreme Court should review the decision. The lower court rejected that argument, and the Supreme Court has now declined to review it.

While the FCC has issued a Declaratory Ruling on this issue, the ruling leaves some room for interpretation with respect to informal agency relationships. *In re Dish Network, LLC*, FCC 13-54 (FCC Decl. Ruling May 9, 2013). Specifically, in its ruling, the FCC explained that the phrase "on behalf of" means that sellers may be held vicariously liable for calls made through third-party telemarketers. However, the agency also explained that "on behalf of" liability does not require a formal agency relationship and could also rely on principles of ratification and apparent authority. Thus, the FCC interpretation appears to have left some flexibility in the application of vicarious liability principles, depending upon the facts of a given case.

Other Cases Highlight Third-Party Issues

Other decisions issued in early 2014 have also illustrated how TCPA issues can flow both upstream and downstream between third-party advertising agencies and underlying companies initiating marketing campaigns or other customer communications.

- **Vicarious Liability for Authorized Third-Party Dealers**

  Despite the defense win in *Uesco*, companies must still be cognizant of the risk of vicarious liability under the TCPA for actions of their "authorized dealers." In a discovery order issued on a January 28, 2014, a federal district court in West Virginia found that the seller-company defendants could face TCPA liability on behalf of a marketing company that they had allowed to be an "authorized dealer" of their products. In *In re Monitronics Int'l, Inc., Tel. Consumer Prot. Act Litig.*, 5:11-CV-90, (N.D. W. Va. Jan. 28, 2014), the plaintiff sued the marketing company making the allegedly unauthorized calls as well as the seller companies for which the calls were made. The plaintiff asserted that despite the fact that the seller companies had not placed the calls, the seller companies could still be vicariously liable to the plaintiff if the marketing company had made the calls "on their behalf." The court agreed that the seller companies could be sued under the TCPA, noting that both companies had agreements with the marketing company that allowed the marketing company to hold itself out as an "authorized dealer" of their products. While the court initially made this determination in a previous summary judgment order, the seller companies again challenged the court's finding in the discovery motion.

The court responded by reiterating its previous holding and explaining that where the seller companies had agreed that the marketing company could hold itself out as an authorized dealer, the seller companies may also be vicariously liable for calls made by the marketing company in violation of the TCPA. The court did not address whether the marketing company had acted inside or outside the scope of the authorized dealer relationship that it had with the seller companies.

- **Protecting Third-Party Independent Contractors Through Express Consent to Primary Contracting Party**

  It is not only liability but also consent that can pass between parties. For example, independent contractors can be protected by consents given to primary contracting parties. Under this principle, a federal district court in California granted an independent-contractor defendant's motion for summary judgment, dismissing a plaintiff's TCPA challenge on the grounds that the plaintiff had consented to receiving the text messages. In *Shaya Baird v. Sabre Inc., et al.*, No. 2:13-cv-00999 (C.D. Cal. Jan. 28, 2014), the plaintiff sued an independent contractor for receipt of an unsolicited text message regarding flight notifications. Prior to the suit, the independent contractor had contracted with an airline to provide flight notification services to the airline's passengers. Despite the fact that the independent contractor was a wholly distinct entity from the airline, the court found that by consenting to be contacted by the airline, the plaintiff, in turn, consented to be contacted by the airline's independent contractors. While the court's decision ultimately turned on its interpretation of what constituted consent—i.e., the plaintiff's provision of her phone number to the airline—the court's extension of that consent to the airline's independent contractor provides an important defense potentially available to independent contractors' facing TCPA litigation.

- **Seeking Indemnification from Third Parties in TCPA Suits**

  Companies can also sometimes seek indemnification from third parties in TCPA suits depending on who had responsibility for obtaining consent. This was illustrated by a decision granting class certification in a TCPA case in California. In *Stern v. DoCircle, Inc.*, No. 12-2005 (C.D. Cal. Jan. 29, 2014), the plaintiff sued the defendant, an online service provider that allowed customers to send text messages via its online platform, for violation of the TCPA. The plaintiff argued that the defendant failed to properly monitor the numbers that it was texting and, as a result, sent multiple text messages to numbers on the do-not-call list. While the defendant denied the plaintiff's allegations, it also filed a third-party complaint, seeking indemnification from the company on whose behalf it sent the text messages in the event that the plaintiff's allegations were successful. The defendant alleged that the third-party defendant contracted with it to send text messages, and that under the terms of the contract, the third-party defendant was responsible for ensuring that the proper consents were obtained prior to the text messages being sent.

Thus, the defendant argued that to the extent that the plaintiff is able to show any violation of the TCPA, the third-party defendant must indemnify it.

- **Court Tosses TCPA Suit Against Third-Party VoIP Provider**

  In contrast, a federal district court in Texas rejected the theory of secondary TCPA liability against telecommunications carriers in a case against a VoIP (Voice over Internet Protocol) provider. In its January 28, 2014, decision, the court granted the VoIP provider's motion to dismiss, on the basis that "Congress did not intend to allow secondary liability on telecommunications carriers based on an allegation of conspiracy." In *Clark v. Avatar Technologies Phl, Inc.*, No. 13-2777 (S.D. Tex. Jan. 28, 2014), the plaintiff sued both the company making the calls and its VoIP provider for violation of the TCPA when an allegedly unauthorized call was placed to the plaintiff's cell phone. The plaintiff alleged that the defendant company made the call using the defendant VoIP provider's services and that, as a result, both of the defendants had violated the TCPA. The plaintiff asserted that the VoIP provider had conspired with the other defendant to violate the TCPA by virtue of allowing the company to use its VoIP services. The plaintiff also alleged that the VoIP provider had transmitted misleading information about the identification of the caller to the plaintiff's cell phone in violation of the TCPA. The court found that there was no precedent for holding a telecommunications carrier, such as a VoIP provider, liable under the TCPA simply for transmitting a call. Further, the court found that the plaintiff had also failed to allege its TCPA claim that the VoIP provider had transmitted misleading information, noting that there was no indication that the VoIP provider had intended to defraud or harm the plaintiff, which were necessary elements for this claim. Thus, the court dismissed the plaintiff's claims against the VoIP provider under the TCPA (although the court allowed the plaintiff the opportunity to replead certain state law claims).

Conclusion

As the TCPA continues to spawn class action litigation and settlements, third-party liability issues will continue to play out in courts across the country. Companies are also continuing to adjust to new FCC rules that went into effect in late 2013, which set a high standard for the type of consent required for marketing calls made to cell phones. With the new FCC rules and ongoing litigation risk, companies should consider obtaining written consent where appropriate and maintain adequate records of the specific details of that consent. Companies should also be cognizant of TCPA compliance when working with third parties to conduct campaigns using texts or automated calls.

INDUSTRY FOCUS

TCPA RISKS INCREASE FOR THE FINANCIAL SERVICES INDUSTRY

Companies in the financial services industry are being targeted in lawsuits brought under the Telephone Consumer Protection Act (TCPA). Record-setting class action settlements like the recent $75 million settlement involving Capital One have captured the headlines. Moreover, unsettled law concerning the scope of consent creates uncertainty and places a compliance burden on financial services companies that communicate with their customers by phone or text using an automated telephone dialing system. This article provides an overview of recent TCPA cases against financial services companies, analyzes the critical issue of consent and discusses strategies to avoid TCPA class actions.

Enacted in 1991 to protect consumers from receiving unsolicited telemarketing calls and faxes, the TCPA regulates and restricts the manner in which a business may advertise its products and services to consumers' cell phones (including via text), residential phone lines, and fax machines. Among other things, the TCPA prohibits the use of an "automated telephone dialing system" or an "artificial or prerecorded voice" to make calls to cell phones without the prior express consent of the called party. This rule applies to both telemarketing calls and non-telemarketing calls, including debt collection or informational calls. Following a change in TCPA regulations that took effect in October 2013, written consent is now required for most automated telemarketing communications.

Of particular significance for companies in the financial services industry, in 2008 the Federal Communications Commission (FCC) found that in the context of a creditor-debtor relationship, a customer is deemed to have provided prior express consent for collection calls when the consumer provided the creditor with his or her number "during the transaction that resulted in the debt owed."[1] The 2008 FCC ruling explained that "the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt." Creditors bear the burden of proving that such consent was obtained.

Despite the FCC's ruling, the U.S. Court of Appeals for the Second Circuit, in *Nigro v. Mercantile Adjustment Bureau, LLC*, No. 13-1363 (October 14, 2014), recently noted that the timing of receipt of the consent could be important, and this question has not been expressly resolved. *Nigro*, No. 13-1363, at 7, n.4 ("Whether a subsequently given phone number is given as part of a continuing 'transaction,' or a transaction separate from the initial one that 'resulted in the debt owed,' is a question for future courts."). Consequently, in some cases, the uncertainty over whether valid consent has been obtained has created TCPA risk for financial services companies. Because the TCPA provides for statutory damages of $500 per violation (and up to $1,500 per willful violation) with no maximum cap on recovery, potential exposure in a TCPA class action can quickly escalate.

Issues regarding the ambiguity surrounding the validity of consent factored prominently in the then-record $24 million settlement in *Arthur et al. v. SallieMae et al.*, No. 10-cv-00198 (W.D. Wa. 2012). The same issues and questions regarding consent have played out more recently in *Wilkins v. HSBC Bank Nevada, N.A.*, No. 14-cv-190 (N.D. Ill., settlement preliminarily approved July 25, 2014) and in *In Re: Capital One TCPA Litigation*, No. 1:12-cv-10064 (N.D. Ill., settlement preliminarily approved July 29, 2014). Together, the combined settlements in these cases exceeded $115 million.

In *SallieMae*, plaintiffs sued SLM Corp., the parent company of Sallie Mae Inc., alleging that it violated the TCPA when, to aid its collection efforts, it called or texted approximately eight million student loan borrowers' cellular telephones using an automated telephone dialing system. Plaintiffs alleged that some of these borrowers (including the named plaintiff) did not provide defendants with their cell phone numbers when the loans were initiated and, therefore, did not give their consent to receive the calls. Defendants took the position that while consent may not have been obtained at the outset of the parties' relationship, it was subsequently and validly obtained. Despite their defense based on the 2008 FCC ruling, and facing substantial potential exposure under the TCPA, in September 2012 defendants agreed to a $24.15 million nationwide class action settlement as well as injunctive relief restricting future calls to class members.

FOR COMPANIES IN THE FINANCIAL SERVICES SECTOR, ONE POSSIBLE LINE OF DEFENSE AGAINST TCPA CLASS ACTIONS MAY BE FOUND IN ARBITRATION AGREEMENTS EXTANT IN MANY CONSUMER CONTRACTS. COURTS HAVE ENFORCED INDIVIDUAL ARBITRATION PROVISIONS WITH CLASS ACTION WAIVERS IN TCPA CASES, BARRING PLAINTIFFS FROM BRINGING OR PARTICIPATING IN CLASS ACTIONS.

More recently, in *HSBC*, plaintiffs filed a class action alleging that the defendant-bank violated the TCPA by placing unsolicited calls to cell phones using an automated telephone dialing system or by prerecorded voice without first obtaining the proper consent. The named plaintiffs, both credit card customers of the defendant, alleged that they repeatedly received calls from the defendant on their cell phones, despite never having provided the numbers or consent. The defendant denied the allegations, arguing that in the context of a debtor-creditor relationship, consent could be obtained at any time. Plaintiffs asserted that consent could only be provided validly at the relationship's inception. Despite the defendant's arguments, in June 2014 the parties agreed to a nearly $40 million class action settlement, pending the court's approval.

In July 2014, the highest TCPA settlement to date was reached in *In Re: Capital One TCPA Litigation*, a case which again showcases the consent issue and serves as a clarion call to others in the financial services industry who communicate with their customers by cell phone or text. Rather than continue to oppose the plaintiffs' arguments on consent, defendants opted to settle for approximately $75 million. The motion for preliminary approval indicates that the estimated settlement class includes individuals throughout the United States who possess 21.2 million unique cellular phone numbers. The settlement reflects the heavy statutory penalties potentially available under the TCPA, the absence of a cap on statutory damages, the burden placed on creditors to prove that they received timely consent, and the FCC's lack of clear guidance governing creditor consent.

For companies in the financial services sector, one possible line of defense against TCPA class actions may be found in arbitration agreements extant in many consumer contracts. Courts have enforced individual arbitration provisions with class action waivers in TCPA cases, barring plaintiffs from bringing or participating in class actions.

In *Cayanan v. Citi Holdings, Inc.*, 928 F. Supp. 2d 1182 (S.D. Cal. 2012), borrowers filed a putative class action, alleging that the defendant violated the TCPA by placing debt collection calls. The defendant moved to compel arbitration pursuant to an arbitration clause in customer agreements signed by each plaintiff. Plaintiffs argued against enforcement of the arbitration agreement on the grounds that without a class action remedy, they would be unable to fully vindicate their statutory rights under the TCPA. The court analyzed each arbitration agreement under the law of each plaintiff's domicile and upheld the validity of the respective arbitration agreements. Further, the district court found that the plaintiffs failed to explain how the arbitration agreements prevented them from vindicating their rights under the TCPA. The court also noted that the arbitration agreements did not limit the type or amount of recovery under the TCPA.

Another case highlights the nexus that must exist between the subject of the allegedly unlawful communication and the underlying contract or agreement between the parties necessary to enforce an arbitration agreement and class action waiver. In *Delgado v. Progress Financial Co.*, No. 1:14-cv-00033 (E.D. Cal.), the plaintiff entered into a loan agreement that had an arbitration clause. The plaintiff argued that the arbitration clause was unenforceable because the calls he received fell "outside the scope of the arbitration agreement." The arbitration agreement required that "any and all claims, controversies, or disputes arising out of or related in any way" to the loan agreement must be arbitrated. The court rejected the plaintiff's argument that the collection calls were not related to the loan agreement, and enforced the arbitration agreement and class action waiver.

Recent high-dollar settlements by companies in the financial services industry, combined with the lack of clear guidance from the FCC on the consent issue, among others, continue to drive a trend of new TCPA filings. Financial services companies engaging in automated communications with consumers will need to be increasingly focused on TCPA compliance to mitigate their potential litigation risk.

[1] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559, 564-65 (2008)

FOR WHOM THE RING TONES: TCPA LITIGATION AND THE INSURANCE INDUSTRY

Insurance companies are increasingly the subject of Telephone Consumer Protection Act (TCPA) lawsuits. Any insurance company that communicates with its customers, job applicants and others by phone or text using an automated telephone dialing system—or that has independent or semi-independent agents engaging in such automated communications—faces potential litigation risk under the TCPA. This article provides an analysis of some of the key issues facing insurers in TCPA cases.

TCPA Background

The Telephone Consumer Protection Act was enacted in 1991 to protect consumers from unsolicited advertisements via telephone and fax. The TCPA regulates and restricts the manner in which a business may market its products and services to consumers' cell phones (including via text messages), residential phone lines, and fax machines. Specifically, the TCPA prohibits the use of an "automated telephone dialing system" or an "artificial or prerecorded voice" to make calls to cell phones without the prior express consent of the called party. For marketing calls, the consent must be in writing, and the prohibitions apply to both calls and text messages. With more and more households abandoning traditional hard-wired landlines in favor of cell phones for their principal means of communication, TCPA risk has increased substantially. In addition, the TCPA prohibits artificial or prerecorded voice calls to residential telephone lines (without prior express consent) and unsolicited fax advertisements.

BECAUSE THE TCPA PROVIDES FOR STATUTORY DAMAGES OF $500 PER VIOLATION (AND UP TO $1,500 PER WILLFUL VIOLATION) WITH NO MAXIMUM CAP ON RECOVERY, AND GIVEN THE TECHNOLOGICAL CAPACITY OF AUTOMATED DIALING SYSTEMS THAT CAN MAKE HUNDREDS IF NOT THOUSANDS OF CALLS AT THE PUSH OF A BUTTON, POTENTIAL EXPOSURE IN A TCPA CLASS ACTION CAN QUICKLY ESCALATE TO MILLIONS OF DOLLARS.

Agent Marketing and Vicarious Liability Issues

Insurance companies often market their products through the use of independent and semi-independent sales forces. Where an agent or agency has allegedly violated the TCPA, the insurer may also be drawn into the litigation on a theory of vicarious liability.

This risk was evidenced in a decision in which an Illinois federal court found that a vicarious liability claim could be raised against an insurance company for the actions of its agents and the agents' third-party marketer. The plaintiffs sued three insurance companies, alleging that they received prerecorded, unsolicited calls regarding car insurance policies on behalf of the respective companies. The calls were allegedly made by a third-party telemarketing company through the use of an automated dialing system. If a person answered the call, the telemarketing company would then join the call, take the individual's information, and pass it along to the insurance company's local agent. If the call was not answered, then the telemarketing company left a prerecorded voice message. The complaint acknowledged that the agents, and not the insurance companies, were the ones who had contracted directly with the marketing company.

In its decision, the district court first addressed the question of whether the insurance companies could be held directly and/or vicariously liable for the calls placed by the marketing company and the agents. Although the court determined that the insurance companies could not be found directly liable since they did not physically place the calls, the court concluded that one of the companies might be subject to vicarious liability for the actions of the agents. Specifically, the court held that nothing in the TCPA directly prohibits the principles of common law vicarious liability from applying. Noting Congress' intent to protect individuals from receiving certain calls without providing prior consent, the court opined that the actual sellers—i.e., the insurers—were in the best position to monitor and police third-party telemarketers' compliance with the TCPA. Otherwise, in the court's view, there would be a disincentive to monitor telemarketers, and consumers would not have an effective remedy under the TCPA. Applying this rationale to the complaint, the court dismissed the complaints against several insurers but found that plaintiffs had alleged sufficient facts to support a basis for holding at least one of the insurance companies liable for the marketing company's actions under a subagency theory, where plaintiffs had alleged that the insurance agents who had hired the marketing company were legally agents of the insurance company.

Vicarious liability has also been asserted where a third-party contractor is making the calls. In 2013, a federal district court in California granted class certification to plaintiffs who allegedly received unsolicited text messages on their cell phones on behalf of a life insurance company in violation of the TCPA.

In that case, the plaintiffs alleged that the defendant insurance company entered into a marketing agreement with a third-party marketing group to promote its life insurance products. The plaintiffs alleged that they received text messages sent by the marketing group encouraging them to call a toll-free phone number to claim a gift card voucher, which, according to plaintiffs, did not exist. Rather, plaintiffs alleged that the number connected callers to a call center operated by the marketing group that pitched the insurance company's products and services, as well as the products and services of the marketing group's other clients. Of particular importance to the issue of third-party liability, the insurance company specifically argued that neither it nor the marketing company had actually caused the text messages to be sent, but rather that third-party contractors actually carried out the operation. The court expressed its skepticism of that defense, stating that it was "unlikely to be viable," and certified the plaintiff class. The case was later settled on a class basis. Note, however, that more recent case law in the Ninth Circuit may provide additional support for a defense against vicarious liability where a company lacks control over a third party that sends the communications. *See Thomas v. Taco Bell Corp.*, No. 12-56458 (9th Cir. July 2, 2014) (holding that Taco Bell Corp. was not vicariously liable for text messages sent by a company that a third-party advertiser had hired to assist with a product promotion campaign).

Insurer Communications and Consumer Consent

Several cases against insurance companies and their affiliates have raised issues of "prior express consent," which can be a defense to claims under the TCPA. (Since October 2013, "prior express written consent" from the called party is required for marketing calls and texts).

In a case against an insurer's affiliate, the Eleventh Circuit examined the question of who constituted the "called party" for purposes of consent and held that the "called party" was the person actually called even if the intended recipient was someone else. In the case, the insured took out a car insurance policy and opened a credit card with the insurer and its affiliate and, as part of the application process, provided her housemate's cell phone number as a contact.

In a subsequent attempt to collect past-due payments, the company allegedly called the housemate's cell phone number. The housemate sued under the TCPA and took the position that the calls were made without consent. The court found that under the TCPA, the "called party" is not the intended recipient of the call (in this case the insured) but rather the actual party that is called (the cell phone subscriber/housemate). To constitute valid consent, the company would have had to obtain consent either directly from the cell phone subscriber/housemate or from someone with the authority to provide consent on the cell phone subscriber's behalf. In this instance, the court stated that consent could be established if the plaintiff was in an agency relationship with her housemate, and the case was therefore remanded for further factual determination on that issue.

More broadly, however, the court's holding on the meaning of the term "called party" creates TCPA risk any time the actual recipient of a call is different from the intended recipient. Several courts have held that consent runs with the person and not with the phone number. Even where a caller has consent from the intended recipient of the call (a former subscriber), some courts have held that there can be a violation of the TCPA where the caller does not have consent from the current subscriber to whom the number has been reassigned, even if the caller is unaware of the reassignment. *See Soppet v. Enhanced Recovery Co.,* LLC, 679 F.3d 637 (7th Cir. 2012). For companies that make a significant number of automated calls, this fact pattern can arise with some frequency, given that there is a regular churn of cell phone numbers being assigned to new subscribers on an ongoing basis.

Several insurance companies have been drawn into TCPA litigation as a result of junk fax advertisements allegedly sent by insurance agents. The issue of consent is central to these cases. In one case against a life insurer, a federal district court granted the plaintiff's motion for class certification in a case alleging that a third-party agent sent unsolicited fax advertisements for low-cost life insurance. The plaintiff further alleged that the faxes lacked the required opt-out that would allow recipients to opt out of future messages. In arguing against class certification, the insurer asserted that determining whether each recipient consented was an individual issue that precluded certification. The court rejected that defense and stated that "no individual inquiry is necessary and [the] established relationship or voluntary consent defenses are unavailable where, as here, the opt-out requirement [of the TCPA] is alleged to have been violated." The case was recently settled on a class basis.

Recruiting Calls

In at least one case, a plaintiff unsuccessfully sued an insurance company under the TCPA for making recruiting calls in an effort to hire new agents. There, the plaintiff had sued an insurance company for allegedly using an automatic dialing system to leave messages on his residential landline phone (not cell phone) requesting that the plaintiff attend a recruiting webinar to learn about the insurer's products and services as part of the insurer's hiring efforts. Because the case involved allegations of calls to a landline rather than to a cell phone, a key threshold issue was whether the recruiting calls constituted marketing or non-marketing, because non-marketing calls to landlines are not covered by the TCPA.

The federal court agreed with the insurer and dismissed the case, holding that the alleged calls did not constitute advertisements or solicitations. The court reasoned that under the TCPA, the insurer's calls did not constitute a solicitation because they were not made for the purpose of encouraging the purchase of property, goods or services. Rather, the company's calls were made for the purpose of promoting an employment and/or independent contractor opportunity. To the extent that the calls mentioned the company's products, the court explained that the intent was not to sell the products to the recipients of the call, but rather to encourage the call recipients to contract with the company to sell those products to others. Thus, the court found that the complaint failed to state a claim. The key distinction in this case was that the calls were made to a landline rather than to a cell phone. A risk to any company making recruiting or other non-marketing calls is that the company may not always know whether it is calling a landline or a cell phone, and consumers more and more are relying on cell phones as their only number.

TCPA Insurance Coverage Issues

In addition to cases brought directly against insurance companies for alleged TCPA violations, a growing number of cases have been brought by commercial liability insurers seeking declaratory judgments that they do not have to provide coverage for their insured's alleged TCPA violations. These cases often turn on the specifics of the exclusions in the commercial liability policy at issue. Some commercial liability policies have express exclusions for TCPA claims, while others may contain more general exclusions that may exclude TCPA claims.

Conclusion

The trend of high-dollar TCPA settlements has spurred a large increase in TCPA filings over the past few years, including an increase in complaints filed against the insurance industry. The issues facing insurers in these cases are similar to the issues facing companies in other industry segments: consent and the scope of that consent, vicarious liability issues arising from the acts of agents and third-party marketers, and large potential exposure due to TCPA statutory damages. Companies are continuing to adjust to new Federal Communications Commission rules that went into effect in late 2013, which set a high standard for the type of written consent required for marketing calls made to cell phones. With the new FCC rules and ongoing litigation risk, companies should obtain written consent where appropriate and maintain adequate records of the specific details of that consent.

TCPA CLASS ACTION AGAINST INSURANCE AGENT NOT COVERED BY PROFESSIONAL LIABILITY INSURANCE

As class action filings under the Telephone Consumer Protection Act (TCPA) have continued to rise, so too have the number of disputes with commercial liability insurers over coverage for their insureds' alleged TCPA violations. Whether TCPA defendants can seek coverage from liability insurers to defend and indemnify them for TCPA-related exposure often depends on the specific language of the policy at issue, including the policy's stated coverage exclusions. In one recent decision, an Illinois appeals court ruled that a professional liability insurer has no duty to defend or indemnify an insurance agent in a class action alleging that the agent sent thousands of prerecorded telephone messages advertising the agent's services for selling life, accident and health insurance. The court affirmed the lower court's decision that telephone solicitations did not constitute negligent acts, errors or omissions "rendering services for others," as required for coverage under the policy. Margulis v. BCS Insurance Co., No. 1-14-0286 (Ill. App. Nov. 26, 2014).

The case arose in 2008 when the plaintiff filed a class action complaint in Missouri state court against an insurance agent and broker that allegedly transmitted automated telephone solicitations to more than 180,000 unique telephone numbers. The complaint alleged that the defendant's automated marketing calls violated the TCPA because they were made without the recipients' prior express consent. At the time of the original action, the defendant sought coverage from its professional liability insurer, which was denied. In 2011, the Missouri state court approved a class action settlement of $4,999,999. As part of the settlement, the parties agreed, and the court approved, that the plaintiff would attempt to collect on the judgment "only from the proceeds of the insurance policies and claims against Defendant's insurer(s)." Shortly thereafter, the plaintiff filed a declaratory judgment action in Illinois against the defendant's professional liability insurer, seeking an order that the insurer had a duty to pay the judgment.

The trial court granted the insurer's motion for summary judgment, and the appeals court affirmed. Both courts held that there was no coverage because "the automated telephone calls at issue did not constitute negligent acts, errors or omissions by [the insurance agent] arising out of the conduct of [the agent's] business in 'rendering services for others' as a licensed insurance agent, general agent or broker." The appeals court agreed with the professional liability insurer that the insurance agent's solicitation of business from members of the general public did not involve the provision of services as a licensed life, accident and health insurance agent and therefore did not fall within the scope of coverage.

The plaintiff argued that the lower court impermissibly construed ambiguous policy language narrowly, rather than broadly, and asked the court to find a duty to defend and indemnify. The insurer countered that the plaintiff was "ignoring the key passage" in the policy, i.e., that the action arise out of the conduct "in rendering services for others." The court held that the policy was unambiguous and that the insurance agent "was not rendering services for the call recipients as an agent or broker where, as here, the recipients were not [the insurance agent's] clients or customers." The lack of an established business relationship was therefore fatal to the plaintiff's claim for coverage under this policy. The court distinguished several other cases involving professional and commercial liability policies with dissimilar language to the policy at issue in this case. *See Landmark American Insurance Co. v. NIP Group, Inc.*, 2011 Ill. App (1st) 101155 (2011); *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352 (2006).

Insurance coverage issues for underlying TCPA claims continue to generate litigation, and these cases are yet another outgrowth of the ongoing wave of TCPA class action filings. Commercial liability insurers often file declaratory judgment actions against their insureds seeking a declaration that there is no coverage for underlying TCPA claims. In other situations, as in the case discussed above, plaintiffs in underlying TCPA litigation may pursue claims against commercial and professional liability insurers after agreeing to settlements that are to be satisfied exclusively from the proceeds of a defendant's insurance policies.

The policy language at issue in these cases can vary significantly. Increasingly, commercial liability policies may contain a specific exclusion for TCPA claims. *See James River Ins. Co. v. Med Waste Mgmt.*, No. 1:13-cv-23608, 2014 WL 4749551 (S.D. Fla., Sept. 22, 2014) (denying coverage based on a TCPA exclusion). Other commercial liability policies may have more general exclusions that can preclude coverage for TCPA claims. *See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Papa John's Int'l*, No. 3:12-cv-00677, 2014 WL 2993825 (W.D. Ky., July 3, 2014) (finding no coverage where the policy contained an exclusion for any loss resulting from a violation of a "statute, ordinance or regulation of any federal, state, or local government"). With TCPA class actions continuing to be filed at a record pace, there will be ongoing issues over the scope of commercial liability coverage for these claims.

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