

A background image showing a dense array of fiber optic cables, with light reflecting off the glass fibers, creating a vibrant green and blue glow.

# Telemarketing and the Telephone Consumer Protection Act: Avoiding Traps and Minimizing Risk

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# PRESENTERS



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# TOPICS

- Brief history and background of TCPA
- Restrictions on calls and text messages to wireless lines
  - Automatic telephone dialing systems (ATDS)
  - Prior express consent, prior express *written* consent, and revocation
  - Determining who is the “called party” in litigation
- Issues related to fax telemarketing
- Theories of direct and vicarious liability
- Issues related to TCPA litigation
  - Damages and standards for determining “knowing and willful” violations
  - Class certification considerations
  - Offers of judgment and other methods of mooted putative class claims
- Recent Developments



# Brief History and Background



## BACKGROUND AND HISTORY

- TCPA was enacted in 1991 in response to telemarketers' increasing use of "automatic telephone dialing systems" to dial numbers *randomly* or *sequentially* in connection with unsolicited telemarketing campaigns and use of unsolicited fax advertisements.
- TCPA rules set by FCC, but law provides private right of action, and huge source of class action litigation.
- Early litigation went after so-called "fax blasts" and cold-call telemarketers.
- Litigation is increasingly focused on established retail, telecommunications, and consumer financial services companies.
- Congress never intended the law to restrict a company's first amendment right to communicate with its customers in the course of an ongoing business relationship.



## RECENT JUDGMENTS / SETTLEMENTS (OR WHY WE SHOULD CARE ABOUT TCPA)

- \$23 million settlement related to alleged fax solicitations (August 2014)
- \$75 million class settlement for alleged calls to cell phones with ATDS (August 2014)
- \$32 million class settlement for alleged calls and text messages (October 2013)
- \$16.5 million class settlement (May 2013)
- \$35 million class settlement (August 2012)
- \$17 million class settlement (June 2012)



# Restrictions on Calls and Text Messages

# RESTRICTIONS ON *NON-TELEMARKETING* CALLS

## Wireless Service, Including Cell Phones

- TCPA makes it unlawful to dial a number assigned to a wireless service using an *automatic telephone dialing system* or an *artificial or prerecorded voice* without the *prior express consent* of the *called party*.
- **Text messages** are also covered by TCPA if they are sent with an ATDS.
- If you remember nothing else today, remember this.

## Residential Telephone Lines

- The FCC has exempted *non-telemarketing* calls to residential lines from the restrictions of the statute.
- Note that telemarketing calls to residential telephone lines *are* covered by the TCPA and related regulations.



# OTHER RESTRICTIONS

## Other Calling Restrictions

The TCPA also makes it unlawful to make auto-dialed or pre-recorded/artificial voice calls to hospitals, elderly homes or “similar establishment[s]” (including patients’ rooms), emergency lines (911), physicians’ offices, other health care facilities, poison control centers, fire departments or law enforcement agencies.

## Other Considerations

In most instances, debt collection calls are considered to be non-telemarketing calls, but still covered by express consent provision for autodialed or prerecorded voice calls to wireless numbers.

# OTHER RESTRICTIONS – COMPLIANCE CONSIDERATIONS

- National Do-Not-Call Registry
- Requirement to provide identity of caller
- Requirement to terminate calls within 5 seconds of end of call
- Requirement for prior express *written* consent for telemarketing calls
- Not intended to be an exhaustive list of TCPA's various restrictions

# AUTOMATIC TELEPHONE DIALING SYSTEM

- The statute defines the term ATDS as equipment which has the capacity to...
  - (A) store or produce telephone numbers to be called, using a random or sequential number generator; and
  - (B) dial such numbers. 47 U.S.C. s. 227(a)(1).
- Originally the term ATDS was meant to encompass equipment that dials numbers randomly or sequentially.
- But Congress included the “has the capacity to...” language to enable the FCC to keep up with changing technologies through later regulation.

# AUTOMATIC TELEPHONE DIALING SYSTEM

- 2003 FCC Interpretive Ruling expanded the definition of ATDS to include so-called “predictive dialers.”
  - A *predictive dialer* is typically described as a telephone dialing system (either hardware or software) that can dial one or more numbers simultaneously or is able to queue telephone numbers from a database.
  - FCC ruled that even though predictive dialers may not dial numbers randomly or sequentially, they “have the capacity to” do so and deemed them ATDS.
  - Some courts correctly require plaintiffs to allege facts sufficient to make it plausible that a particular call was placed with the use of an ATDS.
  - So-called “dead air” is the hallmark of a *predictive dialer*. Commonly used by companies who need to contact customers by telephone.

# COURTS ON PREDICTIVE DIALERS

- *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 950-51 (9th Cir. 2009)
  - Finding ATDS based on plaintiff's expert's testimony.
- *Meyer v. Portfolio Recovery Assoc.*, 707 F.3d 1036, 1043 (9th Cir. 2012)
  - Finding ATDS where defendant's "securities filing shows that [it] uses predictive dialers."
- *Griffith v. Consumer Portfolio Serv., Inc.*, 838 F. Supp. 2d 723 (N.D. Ill. 2011)
  - Finding an ATDS where the defendant's dialer queued numbers from a database.
- *Hunt v. 21st Mortgage Corp.*, 2013 WL 5230061 (N.D. Ala. Sept. 17, 2013)
  - Noting that a system will not be considered an ATDS if it would require additional software or significant modification to have a "present capacity" to dial numbers randomly or sequentially.



# PRIOR EXPRESS CONSENT

- 1992 FCC Report and Order – “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.”
- 2008 FCC Declaratory Ruling – “autodialed and prerecorded message calls to wireless numbers that are provided by the called party to a creditor [that are made] in connection with an existing debt” are considered to be made with “prior express consent”
- Key questions when relying on the provision of a wireless number as consent to autodial that number are nature of the transaction where number provided, and relationship of the call to that transaction.

# PRIOR EXPRESS WRITTEN CONSENT

- In October 2012, FCC adopted a new rule which now requires “prior express *written* consent” for telephone solicitations (1) to residential lines using prerecorded/artificial voice calls and (2) to wireless lines using autodialers or prerecorded/artificial voice calls.
- Eliminated ability of firms to rely on an established business relationship with a customer to make prerecorded/artificial solicitation calls to a residential line.
- Importantly, new requirement does not apply to “informational”, non-solicitation calls, e.g., flight, account, delivery notifications.
- New regs require an agreement, in writing, bearing the signature of the person called.
  - Written agreement and signature requirements can be satisfied through written documents, online forms, and various types of e-signatures
- Specific requirements for the agreement language:
  - Must be “clear and conspicuous” disclosure that (1) by executing agreement, person authorizes the seller to deliver to the signatory telemarketing calls using an ATDS or an artificial/prerecorded voice and (2) that the person is not required to enter the agreement as a condition of purchasing any property, goods, or services”

# PRIOR EXPRESS CONSENT – CONSIDERATIONS

- What was the purpose for which a number was provided, the nature of any disclosures, and what is the purpose for which the number is being used?
- When can you rely on consent obtained by a third party?
- Once it is provided, can consent be revoked?
- Does the scope of consent depend on the circumstances under which it is obtained?
- Can you rely on consent when it is provided by someone other than the cell-phone subscriber?
- Do you need consent to send a text message that confirms receipt of an opt-out request?
- What is the best way to document consent and revocation?



# Compliance Considerations

# COMPLIANCE CONSIDERATIONS

- TCPA awareness should be an integral component of a regulatory compliance management program
  - Well documented policies and procedures are key.
- Best practices include:
  - Implementing process for scrubbing cellular phone numbers from databases
    - Be aware that previously scrubbed numbers may subsequently be “ported” to wireless
  - Maintaining evidence of the call scrubbing process



# COMPLIANCE CONSIDERATIONS

- Evaluating calling campaigns to determine when prior express consent or prior express written consent may be required
  - Evaluating dialing systems
  - Evaluating call purpose and content
  - Formalizing compliance review and approval
  - Scripting campaign calls
- Designing specific processes to obtain consent
  - Verify the identity of person providing consent
  - Develop standardized scripting / copy
  - It is preferable for a consumer to expressly agree to be contacted via an automated telephone dialing system or a prerecorded voice (as applicable).

# COMPLIANCE CONSIDERATIONS

- Recording and retaining consents and revocations of consent
  - Call recordings, electronic records, paper records, etc.
- Auditing/monitoring
- Training
- Corrective Action

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# Issues Related to Fax Telemarketing

# TELEMARKETING WITH FAXES

## What is an Unsolicited Advertisement?

- “Any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission, in writing or otherwise.” 47 U.S.C. § 227(a)(5)

FCC and courts distinguish between “pretextual” or “dual purpose” faxes (advertising) and purely “informational” or “transactional” communications (not advertising)

# UNSOLICITED FACSIMILE ADVERTISEMENTS

- Can send advertising faxes with consent, or to recipient with whom sender has “existing business relationship.”
- Prior Express Consent:
  - Consent must be obtained before faxes are transmitted to recipient;
  - Should not be a negative option;
  - Should be sender-specific; and
  - Need not be in writing, BUT burden will fall upon the sender to establish existence of prior express consent from the recipient.



# UNSOLICITED FACSIMILE ADVERTISEMENTS

**FCC Position: All faxes sent with consent or to existing business relationship recipients must contain op-out language: 47 C.F.R. § 64.1200(a)(4)(iv)**

- Must inform recipient of ability and means to avoid future unsolicited advertisements (“Opt-Out Request”)
- Must include contact information: Toll-free domestic contact telephone number and toll-free facsimile machine number for the recipient to transmit Opt-Out Request
- Must state the following:
  - That recipient may make a request to sender not to send any future advertisements; and
  - That failure to comply, within 30 days, with such a request is unlawful.
- Must be clear and conspicuous
- Must be on the first page of the advertisement
- For compliance with TCPA only. Additional requirements may apply for compliance with state facsimile laws.
- Multiple pending petitions request ruling that faxes sent with prior express invitation or permission need not contain opt-out language
  - In alternative, petitions request that FCC identify statutory authority for § 64.1200(a)(4)(iv) other than Section 277 of the TCPA – could eliminate private cause of action



# Theories of Direct and Vicarious Liability

## DIRECT AND VICARIOUS LIABILITY UNDER TCPA

- Fax
  - Sender: “the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement” 47 C.F.R. § 64.1200(f)(10)
  - Transmitter can be liable “if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions” 47 C.F.R. § 64.1200(a)(4)(vii)

# DIRECT AND VICARIOUS LIABILITY UNDER TCPA

- Calls/Texts
  - Telemarketer: “the person or entity that initiates a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person” 47 C.F.R. § 64.1200(f)(11)
  - Seller: “the person on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person” 47 C.F.R. § 64.1200(f)(9)

## DIRECT AND VICARIOUS LIABILITY

- *In re Joint Petition Filed by DISH Network*, 28 F.C.C. Rcd 6574 (2013): For calls/texts, telemarketer has direct liability under the TCPA; seller does not have direct liability but may have liability under federal common law of agency
- Some disagreement as to whether apparent authority or ratification can provide basis for TCPA liability for calls/texts
- FCC has taken the position that “sender” liability for faxing is broader than “telemarketer” liability for calls/texts under “on behalf of” standard, but some courts are analyzing fax liability under agency principles
- 11th Circuit appeal in *Palm Beach Golf Center v. Surrís* may provide further guidance



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# Issues Related to TCPA Litigation



# AVAILABLE DAMAGES UNDER TCPA

- Damages: the greater of actual damages or statutory damages in the amount of \$500 per violation. The Court may treble the amount of damages if it finds that the defendant “willfully or knowingly” violated TCPA.
- No cap on the amount of damages that can be awarded.
- Other Relief: TCPA allows for injunctive relief.
- Attractive to class action plaintiff’s lawyers.
- We continue to see new cases against defendants who do not engage in unsolicited telemarketing.

# CLASS CERTIFICATION ISSUES

- Consent and revocation may provide individualized issues to attack class certification.
- Document and maintain records that address these issues.
- Prior express written consent may also impact analysis in cases that involve telemarketing.
- Consider cases that involve a “wrong-number” class plaintiff.

# MOOTING A CLASS PLAINTIFF'S CLAIM WITH A RULE 68 OFFER OF JUDGMENT OR ANALOGOUS TENDER

- Courts are divided or silent as to whether a Rule 68 offer of judgment can moot a class action in its entirety:
  - **Third, Ninth, and Tenth Circuits** – Offers of judgment to a named plaintiff do not moot a class action prior to a final decision on class certification.
  - **Seventh Circuit** – Tender can moot individual claims if made before class action complaint and motion for class certification are filed.
  - District Courts in other circuits have taken divergent views
- *Genesis HealthCare Corp. v. Symczyk*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1523 (2013).
  - Offers of judgment made in connection with collective actions under the Fair Labor Standards Act may be sufficient to moot individual claims.
  - Since the Supreme Court's decision, several courts have ruled that the holding in Genesis is inapplicable to the Rule 23 context



# Recent Developments



## RECENT POSITIVE OUTCOME

### ***MAIS v. GULF COAST COLLECTION BUREAU, INC.***

- In a TCPA class action filed in Southern District of Florida, district court held that:
  - It was not bound by FCC ruling interpreting meaning of “prior express consent.”
  - Providing wireless number on application form did not constitute “prior express consent” contrary to FCC 2008 ruling on the issue.
- Courts, however, have typically found that under Hobbs Act, they are bound by FCC TCPA rules and interpretation
- Eleventh Circuit rejected the district court’s position, and ruled that:
  - Federal district courts are bound by FCC interpretive rulings.
  - Under the FCC’s 2008 ruling, providing a cell phone number in connection with a credit transaction *does* constitute prior express consent to call the number in connection with the debt.





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