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Defense Perspective On Major TCPA Developments In 2013

Law360, New York (January 14, 2014, 9:33 PM ET) -- The Telephone Consumer Protection Act has attracted great interest from the plaintiffs' bar for several years, and, in 2013, the statute seemed to attract more attention than ever. With some exceptions, the TCPA prohibits parties from making "any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system [ATDS] or an artificial or prerecorded voice." The nature of this statute and its prescribed damages — $500 or $1,500 per call or fax — has made the TCPA an increasingly popular vehicle for consumer class actions. A review of federal dockets reveals multiple TCPA class actions filed daily, with no industry or business form immune to class claims.

In addition to an active year of litigation, 2013 saw key changes by the Federal Communications Commission to TCPA regulations. The following summary of developments from 2013 may serve as guidance for defendants looking to minimize their TCPA exposure.

New FCC "Consent" Regulations

First, the FCC's promulgation of rules introducing new consent requirements for telemarketing messages may be the most impactful development from 2013. As of Oct. 16, 2013, parties that use prerecorded calls, autodialers or text messages to advertise goods or services must obtain a consumer's "prior express written consent" before placing prerecorded telemarketing calls to residential or wireless numbers or using an autodialer to place telemarketing calls or text messages to mobile numbers.

The FCC's new "prior express written consent" definition places a steep burden on anyone engaged in telemarketing. "Prior express written consent" requires "an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered." The written agreement must also include a disclosure that the recipient specifically consents to receiving telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice, and that the recipient is not required to make any agreement as a condition of purchasing any goods or services. Parties may obtain written consent electronically in compliance with the federal E-Sign Act and applicable state contract law.

Second, the new rules eliminate the "established business relation exception" for calls to residential telephone lines, which had previously exempted parties from having to obtain consent in certain circumstances. As a result, parties must now obtain consent to make certain calls without regard to any prior relationship with the receiving party.

Third, the FCC revised its rules to require parties placing artificial or prerecorded calls to include an interactive opt-out mechanism for the party that receives the call. The opt-out option must be announced at the outset of the message and remain available for the entirety of the call.

These changes may impact merit-based defenses to TCPA claims and arguments regarding class certification in future TCPA litigation.

Revoking Consent

Developments regarding consent under the TCPA were not limited to the FCC's regulatory changes. In Gager v. Dell Financial Services, the Third Circuit became the first appellate court to address whether a party can revoke its consent to receive autodialed or prerecorded calls under the TCPA. According to guidance from a prior FCC ruling, a defendant had obtained the plaintiff's consent when the plaintiff provided a cell phone number when applying for a line of credit. In Gager, the plaintiff claimed she

revoked that consent when, in response to debt collection calls, she sent the defendant a letter telling the defendant to cease calling her number.

Citing a previous declaratory ruling from the FCC, the court held that the agency had "endorse[d] two important points: (1) a consumer may revoke her informed consent once it has been given ... and (2) there is no temporal limitation on when a consumer may revoke her prior express consent by sending an opt-out message." Moreover, the court found that "the common law concept of consent shows that it is revocable," and "any silence in the statute as to the right of revocation should be construed in favor of consumers."

Gager is inconsistent with a number of district courts that have held that consent is irrevocable under the TCPA. Nevertheless, plaintiffs are likely to grasp onto Gager in support of any claims for calls received after asking for calls to be stopped.

Importantly, the Gager court did not address whether specific contractual consent to receive calls can be waived, and that question has not been addressed by any court of record to date. Although the Gager court rejected the defendant's argument that basic principles of contract law should preclude the plaintiff from revoking her prior express consent, there was no express contractual consent in the case. Therefore, Gager does not foreclose TCPA defendants from successfully arguing that express contractual consent cannot be revoked and that a party cannot unilaterally amend a contract by striking a prior express consent provision.

Defining Automatic Telephone Dialing System

Defendants achieved some victories in narrowly construing the definition of an automatic telephone dialing system ("ATDS"), which triggers many of the TCPA's provisions governing phone calls and text messages, but the FCC's narrow interpretation generally stands. The TCPA defines an ATDS as "equipment which has the capacity — (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (b) to dial such numbers." A California state court granted partial summary judgment in Stockwell v. Credit Management, agreeing with the defendant that the use of a number generator is required for equipment to be deemed an ATDS. The Northern District of Alabama similarly concluded, in Hunt v. 21st Mortgage Corporation, that only the present capability of the equipment is relevant, not the capability if modified or altered.

On the other hand, in Brown v. Enterprise Recovery Systems Inc., the Texas Court of Appeals explained that the capability to randomly generate calls made the technology an ATDS, regardless of whether the capability was employed. And other courts have shown a strict adherence to the FCC's guidance that an ATDS, at a minimum, includes equipment or software that can call a person "without human intervention." The Northern District of California cited the FCC language in Fields v. Mobile Messengers America Inc., holding that equipment that had the capacity to dial numbers without human intervention constituted an ATDS. Defendants wishing to narrow the scope of equipment that constitutes an ATDS may fare best by narrowing the scope of capabilities of their own equipment.

Compelling Arbitration

An increasingly valuable tool for defendants in TCPA class actions is a motion to compel arbitration and 2013 was no exception. Courts have generally enforced broad arbitration agreements in the context of debt collection calls. In 2013, courts granted most motions to compel arbitration brought by a creditor with whom a debtor had a contractual relationship or brought by a nonsignatory collection agency. For example, in Betancourt v. Green Tree Servicing, the Middle District of Florida explained that the TCPA claims had a nexus to efforts to collect on a note that included an arbitration agreement and therefore the non-signatory caller could compel arbitration.

Class Action Settlements

As more TCPA class actions are filed, more TCPA class actions are settled. The 2013 TCPA settlements provide guidance on current trends for defendants looking to settle class actions against them. The largest settlement in the history of the TCPA was preliminarily approved in 2013 totaling $32 million — three

times the average maximum settlement in other TCPA class actions — providing estimated payments between $20 and $40 per claimant for over seven million potential class members.

TCPA class action settlements in 2013 generally averaged in the range of $5 million to $10 million with the funds typically placed in a settlement fund for distribution. Potential payments to each claimant varied according to the number of class members and number of claimants, ranging generally from $20 to $500 per claimant. Two courts noted that the claim rate in these types of cases was below 10 percent, with one noting that it was less than one percent. While most settlements in 2013 resulted in cash payments to class members, at least two offered coupons. These settlements also proved profitable for plaintiffs' counsel, who often claimed up to 25 percent of the settlement fund in attorney's fees.

Insurance Coverage

Several reported opinions in 2013 help clarify when TCPA damages may be covered by liability insurance. Courts generally hold that TCPA damages are covered by insurance policies that cover advertising injuries. But courts do enforce policy exclusions for occurrences arising from the distribution of material in violation of a statute (e.g., TCPA violations).

Insurance companies have long argued that TCPA damages are fines or penalties constituting punitive damages, which are not covered by provisions regarding advertising. But in Standard Mutual Insurance Company v. Lay, the Illinois Supreme Court reversed a 2012 appellate court decision and held that TCPA damages are not uninsurable punitive damages. Illinois disagreed with earlier decisions from Colorado and New York that TCPA damages were penal or punitive, reasoning that TCPA damages are akin to liquidated damages intended to aid enforcement of the TCPA. The Missouri Supreme Court concurred in Columbia Casualty Co. v. HIAR Holding.

However, defendants are not finding coverage under all policies. In Nationwide Mutual Insurance Company v. David Randall Associates Inc., the Eastern District of Pennsylvania held that conduct in violation of the TCPA was intentional, not accidental, and therefore not covered by the property damage provision. And in BCS Ins Co. v. Big Thyme Enterprises Inc., the District of South Carolina held that a professional services policy did not cover the sending of unsolicited faxes.

In MDC Acquisition Co. v. Traveler's Property Casualty Company of America, the Sixth Circuit reiterated that policy exclusions applying to TCPA damages are enforceable and upheld a provision that such exclusions could be added to the policy through proper notice.

Given the wide-ranging results in coverage actions, potential TCPA defendants should maintain close review of their policies to ensure an understanding of whether TCPA claims would be covered.

In light of the 2013 TCPA developments and continued active litigation involving the TCPA, companies in all industries are wise to closely review their customer agreements to ensure those agreements provide the best possible defenses to any TCPA claims.

—By Kelley C. Barnaby and David Carpenter, Alston & Bird LLP

Kelley Barnaby and David Carpenter are senior associates in Alston & Bird's litigation & trial practice group, based out of Washington, D.C., and Atlanta respectively. Barnaby and Carpenter both focus their practice on commercial business litigation.

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