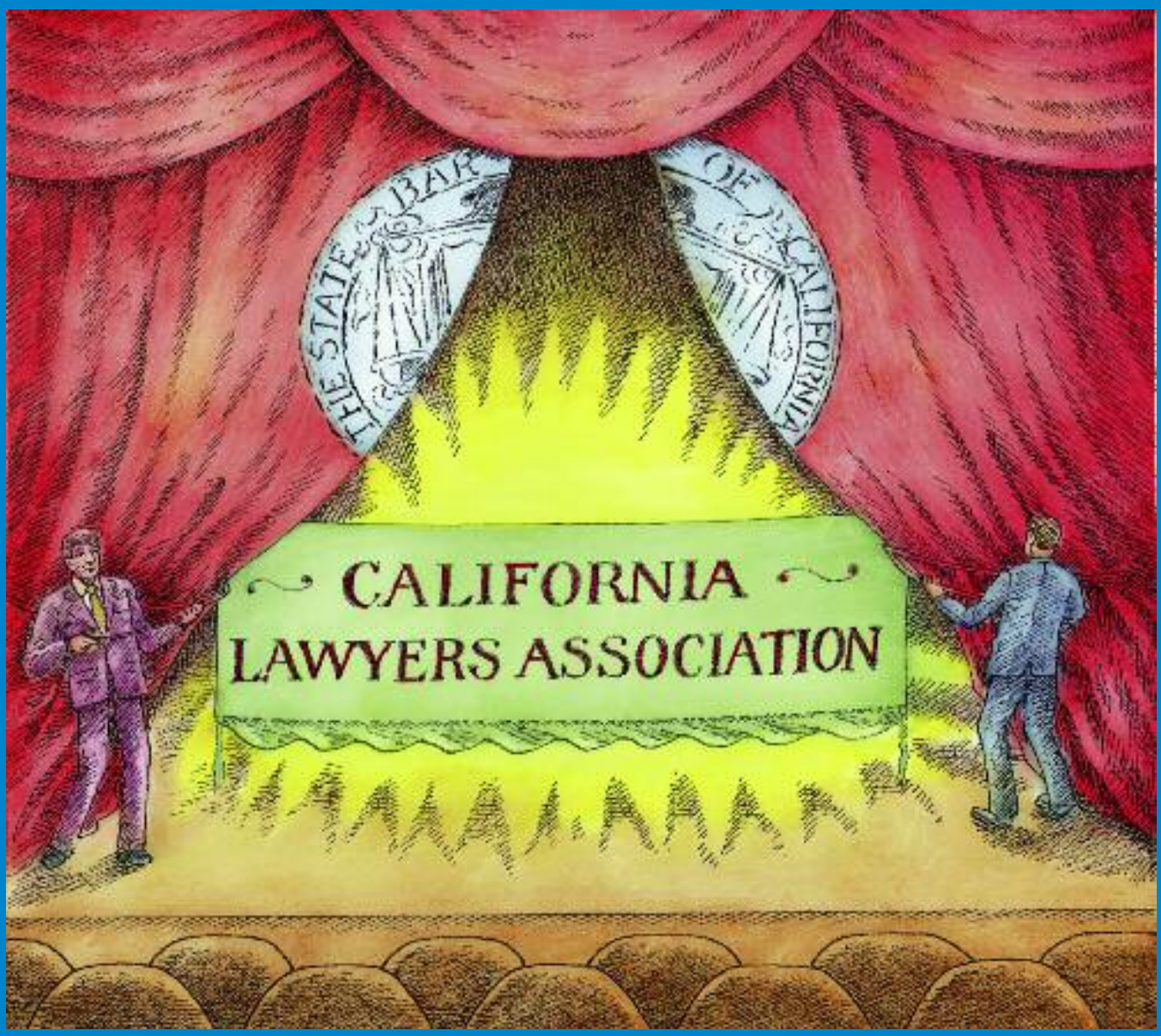
Volume 30 • Number 3 • 2017

California Litigation

THE JOURNAL OF THE LITIGATION SECTION, STATE BAR OF CALIFORNIA



The ABC's of the TCPA

By Christine M. Reilly and Diana L. Eisner

Christine M. Reilly

Diana L. Eisner

The Telephone Consumer Protection Act of 1991 ("TCPA"), 42 U.S.C. § 227 et seq., or "Total Cash for Plaintiffs' Attorneys" as it's euphemistically called, is an increasingly hot topic in litigation. The TCPA is a federal consumer privacy statute that regulates the technology used to place outbound calls and text messages. The TCPA has gained increasing attention because it created an attractive private right

of action for alleged violations. Under the TCPA, a plaintiff is entitled to $500 per violation (if negligent) or $1,500 (if willful or knowing). And a "violation" means per call or message.

Given these steep, uncapped statutory penalties, the TCPA has created a cottage industry for plaintiffs' lawyers. TCPA class actions continue to be filed at a startling rate. A recent study by the U.S. Chamber of Commerce found that TCPA litigation has increased 46% since July 2015. More than 30% of those cases have been brought as class actions. And settlements continue to grow in amount. In late 2016, Caribbean Cruise Line agreed to settle a TCPA class action for $76 million—the largest TCPA settlement to date. While the TCPA does not provide for attorneys' fees, plaintiffs' attorneys are the main beneficiaries of this litigation boom, often recovering a third of these massive settlements.

July 2015 is an important benchmark in the TCPA world because on July 10, 2015, the FCC issued its omnibus TCPA Declaratory Ruling and Order. The TCPA tasks the FCC with enforcing and promulgating regulations governing the TCPA, 47 C.F.R. § 64.1200 et seq. Acting under its rule-making authority, the FCC purported to "clarify" certain aspects of the TCPA in its July 2015 Ruling. In reality, the July 2015 Ruling resulted in confusing, conflicting rules and expanded the scope of potential violations. California has been the venue for the largest percentage of TCPA cases filed since the July 2015 Ruling, with 1005 cases. By comparison, the state with the second highest number is Florida, with 620.

Enacted in 1991, the TCPA was designed primarily to address prerecorded telemarketing calls to residential numbers and calls to mobile phones. In a nutshell, it regulates the use of automated technology and prerecorded voices to initiate outbound telephone calls, and applies to voice calls, voice messages, text messages, and faxes.

The TCPA requires consent for certain types of automated calls to residential landlines and mobile phones. Calls to business landlines are not covered. There are three elements of a TCPA claim: (1) the defendant called a telephone number, (2) using an "automatic telephone dialing system" or an artificial or prerecorded voice message, *(3) without the recipient's consent. (Meyer v. Portfolio Recovery Assocs., LLC* (9th Cir. 2012) 707 F.3d 1036, 1043 (citing 47 U.S.C. § 227(b)(1).)

— Element One: A Call —

A "call" includes a voice call, of course. But a "call" also includes text messages. Although the TCPA was enacted before text messaging existed, the FCC has determined that a text message is a "call." The scope of a "call" likely will continue to evolve as technology changes. Currently, there is debate whether ringless voicemail, or voicemail drops, are "calls." A voicemail drop uses technology that bypasses the wireless subscriber and sends a voicemail directly to the individual's voicemail. The phone should not ring and the voicemail drop typically does not appear on the subscriber's call log.

In March 2017, a company called All About the Message filed a petition with the FCC, seeking a declaratory ruling that voicemail drops are not calls. The FCC received thousands of comments on the petition, many likely the result of a New York Times article which included a direct link to submit comments. In June 2017, All About the Message withdrew its petition. It is likely that given the huge volume of comments opposing the petition, All About the Message feared an adverse ruling was inevitable. For now, it remains unclear whether voicemail drops are "calls" under the TCPA. We suspect that the answer will

largely depend on how the technology works (for example, whether it uses phone lines) and whether it is ringing the phone and/or the wireless network.

— Element Two: Autodialing —

The second element for a TCPA plaintiff to prove is that the call was placed using an "automatic telephone dialing system" (an "autodialer"), or an artificial or prerecorded voice message. An autodialer is equipment having 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. § 227(a)(1).) Importantly, autodialed calls to residential landlines are not covered by the TCPA. Autodialed or prerecorded messages to mobile numbers are covered.

In the July 2015 Ruling, the FCC muddied the waters, ruling that "capacity" in the autodialer definition includes both the present and potential capacity for autodialing. This expansive definition includes current features "that can be activated or de-activated" and features "that can be added to the equipment's overall functionality through software changes or updates." The FCC gave a single example of equipment that would not be treated as an autodialer: a rotary phone. The FCC rejected industry requests to create a more bright-line rule that limited "capacity" to present ability and carved out situations where human intervention is involved in dialing. Instead, the FCC said that human intervention must be determined on a case-by-case basis.

Since then, judges in the Northern District of California have ruled that where human intervention is needed to place the call or send the text message, such as through the click of a button, the system is not autodialer. (See, e.g., *Luna v. Shac, LLC* (N.D.Cal. 2015) 122 F.Supp.3d 936; *McKenna v. WhisperText* (N.D.Cal. 2015) 2015 WL 428728; *Derby v. AOL*, Inc. (N.D. Cal. 2015) 2015 WL 5316403.) But in the Southern District, judges seem less willing to rule that human intervention is dispositive. (See *Horowitz v. GC Services Ltd. P'ship* (S.D.Cal. 2016) 2016 WL 7188238; *Sherman v. Yahoo! Inc.* (S.D.Cal. 2015) 150 F.Supp.3d 1213.) So, while there appears to be some judicial skepticism towards these claims, the pendulum swings both ways, forcing companies to continue litigating.

'The TCPA regulates two types of technology used to make outgoing calls: calls placed by an autodialer and calls using an artificial or prerecorded voice.'

Clarity on what precisely is an ATDS may come soon. The July 2015 Ruling is on appeal to the Court of Appeals for the District of Columbia Circuit. (*ACA Int'l v. FCC* (D.C. Cir. No. 15-1211.) A key issue on appeal is whether the FCC unlawfully exceeded its authority in its expansive interpretation of "capacity."

— Element Three: Consent —

The third element, consent, is arguably the most complicated piece of the puzzle because the type of consent required varies depending on the type of technology used to make the call, the type of phone dialed, and the purpose of the call.

The TCPA regulates two types of technology used to make outgoing calls: calls placed by an autodialer and calls using an artificial or prerecorded voice.

'The type of consent required varies based on whether the call is made to a residential or mobile phone and the type of technology used.'

The type of number called is also important. Calls to residential landlines using an autodialer but by live operators do not trigger the TCPA's consent provisions, and are thus exempt from the consent requirements. Calls to mobile phones using an artificial/prerecorded voice message or autodialers are regulated by the TCPA. So for calls to mobile phones, only those made by live operators that are manually dialed do not trigger the TCPA's consent requirements.

Finally, the purpose of the call must be considered. There are generally two types of calls for TCPA purposes: informational and marketing. "Informational" calls do not advertise goods or services, e.g., debt collection calls, survey calls, customer service calls, and appointment reminders. "Marketing" calls include calls that include or introduce an "advertisement" or constitute "telemarketing." An advertisement is "any material advertising the commercial availability or quality of any property, goods or services." (47 C.F.R. § 64.1200(f)(1).) "Telemarketing" is "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental or investment in property, goods, or services, which is transmitted to any person." (47 C.F.R. § 64.1200(f)(12).) A dual-purpose call, which has both informational and marketing content, is considered a marketing call. In one case, a call about redeeming loyalty program reward points was deemed an advertisement because the call encouraged a future purchase, because the only way to redeem the points was to go to the retailer's store and purchase goods. (*Chesbro v. Best Buy Stores, L.P.* (9th Cir. 2012) 705 F.3d 913.)

All of these factors need to be assessed to determine what type of consent is needed. There are two types of consent: "prior express consent" and "prior express written consent."

"Prior express consent" means the voluntary provision of a telephone number where the consumer has not expressed a desire not to be called. (See *In re Rules & Reg's Implementing the Tel. Consumer Prot. Act of 1991* (1992) 7 F.C.C.R. 8752, 8769 ¶ 31.) It may be verbal or written, and context should be considered. For example,

someone who provides a phone number for appointment reminders might not be deemed to have consented to automated survey calls.

"Prior express written consent" is much more specific and requires: (1) identification of the seller to whom consent is being provided; (2) identification of the consumer's phone number; (3) an affirmative agreement with the consumer; (4) disclosure that the consumer is authorizing the seller to engage in telemarketing; (5) disclosure that the calls will be made using automated technology (i.e., prerecorded messages and/or autodialers); (6) disclosure that the consumer is not required to provide consent as a condition of purchasing goods or services; and (7) provision of a written signature from the consumer (either electronically through E-SIGN or handwritten). (47 C.F.R. § 64.1200(f)(8).)

The type of consent required varies based on whether the call is made to a residential or mobile phone and the type of technology used. For calls to residential landlines, prerecorded informational calls generally do not require consent. Prerecorded marketing calls to residential landlines require prior express written consent. For calls or text messages to mobile phones, autodialed or prerecorded informational calls require prior express consent. Autodialed or prerecorded marketing calls or text messages to mobile phones require prior express written consent. So, calls to a mobile phone always require some type of consent.

The stricter rules for mobile versus landlines are a relic from when the TCPA was enacted. Remember the TCPA was enacted in 1991, before cell phones were ubiquitous and calls to cell phones were very costly to receive. These more specific consent rules for mobile phones are just one example of how the TCPA has become outdated.

Someone who provides consent has the right to revoke consent. Another problem posed by the July 2015 Ruling is the FCC's statement that a consumer may revoke previously given consent "at any time" by any "reasonable means." Early in 2017, the Ninth Circuit clarified the standard for revocation, stating that "[r]evocation of consent must be clearly made and express a desire not to be *called or texted." (Van Patten v. Vertical Fitness Group, LLC* (9th Cir. 2017) 847 F.3d 1037, 1048.) Opportunistic plaintiffs have attempted to take advantage of the FCC's broad ruling by ignoring clear instructions to opt-out by texting "stop" and instead texting commands like "leave me alone" or "cease contacting me please," which the platform will not recognize; or claim revoked consent, prompt the system in order to receive a significant number of text messages, and then file suit. In February 2017, a Central District judge rejected this gambit, holding that ignoring clear opt-out instructions was unreasonable. (*Epps v. Earth Fare, Inc.* (C.D.Cal. 2017) 2017 WL 1424637.)

This is all just the tip of the TCPA iceberg. TCPA practice is a highly complex and ever-changing area that can impact any business. There is no "get out of jail free" card and companies can spend significant sums defending themselves. When it comes to the TCPA, proactive compliance is the best strategy. Given the staggering number of cases filed in California between August 2015 through December 2016, any business that engages with consumers in California would be well-served by ensuring their practices are consistent with the TCPA.

Christine M. Reilly is a Partner at Manatt, Phelps & Phillips, LLP in Los Angeles who chairs the firm's TCPA compliance and focuses on defense. Diana L. Eisner is a Manatt associate who focuses on TCPA defense.

MCLE Test

Questions for Self-Study Test (1 hour of credit)

1. ***True or false?*** TCPA stands for "Telephonic Communications Protection Act".

2. ***True or false?*** The TCPA was enacted in 1991.

3. ***True or false?*** Statutory penalties under the TCPA start at $500 per violation.

4. ***True or false?*** Statutory penalties under the TCPA max out at $1,500 per violation.

5. ***True or false?*** Damages under the TCPA are uncapped.

6. ***True or false?*** The TCPA has a fee shifting provision.

7. ***True or false?*** TCPA litigation has increased 46% since July 2015.

8. ***True or false?*** Half of all of TCPA cases are filed as class actions.

9. ***True or false?*** The largest number of TCPA cases are filed in California.

10. ***True or false?*** The second leading TCPA jurisdiction for number of cases filed is Illinois.

11. ***True or false?*** The FTC enforces the TCPA.

12. ***True or false?*** The FCC recently issued a ruling that voicemail drops are "calls."

13. ***True or false?*** An "autodialer" is a system which does not use human intervention to make calls.

14. ***True or false?*** The FCC has said that "capacity" to be an autodialer means only present capacity.

15. ***True or false?*** The TCPA does not cover calls to business landlines.

16. ***True or false?*** "Prior express consent" must be in writing.

17. ***True or false?*** All marketing calls require prior express written consent.

18. ***True or false?*** Autodialed calls to residential landlines do not require consent.

19. ***True or false?*** Once consent is provided it is irrevocable.

20. ***True or false?*** Calls that primarily provide information and also include a sales component are not considered marketing calls for consent purposes.