



**August 28, 2015**

**CLIENT ALERT**

**HOW THE FCC'S RECENT RULING ON THE TELEPHONE CONSUMER PROTECTION ACT AFFECTS YOU AND YOUR BUSINESS**

In response to 21 petitions from a number of businesses and trade associations, on July 10, 2015, the U.S. Federal Communications Commission (“FCC”) released a sharply divided [Declaratory Ruling and Order](#) (“DRO”)<sup>1</sup> regarding requirements established by the Telephone Consumer Protection Act of 1991 (“TCPA” or “Act”).<sup>2</sup> The FCC’s adoption of the DRO, by a 3-2 vote, has significantly altered the regulatory and compliance landscape of the TCPA, by expanding the types of activity to which the TCPA may apply. While lawsuits currently are pending that challenge the DRO<sup>3</sup> and its ultimate application may be reduced as a result of judicial review, it is important for owners of all types of businesses to be aware of the Act and the potentially harsh consequences of even a relatively harmless and inadvertent violation of its provisions.

**The Scope of the TCPA is Far Reaching and Diverse**

TCPA lawsuits are costing American businesses hundreds of millions of dollars across every type of industry. The TCPA has become the litigation vehicle of choice for consumer class action attorneys. While the impetus for enacting the TCPA originated exclusively from a legislative intent to regulate telemarketers, the Act has been used as the basis for filing class action lawsuits against businesses and institutions alleging violations of the TCPA in fields as diverse as the following:

**A. The L.A. Lakers**<sup>4</sup>

- The Los Angeles Lakers offered its fans an opportunity to send a text message to the team to place a personalized message on the Jumbo Tron at the Staples Center. The Lakers acknowledged receipt of each text with a reply making it clear that not every message would appear on the Jumbo Tron. What followed was a

class action lawsuit claiming that every automated text response was a violation of the TCPA.

**B. Steve Madden**<sup>5</sup>

- The nationwide class action lawsuit alleged that Steve Madden violated the TCPA by sending unsolicited text message advertisements. The lawsuit resulted in a settlement, with defendant agreeing to create a \$10,000,000 settlement fund for the class.

**C. Rubio's (a West Coast Restaurateur)**<sup>6</sup>

- Rubio's had a policy of sending its quality-assurance team text messages about food safety issues. When one Rubio's employee lost his phone, his wireless carrier reassigned his number to someone else. Unaware of the reassignment, Rubio's kept sending texts to what it thought was its employee's phone number. The new subscriber never asked Rubio's to stop texting him - at least not until he filed a TCPA lawsuit against Rubio's for nearly a half-million dollars.

**D. Jiffy Lube**<sup>7</sup>

- According to the class action complaint, Jiffy Lube violated the TCPA by sending information to customers regarding a promotional campaign via text message. The lawsuit resulted in a class action settlement worth somewhere around \$47,000,000 along with an injunctive relief component.

**E. Lifetime Entertainment Services and its "Project Runway" TV Show**<sup>8</sup>

- A class action lawsuit was filed against Lifetime Entertainment Services, LLC accusing the television network of violating the TCPA by calling people to advertise its TV show "Project Runway."

**F. The Banking and Finance industries at large**<sup>9</sup>

- By way of example, a TCPA class action lawsuit was filed against Capital One and other defendants alleging that automatic telephone dialing systems ("ATDS") were used to contact consumers' cell phones without prior consent. The lawsuit resulted in a class action settlement worth \$75,455,099 to the class, plus \$15,668,265 in attorneys' fees and costs for plaintiffs' counsel and incentive awards of \$5,000 to each of the five named plaintiffs.

**G. Sirius XM Holdings, Inc. and Toyota Motor Sales, U.S.A. Inc.**<sup>10</sup>

- A class action was filed against Sirius and Toyota by a customer of Toyota alleging that Sirius violated TCPA rules and placed unsolicited calls to his cellphone (and a class of consumers) using ATDS.

**H. Virginia College and Education Corporation of America**<sup>11</sup>

- Plaintiff filed a class action lawsuit alleging that defendants willfully and knowingly violated the TCPA by making calls to the cellular telephone numbers of the class using ATDS and/or artificial or prerecorded voice. Plaintiff alleged

that the value of the case exceeds \$5,000,000, in the aggregate, exclusive of fees and costs.

In point of fact, the number of TCPA lawsuits filed each year has skyrocketed from 14 lawsuits in 2008 to 2,336 TCPA lawsuits in 2014.<sup>12</sup>

### **The TCPA has become the Litigation Vehicle of Choice for Consumer Class Action Attorneys**

The TCPA was enacted in 1991 as the legislative answer to protect consumers from unsolicited advertisements by telemarketers, where the recipient was forced to incur the cost of printing a faxed advertisement or incurring an actual charge on a cellular telephone of a call from a telemarketer. As to damages, the initial sponsor of the Senate bill, Senator Fritz Hollings (D-SC), explained that the TCPA was intended to make it easier for consumers to recover a few hundred dollars in damages from computerized telemarketing calls, and that the intent was for consumers to go into small claims courts in their home states without having to retain counsel.<sup>13</sup> However, notwithstanding the stated intent in the Congressional Record for nominal damages, the provisions of the TCPA, as enacted, expressly allow for uncapped statutory damages against all types of businesses (regardless of size) that easily can reach the tens of millions of dollars.

The TCPA is a strict liability statute – meaning the intent by the caller is irrelevant for purposes of establishing liability.<sup>14</sup> However, if it is determined that the caller willfully or knowingly violated the Act, then each statutory penalty can be trebled.<sup>15</sup>

In addition to uncapped damages, the scope of activities to which it has been determined the Act applies, has expanded significantly as a result of the development and widespread usage of modern forms of technology for communication.

Thus, with virtually no limits on recoverable damages, and the strict liability nature of the statute, class action attorneys view the TCPA as a potential goldmine. In fact, there are websites set up that provide instructions to consumers on how to manufacture the perfect TCPA lawsuit.<sup>16</sup>

### **The FCC's DRO**

As broadly construed as the TCPA was prior to the adoption of the DRO (as described in the examples cited above), now the Act is even more expansive. As expressed by dissenting Commissioner Ajit Pai, the DRO transforms "...the TCPA from a statutory rifle-shot targeting specific companies that market their services through automated random or sequential dialing into an unpredictable shotgun blast covering virtually all communications devices."<sup>17</sup>

Crucial rulings in the DRO are as follows:

#### **1. Broadening the definition of Automatic Telephone Dialing System**

The TCPA expressly covers ATDS, defining this equipment as "[having] the capacity – to store or produce telephone numbers to be called, using a random or sequential number

generator.” However, the DRO expands the TCPA’s application to equipment having *potential ability*, even if the equipment *does not* have the current ability to store, dial or produce telephone numbers using ATDS. In fact, the FCC uses *rotary phones* as an example of a technology that would not be covered by the TCPA. In his dissenting opinion, Commissioner Michael O’Rielly likened this application by the FCC to “the FAA regulating vehicles because with enough modifications cars and truck could fly, and then using a skateboard as an example of a vehicle that does not meet the definition.”<sup>18</sup>

## **2. Reassignment of Phone Numbers**

The TCPA prohibits calling a cell phone number using ATDS without prior express consent. Receiving a consumer’s prior express consent for communication is a standard business practice in situations such as signing up for a membership or applying for a credit card, where a consumer knowingly consents to be reached on his or her cell phone number absent instructions to the contrary.

Every year approximately 37 million telephone numbers are reassigned to different users.<sup>19</sup> If a business that has a reasonable basis to believe it has a valid prior consent calls a number that it did not know had been reassigned, a fair reading of the TCPA suggests that liability should not apply until the business has actual knowledge of the reassignment. However, contrary to that interpretation, under the DRO, a caller only can initiate one phone call before TCPA liability may apply, irrespective of whether the caller gains knowledge of reassignment or even speaks to someone during the phone call. Therefore, even if a business is acting in good faith and has no reason to know that it is calling a wrong/reassigned number, it may be found liable under the TCPA. Consistent with this analysis, dissenting Commissioner Ajit Pai referred to the FCC’s interpretation of reassignment as “a veritable quagmire of self-contradiction and misplaced incentives.”<sup>20</sup>

## **3. Revocation of Consent**

Finally, the DRO also significantly expands the allowable means of revocation of prior consent for communications covered by the TCPA, by specifying that prior consent may be revoked by *any* reasonable means, including orally at a store or bill payment location. As questioned by Commissioner Ajit Pai in his dissent, “[H]ow could any retail business possibly comply with the provision that consumers can revoke consent orally at in-store bill payment locations? Would a harried cashier at McDonald’s have to be trained in the nuances of customer consent for TCPA purposes?”<sup>21</sup> From a litigation standpoint, this construction of revocation potentially places a TCPA defendant in the position of having to prove a negative (having to prove the alleged conversation or communication revoking consent did not take place) simply to avoid significant liability.

## **Conclusion**

If you have a business that utilizes any form of communication that conceivably might fall within the scope of the TCPA, you should be aware of the broad reach of the Act and the

significantly large potential liability to which your business may become subject for relatively inconsequential and innocuous activities.

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Warshaw Burstein's Creditors' Defense Litigation and Compliance attorneys advise clients on all facets of TCPA compliance, and defend clients against individual and class action lawsuits brought under the TCPA. For more information about the FCC's Declaratory Ruling and Order, please contact Scott E. Wortman by phone at 212.984.7723 or email at [swortman@wbcsk.com](mailto:swortman@wbcsk.com) or your regular Warshaw Burstein attorney.

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<sup>1</sup> *In re Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, CG Docket No. 02-278, WC Docket No. 07-135, FCC 15-72 (released July 10, 2015)

<sup>2</sup> 42 U.S.C.S. § 227

<sup>3</sup> See *consolidated lawsuits* at United States Court of Appeals for the District of Columbia Circuit, Case No. 15-1218

<sup>4</sup> *Emanuel v. L.A. Lakers, Inc.*, 2013 U.S. Dist. LEXIS 58842, 2013 WL 1719035 (C.D. Cal. Apr. 18, 2013)

<sup>5</sup> *Ellison v. Steve Madden Ltd*, No. 2:11-cv-05935 (C.D. Cal.)

<sup>6</sup> *FCC DRO*, Dissenting Statement of Commissioner Ajit Pai, at 120.

<sup>7</sup> See *Id.*, and *In re Jiffy Lube International Inc.*, No. 3:11-MD-02261 (S.D. Cal.)

<sup>8</sup> *Leyse v. Lifetime Entertainment Services, LLC* 13-cv-05794-AKH, 2013 (S.D.N.Y.)

<sup>9</sup> *Amadeck v. Capital One Fin. Corp.* (In re Capital One Tel. Consumer Prot. Act Litig.), 2015 U.S. Dist. LEXIS 17120 (N.D. Ill. Feb. 12, 2015); *Franklin v. Wells Fargo Bank, N.A.*, 4-cv-02349-MMA-BGS (Southern Dist. CA); *Rose v Bank of America*, No. 11-cv-2390 (N.D. Cal.); *Arthur et al. v. SallieMae et al.*, No. 10-cv-00198 (W.D. Wa.)

<sup>10</sup> *Trenz v. Sirius XM Radio, Inc. et al*, 15-cv-00044-AJB-DHB (S.D. Cal.)

<sup>11</sup> *Fitzhenry v. One on One Marketing LLC et al (includes Virginia College and Education Corporation of America)*, 14-cv-04782-DCN (District of South Carolina)

<sup>12</sup> *FCC DRO*, Dissenting Statement of Commissioner Ajit Pai, at 113.

<sup>13</sup> 137 Cong. Rec. 30821–30822 (1991).

<sup>14</sup> Each call in violation of the statute is subject to a \$500.00 penalty. 47 U.S.C. § 227(b)(3)(B).

<sup>15</sup> 47 U.S.C. § 227(b)(3)

<sup>16</sup> <http://www.killthecalls.com/suing-telemarketers.php>. See also "How To Make A Telemarketer Cry (or, Suing Bozos for Fun & Profit)", online article accessed on October 15, 2013, <http://www.panix.com/~eck/telemarket.html>; and See also, How to Sue A Telemarketer", <http://www.impactdialing.com/2012/05/how-to-sue-a-telemarketer/>

<sup>17</sup> *FCC DRO*, Dissenting Statement of Commissioner Ajit Pai, at 115.

<sup>18</sup> *FCC DRO*, Dissenting Statement of Commissioner Michael O'Rielly, 128

<sup>19</sup> *FCC DRO*, Dissenting Statement of Commissioner Ajit Pai, at 117.

<sup>20</sup> *Id.*, at 120.

<sup>21</sup> *Id.*, at 123.