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Telephone Consumer Protection Act Litigation

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TCPA Litigation Slump: Down for the Year, Down Month over Month

- According to webrecon.com, 1,297 TCPA actions filed January through October 2022
  - Down year over year 14.2% from Jan. – October 2021
    - In October 2022, 132 TCPA actions filed – 47% were filed as putative class actions
    - Decrease of 2.2% month over month from September 2022, but up 12.8% from October 2021

https://webrecon.com/webrecon-stats-for-oct-2022-halloween-treat/

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Autodialer Cases Recede, DNC Cases Increase

- As a result of the Facebook v. Duguid ruling, ATDS cases are not as prominent as they were a few years ago. While plaintiffs are still filing ATDS liability cases, there are significantly fewer of them.
- Do Not Call list cases are increasing.
- Seeing many cases arising out of relationships with third party lead generators:
  - Very important to have contracts with such companies setting forth compliance expectations and indemnification provisions.
  - Perform your due diligence on third party vendors – this is part of vendor management!

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What is the TCPA?

- Telephone Consumer Protection Act of 1991
  - 47 U.S.C. § 227
  - Regulations codified at 47 CFR 64.1200, 1201, and 1202
  - Federal Communications Commission has authority to issue regulations
- Designed to protect consumer privacy rights and deter the nuisance of telemarketing calls at home
- Statutory Violations
  - $500 per violation
  - $1500 per willful violation

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Important TCPA Definitions

- ATDS – “means 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 USC 227(a)(1)
- Prior express written consent – “means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered 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.” 47 CFR 64.1200(f)(8)

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Important TCPA Details

- Statute is construed as strict liability
  - i.e., intent does not matter, only the act itself
- Third party liability is possible
  - i.e., vicarious liability through agents acting on your behalf
- Private Right of Action
  - $500 per violation
  - $1500 per violation for willful and knowing
- TCPA is susceptible to class status

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What does the TCPA Do?

- Generally prohibits any call to a cell phone from an Automatic Telephone Dialing System, or using a pre-recorded or automated voice, without express prior consent of the party being called
  - Includes text messages – 2003 FCC Ruling
- Also prohibits telemarketing calls to residential lines using a pre-recorded or artificial voice without prior express consent
- Prohibits calls to individuals on the federal Do Not Call list
- Also prohibits unsolicited fax advertisements, with exceptions for established business relationships (there are conditions to this exemption, not relevant for today's presentation)

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Do Not Call List

- Any company utilizing calls or text messages for marketing purposes must have written procedures in place to prevent contacting numbers listed on the Do-Not-Call Registry (DNCR).
- Failure to refrain from contacting numbers listed on the DNCR could result in statutory liability under the TCPA, 47 C.F.R. § 64.1200(d).
- Contacting consumers listed on the DNCR could also result in regulatory fines from the FTC up to $43,792.00 per call.

https://consumer.ftc.gov/articles/national-do-not-call-registry-faqs

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Do Not Call List

- Under the TCPA's Safe Harbor Provision, companies maintaining business practices in support of compliance with the DNCR may assert these policies and procedures in defense of allegations they violated the DNCR.
  - Any person or entity making telephone solicitations (or on whose behalf telephone solicitations are made) will not be liable for violating this requirement if the person or entity can establish business practices include: (A) written procedures; (B) training personnel; (C) recording consumers requesting not to be contacted; and, (D) Accessing the National DNCR.

47 CFR 64.1200(c)(2)(i)

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Safe Harbor Provisions

- "A person will not be liable for violating [the cell phone provision] when the call is placed to a wireless number that has been ported from wireline service and such call is a voice call; not knowingly made to a wireless number; and made within 15 days of the porting of the number from wireline to wireless service . . . ." 47 CFR 64.1200(a)(1)(iv)
  - Cannot be on National Do Not Call List
  - Cannot be on Company's internal Do Not Call list
- Differs from DNCR Safe Harbor, which allows for defense based on policies and procedures.

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Back to that Definition of an ATDS

- FCC made a controversial ruling in 2015 on definition of an ATDS
  - Statutory definition includes whether the device has the "capacity" to perform the stated functions
  - FCC's 2015 Declaratory Ruling sought to clarify what it means to have the "capacity" to store or dial such numbers
    - Declined to rule that "capacity" refers only to ***present*** capacity
    - Defined "capacity" to include "potential functionalities"
    - Affirmed its prior orders finding "predictive dialers" qualify as an autodialer
      - Predictive dialer refers to a device that dials automatically from a given list based on algorithms designed to predict when a sales agent is available

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ACA Int'l v. FCC (DC Cir. 3/16/18)

- This matter was a challenge brought by ACA Int'l to 4 different rulings in the 2015 Order referenced previously
- Importantly for our purposes, it ruled on the FCC's clarification of the definition of an ATDS
- Case was brought under the Administrative Procedures Act
  - Ruling must be found arbitrary and capricious, an abuse of discretion, or not in accordance with the law

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ACA Int'l v. FCC

- DC Circuit found the FCC's interpretation of "capacity" to be unreasonably and impermissibly expansive
- Found the FCC's definition had "the apparent effect of embracing any and all smartphones"
- Because smartphones qualify, the Court noted "the statute's restrictions on autodialer calls assume an eye-popping sweep"
- Court found that, under FCC's definition, a simple invitation to 10 people to a social gathering among newly acquainted friend could result in a $5K error

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ACA Int'l v. FCC

- DC Circuit invalidated the FCC's "clarification" of the definition of an ATDS
- "It cannot be the case that that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact."

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3d and 2d Circuits Follow DC Circuit

- On June 26, 2018 and June 29, 2018, the U.S. Court of Appeals for the Third Circuit and the U.S. Court of Appeals for the Second Circuit, respectively, held that a device is not considered an automatic telephone dialing system (ATDS) under the Telephone Consumer Protection Act (TCPA) unless it currently has the capability to dial randomly generated or sequential phone numbers.
- While not bound by the D.C. Circuit's discussion concerning an ATDS, the Second Circuit and Third Circuit both adopted the D.C. Circuit's reasoning, holding that the definition of an ATDS under the TCPA only looks at the device's present capabilities.
- Dominguez v. Yahoo, Inc. (3d Cir. 2018)
- King v. Time Warner Cable, Inc. (2d Cir. 2018)

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9th Circuit Refuses to Follow DC Circuit

- Marks v. Crunch San Diego, LLC (9th Cir. 2018)
- The 9th Circuit Court of Appeals held that the statutory definition of an automatic telephone dialing system included a device that stored telephone numbers to be called and did not depend solely on whether those numbers had been generated by a random or sequential number generator.
- The case revolved around a consumer who received a series of text messages from a gym that he had joined. The consumer alleged that the gym sent him three text messages that his phone carrier charged him for. The consumer filed a putative class action against the gym and alleged the gym violated the TCPA by using an ATDS to send him the alleged text messages. The gym filed a summary judgement motion arguing the system it used did not have the capacity to store or produce telephone numbers to be called using a random or sequential number generator and did not fall under the definition of an ATDS. The trial court granted the motion and the consumer appealed the decision.

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Marks – Cont'd

- In considering the consumer's case, the 9th Circuit evaluated the D.C. Circuit's recent decision in *ACA Int'l v. FCC* and determined that since the D.C. Circuit vacated the FCC's interpretation of an ATDS, the 9th Circuit could only rely on the statutory definition of an ATDS found in the TCPA. The 9th Circuit determined that the TCPA's definition of an ATDS was ambiguous and decided to consider the context and structure of the TCPA. The 9th Circuit found that after the FCC issued its 2015 declaratory order, Congress amended the TCPA without making changes to the definition of an ATDS. The 9th Circuit, therefore, inferred that Congress was aware of the existing definition of an ATDS and gave the definition its "tacit approval" when it decided not to overrule the FCC's interpretation.
- The 9th Circuit reversed the trial court's order granting the gym's motion for summary judgement and held that ATDS "means equipment which has the capacity – (1) to store numbers to be called; or (2) to produce numbers to be called, using a random or sequential number generator – and to dial such numbers automatically (even if the system must be turned on or triggered by a person)."

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Facebook v. Duguid

- SCOTUS resolves the circuit split in favor of the DC Circuit's 2021 interpretation

- Plaintiff sued Facebook after receiving automated security alert texts over a ten month period despite Plaintiff never creating a Facebook account and requesting the messages stop.
  - The district court dismissed Complaint for failure to allege Facebook's message system had the capacity to dial random or sequential numbers under the narrow definition of an autodialer.
    - Facebook also alleged the government-backed debt exemption for autodialer use to be a content-based free speech restriction.
  - The Ninth Circuit reversed the district court's holding under its prior decision in *Marks*, clarifying that to be an autodialer, a device, "need not be able to use a random or sequential generator to store numbers," only that it "have the capacity to store numbers to be called and to dial such numbers automatically."

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Facebook v. Duguid – Con't

- SCOTUS granted cert., resolving the circuit split and narrowing the definition of an autodialer
  - Finding for Facebook, the Court held found the notification system does not constitute an autodialer as it neither stores nor produces numbers "using a random or sequential number generator[.]"
    - The Court clarified the holding in *Marks* opinion by relying on rules of grammar and statutory history to conclude the phrase "using a random or sequential number generator" modifies both verbs to "store" and to "produce" telephone numbers.
  - The Court narrowed the definition of an autdialer, contrary to Duguid's position that would capture virtually all modern cell phones, which have the capacity to 'store … telephone numbers to be called.

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Facebook v. Duguid – Current Impact

- Since *Duguid*
  - ATDS claims under U.S.C. § 227(b)(1)(A)(iii) have been dismissed more easily than claims based on the National Do-Not-Call Registry (DNC claims) under 47 C.F.R. §§ 64.1200(c) and (d)
  - Most likely the primary reason for the decrease in TCPA cases seen in the data at front of presentation
    - *Hunsinger v. Alpha Cash Buyers*, *LLC*, No. 3:21-CV-1598-D, 2022 U.S. Dist. LEXIS 32319, 2022 WL 562761 (N.D. Tex. Feb. 24, 2022) (finding that Do-Not-Call claim survived 12(b)(6) motion while ATDS claim was dismissed)
    - *Thorington v. Pro Custom Solar, LLC*, No. 3:21-cv-00187, 2021 U.S. Dist. LEXIS 254788, 2021 WL 7286283 (D. Conn. Nov. 23, 2021) (finding that DNC claim survived 12(b)(6) motion while ATDS claim was dismissed)

Facebook v. Duguid – Interpreted

- *Beal v. Outfield Brew House, LLC*, 29 F.4th 391 (8th Cir. 2022)
  - Court responds to arguments that the *Duguid* court's interpretation of the word "store" is superfluous because of the difficulty in a phone storing a number without it being produced first.
    - Finds that systems that "randomly select from non-random phone numbers" are not ATDS under the TCPA.
    - Interprets the term "produce" to require the use of an "random number generator" for a system to fall under the ADTS definition.
    - This interpretation is the same reached by the Ninth Circuit's findings in *Meier v. Allied Interstate LLC*, 2022 U.S. App. LEXIS 1413, 2022 WL 171933 (9th Cir. 2022)
  - Other District Court *Duguid* interpretation cases
    - *Soliman v. Subway Franchisee Adver. Fund Trust, Ltd.*, No. 3:19-cv-592 2022 U.S. Dist. LEXIS 126468, 2022 WL 2802347 (D. Conn. July 18, 2022) ("The TCPA is clear: a device is not an automatic telephone dialing system merely because it generates random or sequential index numbers that are used in turn to select which numbers to call from a stored list.").
    - *Mina v. Red Robin Int'l, Inc.*, 2022 U.S. Dist. LEXIS 104423, 2022 WL 2105897 (D. Colo. 2022) (finding the TCPA renders it unlawful for any person to make any non-emergency call without the express prior consent or the called party "using an automatic telephonic dialing system or an artificial or prerecorded voice.")
    - *In re Portfolio Recovery Assocs., LLC, Tel. Consumer Prot. Act Litig.*, 2021 U.S. Dist. LEXIS 216747, 2021 WL 5203299 (S.D. Cal. 2021) (rejecting the argument that a device may be deemed an autodialer under the TCPA even if it uses a preprepared list of numbers, so long as the device randomly or sequentially chooses which numbers on that list to contact)

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Vicarious Liability

- A "defendant may be held vicariously liable for TCPA violations where the plaintiff establishes an agency relationship, as defined by federal common law, between the defendant and a third-party caller."
  - *Worsham v. Disc. Power, Inc.*, No. RDB-20-0008, 2022 U.S. Dist. LEXIS 139580, 2022 WL 3100762 (D. Md. Aug. 4, 2022) (dismissing TCPA based on vicarious liability because plaintiff could not establish the required agency relationship)
- Recent Cases
  - *Bradley v. DentalPlans.com*, __ F.Supp.3d __, 2022 U.S. Dist. LEXIS 134664 (D. Md. July 27, 2022) (finding that the plaintiff plausibly plead sufficient apparent agency to establish possible vicarious TCPA liability)
  - *Escano v. Concord Auto Protect, Inc.*, No. 21-223 MV/CG, 2022 U.S. Dist. LEXIS 76392 (D.N.M. Apr. 27, 2022) (finding that the plaintiff failed to sufficiently plead control over a telemarketing firm employee, though the plaintiff introduced evidence of the defendant having control over scripts and other materials)
  - *Rahimian v. Adriano,* 2022 U.S. Dist. LEXIS 46437, 2022 WL 798371 (D. Nev. Mar. 16, 2022) (dismissing TCPA vicarious liability claims because the plaintiff did not plead a plausible theory of authority)
  - *Schick v. Caliber Home Loans*, No. 20-cv-00617, 2021 U.S. Dist. LEXIS 176765, 2021 WL 4166906 (N.D. Cal. Sept. 14, 2021) (finding because defendant did not "blindly accept leads" and inquired about the contractor's TCPA compliance that the defendant was not vicariously liable)

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Vicarious Liability

- Best Practices
  - Always require a contract with a third party that provides any assistance with telemarketing
    - Indemnification is a must
    - Clearly state expectations
      - Including compliance with TCPA, and how the third party intends to achieve it
  - Do your due diligence on third party providers
    - Are they a reputable provider?
    - Where are their operations?
    - Will they be making calls on your behalf? If so, who will be doing it and what will they be saying?
    - How do they obtain their leads?

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Revocation of Consent

Medley v. Dish Network, LLC (11th Cir. 2017)

- Company allegedly violated the TCPA by contacting Plaintiff regarding past due balances under her contract for television services, despite Plaintiff's bankruptcy counsel requesting the company no longer contact Plaintiff. Despite receiving this notice, the company contacted Plaintiff six more times regarding overdue payments.
- Neither party disputed the validity of the original contract between the parties authorizing the company to use an automated or predictive dialing system to contact Plaintiff. However, Plaintiff alleged the letter from her bankruptcy counsel constituted her revocation of consent to receive these automated calls. The company relied on the validity of the original agreement and black-letter contract law to argue consent given as part of a bargained-for agreement could not be unilaterally revoked.
- The Court addressed whether unilateral revocation of consent given as part of a bargained-for contract was permissible under the TCPA. Although Plaintiff argued finding unilateral revocation impermissible under the TCPA would be contrary to the consumer-protection purposes of the TCPA, the Eleventh Circuit held that common law contract principals underlying the original agreement ***do not*** permit unilateral revocation, especially in light of the implications unilateral revocation could have for businesses that rely on this consent to conduct business.

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Revocation of Consent

Schweitzer v. Comenity Bank (11th Cir. 2017)

- Consumer sued the Bank for violating the TCPA and alleged that, based on statements made to the bank during a prior communication, she had revoked her consent to have the Bank call her cell phone in the morning and during work hours. The trial court granted summary judgment in favor of the Bank, finding that the Bank "did not know and should not have had reason to know that [the Consumer] wanted no further calls." The trial court also noted that the Consumer did not "define or specify the parameters of the times she did not want to be called," and as a result "no reasonable jury could find that [she] revoked consent to be called."
- The Eleventh Circuit first noted that "[a]lthough the TCPA is silent on the issue of revocation, our decision in [*Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014)] holds that a consumer may orally revoke her consent to receive automated calls." The Court then stated that "[b]ecause the TCPA is silent as to the partial revocation of consent, our analysis is informed by common-law principles." At common law, "consent is a willingness for certain conduct to occur," and "[s]uch willingness can be limited, i.e., restricted." Moreover, the Eleventh Circuit noted that the notion of limited consent finds support in other areas of federal law, such as the Fourth Amendment, which allows a person to provide limited consent to a search. For these reasons, the Court ultimately held that the "TCPA allows a consumer to provide limited, i.e., restricted, consent for the receipt of automated calls . . . [and] unlimited consent, once given, can also be partially revoked as to future automated calls under the TCPA."
- The Eleventh Circuit also rejected the Bank's second argument and held that summary judgment was inappropriate because a reasonable jury could find that the Consumer limited her prior consent to be called in the morning and during work hours in earlier communications with the Bank.

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Standing Issues

- *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540 (2016)
  - The Supreme Court held that a plaintiff need not suffer a "tangible" injury to have standing to bring suit in federal court, but that the plaintiff's injury must be *both* "concrete" and "particularized," and that a court must separately evaluate each of those requirements, even where Congress has provided a private right of action.
- *Transunion v. Ramirez*, SCOTUS, 141 S. Ct. 2190 (2021)
  - The Supreme Court held that some class members lacked standing to bring claims under the Fair Credit Reporting Act (FCRA) for a lack of concrete injury when TransUnion erroneously included an alert for creditors that class members were linked to a Treasury Department terrorist database, but had not yet disseminated those files.

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Standing Issues

- *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037 (9th Cir. 2017)
  - Receipt of two unwanted text messages sufficient to establish standing.
- *St. Louis Heart Center, Inc. v. Nomax, Inc.*, (8th Cir. 2018)
  - Applied *Spokeo* to TCPA unsolicited fax case.
  - The Eighth Circuit recently held that a plaintiff health center lacked Article III standing in a putative class action lawsuit alleging violations of the TCPA where advertisements were faxed to the health center without proper opt-out notices. The circuit court concluded that, even though the advertisements did not meet the technical requirements for displaying proper opt-out notices, the health center did not establish a causal connection between the injury and the alleged TCPA violation.
- *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019)
  - held that a plaintiff has not suffered a concrete injury for Article III purposes if they have received a single unwanted text message.

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Standing Issues

- *Drazen v. Pinto,* 41 F.4th 1354 (11th Cir. 2022)
  - Court evaluates *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019) which held that a plaintiff has not received a concrete injury for Article III purposes if they have received one unwanted text message against *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037 (9th Cir. 2017) which held that such conduct is sufficient to establish an Article III injury.

  - Court punts on finding whether one unwanted call to a *cell phone* is sufficient to prove TCPA standing, but finds that TCPA class action plaintiffs can only receive damages if they have suffered an Article III injury per *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021).

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Questions?

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