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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

2 Litigation Trends Offer Guidance On TCPA Compliance

By **Fredrick Levin and Andrew Grant**

Law360, New York (September 7, 2017, 12:22 PM EDT) --
$76 million, $14.8 million, $12 million and $3.7 million. These numbers represent some of the Telephone Consumer Protection Act settlement agreements negotiated in 2017. As shown by these numbers, TCPA litigation continues to be a leading litigation risk for corporate America. Recently, several courts have begun to take a hard look at TCPA compliance issues and their decisions offer useful guidance, which may help companies avoid traps for the unwary that may lead to large TCPA penalties.

Fredrick Levin

Andrew Grant

Two developments in particular stand out. First, courts across multiple federal judicial districts have provided new guidance concerning when telephone equipment qualifies — or does not qualify — as an automatic telephone dialing system (ATDS). These courts have not been as expansive as plaintiffs would like when determining what qualified as an ATDS. These courts have also provided clearer guidance on the level of manual intervention needed in order for a system to not be classified as an ATDS. This article focuses on a few cases that have taken the position that if a person manually initiates the call and the telephone or other dialing system has no other current configuration to allow the person to autodial, then a strong argument exists that the equipment is not an autodialer. Second, courts have placed some limitations on a consumer's ability to revoke consent to receive marketing and information phone calls via autodialers, including what methods of revocation may be unreasonable.

Recent Judicial Analysis of What Constitutes an ATDS

The TCPA defines an ATDS and autodialer to mean equipment that has the "capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers." In 2015, the Federal Communications Commissionissued its now-famous declaratory order (2015 order), which among other things, made two important decisions with respect to the ATDS definition. First, it defined "capacity" in terms of a system's "potential functionality" as opposed to its actual or current configuration. Under this test, a dialing system would be deemed an ATDS for purposes of TCPA liability if it had the potential to act as an automatic dialer, even if it was not currently configured to do so. Second — and even though the FCC maintains that at its core, an autodialer dials numbers "without human intervention" — it declined to provide guidance on when human intervention

would preclude a telephone from being classified as an autodialer. Indeed, the only example that the FCC was willing to offer of a telephone that did not qualify as an ATDS under its "potential functionalities" test was that of a rotary dialer (like those in use in the early 1970s, when AT&T first used its famous "walking fingers" slogan to market printed telephone directories). Taken together, the FCC's 2015 order implies that calls made with human intervention could still be deemed autodialed calls if the equipment used has the latent capacity to be an autodialer. If courts accept this expansive interpretation of "capacity," many telephone systems are at risk of being classified as an ATDS.

In contrast, several recent cases have taken a more measured approach to applying the FCC's guidance. In Ung v. Universal Acceptance Corporation, No. 15-127, (D. Minn. April 6, 2017), the court analyzed equipment that required each employee to manually dial the telephone number. The defendant's system at issue could only call individuals if (1) the employee manually entered a telephone number on a handset telephone; or (2) using a computer web application, the employee copied and pasted (or manually typed) the number into the application, which then dialed the number.

The court dealt quickly with whether the system sufficiently required manual intervention to place the calls. It stated that because a live human was required to place calls, the system was not an ATDS.

In response to the plaintiff's "potential functionalities" argument, the court stated that the plaintiff's logic meant that almost any telephone could be an autodialer. While the court cited the FCC's rotary phone example, it appeared to go further in excluding systems that may have latent capacity to act as an autodialer. The court stated that this system — unlike another used by the defendant, which the court noted could be configured to autodial — simply could not be configured to autodial. As evidence of that conclusion, the court highlighted that the equipment was "separate and independent" from the system capable of being an autodialer. The court concluded by finding that it does not believe that there was any "genuine issue that the telephone system used to call [the plaintiff] qualifies as an ATDS."

Therefore, it appears that in rendering its ruling the court considered relevant only the current configuration of the dialer and determined that as currently configured, the equipment could not be used as an autodialer. This interpretation is narrower than other potential interpretations of the 2015 order, such as the very broad "potential functionalities" argument put forward by the plaintiffs pursuant to which almost any phone equipment can be characterized as an ATDS, so long as it could, theoretically, be modified in some way to act as an autodialer.

In Smith v. Stellar Recovery Inc., No. 15-cv-11717, (E.D. Mich. Feb. 7, 2017) the court analyzed a slightly different system, one in which the person dialing the number was not the person who spoke to the recipient. The dialing system required a "clicker agent" to confirm the availability of an agent to answer calls; once confirmed, the clicker agent dialed the call. If the call was answered, the "closer agent" spoke to the recipient. In no instance could a call be placed in the system without a clicker agent initiating the call.

In addressing the plaintiff's "capacity" argument, the court noted that the system at issue included both hardware and software, that it did not share those with any other dialing systems (including systems that were autodialers), and that the plaintiff did not put any facts forward stating the system at issue could run the defendant's other dialing systems, which include autodialers. Further, the court agreed with an earlier judicial opinion that "potential functionality" does not include a hypothetical ability to modify and rewrite the software's code to act as an autodialer. Therefore, the Smith court looked at the equipment's current configuration and determined that it did not have the "capacity" to act as an autodialer because it operated independently of any system that could be used as an autodialer.

Next, the court addressed the plaintiff's argument that "clicker agents" do not meaningfully intervene. The court stated it was convinced that a system that employed a "point and click" function was not an autodialer, at least where the dialer was configured in a manner similar to that described in the court's opinion.

Lastly, in Blow v. Bjora Inc., 855 F.3d 793 (7th Cir. May 4, 2017) the Seventh Circuit clarified the stage at which human intervention was required. It ruled that summary judgment was premature because human involvement was not necessary "at the precise point of action barred by the TCPA," which in the case before that court was the moment of "pushing" texts to an aggregator, which, in turn, sent the messages out simultaneously to hundreds of thousands of cell phone numbers.

Taken together, these cases support two propositions, both of which provide companies useful guidance when evaluating the operation of their own telephone systems. First, these decisions support an argument that courts are analyzing dialing systems on two criteria: (1) the dialing system's current configuration, and (2) whether that configuration is susceptible to being changed such that it would act as an autodialer. For example, if the system does not interface with an autodialer, and instead can only manually dial calls, then the caller could have a strong argument that the equipment does not have the "capacity" to be an ATDS. Second, if manual intervention is required at the precise moment the call is made, such as with a "click-to-dial" system where the caller both selects the number to be called and manually initiates the call, then the call will likely be deemed to have been manually dialed (provided that the equipment does not have the "capacity" to act as an autodialer).

Recent Judicial Analysis of a Consumer's Right to Revoke Consent

In that same 2015 order, the FCC concluded that consumers have a right to revoke consent using any reasonable method. This conclusion raised questions about (1) when consent is considered to have been revoked, and (2) what methods are considered "reasonable" to revoke consent. Recent case law has indicated that there may be some limitations on a consumer's ability to either revoke consent or the methods used to do so.

In Epps v. Earth Fare Inc., No. 16-08221, (C.D. Cal. Feb. 27, 2017), the court, in weighing whether the methods used to revoke consent were reasonable, held that the plaintiff's method for revoking consent, which consisted of texting a verbose response instead of "STOP," was not reasonable. Acknowledging that the plaintiff had the right to revoke consent in a reasonable manner, the court concluded that the totality of the alleged facts weighed against finding that the plaintiff's approach was reasonable. The court noted that the plaintiff ignored the defendant's "clear instruction" for how to stop the messages, and that such instructions were not deliberately designed to make revocation impossible. In fact, the court stated that texting "STOP" could not have been more burdensome than sending the more verbose messages. There are other cases currently moving through the courts with similar fact patterns, so this is an area to watch in the coming months.

Next, the Second Circuit recently ruled in Reyes v. Lincoln Automotive, 861 F.3d 51 (2nd Cir. June 22, 2017) that the TCPA does not allow a person to revoke his or her "consent to be called when that consent forms part of a bargained-for exchange." The court stated that earlier case law and the 2015 order considered a different and narrower question, namely whether the TCPA allowed a person who had unilaterally given his or her consent to be contacted could later revoke such consent. After reviewing common law and the plaintiff's arguments, the Second Circuit found no indication within the TCPA that Congress intended to deviate from the common law principle that "consent becomes

irrevocable when it is integrated into a binding contract."

Caution, however, is warranted when interpreting — and possibly implementing — this case. For example, the Fair Debt Collection Practices Act (as well as some state analogues) expressly allows consumers to request that the debt collector cease contacting them.

The rulings for consent, however, have not been uniform. The Eleventh Circuit, in Schweitzer v. Comenity Bank, No. 16-10498, (11th Cir. Aug. 10, 2017) recently held that the TCPA allows a consumer to partially revoke his or her consent. The court stated that because the TCPA allows a consumer to completely withdraw consent, it is logical that it permits consumers the power to partially withdraw their consent. The court remanded the case as it was a fact issue as to whether the plaintiff's statements that she did not want to be called in the mornings or during the workday constituted a partial revocation. The ultimate resolution of that issue could prove significant. If somewhat vague requests for partial revocation are allowed, companies could face significant operational problems when attempting to implement a customer's instructions.

Taken together, courts appear willing to restrict a consumer's ability to revoke consent or the means used to do so. However, in each circumstance described above, courts have not issued sufficient rulings to create meaningful precedent, thus this area requires appropriate caution before taking an aggressive approach.

Conclusion

Even with these developments, analysis of TCPA applicability can be heavily fact-dependent, and each case will turn on its own facts. For example, whether equipment qualifies as an ATDS or whether a consumer has sufficiently revoked consent will be a fact-specific determination in most cases. Therefore, to thoroughly examine whether, for example, dialing equipment is an ATDS will still require greater initial scrutiny than might have been expected based on its relatively simple definition.

Finally, we note that the FCC's 2015 order, which is the source for much of this confusion and frustration, is currently being challenged in the D.C. Circuit Court and a decision is expected at any time.

Fredrick S. Levin is a partner at Buckley Sandler LLP in Los Angeles and Chicago. He represents individual and corporate clients in high-stakes class actions and complex civil litigation, including numerous matters involving the TCPA. Andrew W. Grant is an associate at Buckley Sandler in Washington, D.C. He advises financial institutions and technology companies on a variety of compliance and regulatory matters, with a particular focus on consumer protection laws, including the TCPA.