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LITIGATION
>>ALERT

NO HARM, NO FOUL? INDIVIDUALIZED CONSENT ISSUES SINK TCPA CLASS ACTION

Is a class action lawsuit appropriate when some class members have consented to the defendant's conduct, but have not given that consent in the manner the law requires? According to at least one federal judge, the answer to that question is "no."

The Telephone Consumer Protection Act (TCPA) has become notorious among businesses that rely on ongoing telephonic contact with their large customer bases. Originally enacted in 1991 with the purpose of deterring telemarketing, the Federal Communications Commission (FCC) and the courts have expanded the reach of the law over time to prohibit automated dialing or messaging for almost any purpose, particularly to mobile phones. With the significant restrictions it imposes, and the statutory penalties it prescribes for each violation, ranging from $500 to $1,500 per violation, class actions under the TCPA have steadily increased in stakes over the past several years. A TCPA suit is the nightmare of many a CEO, given the "bet-the-company" liability that could potentially be involved in such a litigation.

As the TCPA has continued to gain popularity over the past several years – even as more and more people use their mobile phones exclusively – many have wondered whether the FCC, the courts or even Congress would take action to limit or better define the scope of the TCPA. Companies have had some success in defeating class certification on the basis that the question of consumer consent to be called or texted can only be determined on an individualized basis. A recent decision from a federal court in Illinois takes this defense a step further.

THE BOTTOM LINE

The Northern District of Illinois' practical approach to analyzing whether lack of consent gives rise to actionable harm under the TCPA, and whether this issue can truly be determined on a class-wide basis, may represent a significant victory for businesses that rely heavily on telephone and text interactions with their customers. Companies should nonetheless be sure they are following best practices in both their dialing procedures and their agreements with call centers and other dialing vendors.

BACKGROUND

Under the Federal Rules of Civil Procedure, parties seeking class-wide damages must demonstrate two key elements, among others:

- >> the existence of questions of law or fact common to all class members; and
- >> the predominance of those common questions over individualized issues, such that a class action is a superior method to fairly and efficiently adjudicate the matter at issue.

Under the TCPA, a consumer's consent to be called can constitute a complete defense to liability, and TCPA defendants have long argued that determining whether each individual consumer consented to be called or not makes class-wide resolution of TCPA claims infeasible. Defendants making this argument have met mixed results, with some courts accepting this defense to class certification, while others finding that circumstances made this issue capable of class-wide proof.

In the case of calls or texts transmitted for telemarketing or advertising purposes, the most recent TCPA regulations promulgated by the FCC

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require the consumer's prior express *written* consent before an automatically dialed call or text may be sent to that consumer. TCPA plaintiffs have argued that where the calls they complained of are telemarketing or advertising-related calls, the advertiser's failure to adhere to the TCPA's requirement of formal written consent fundamentally enables class-wide proof. This was the issue presented to the U.S. District Court for the Northern District of Illinois.

FORM OVER SUBSTANCE: LACK OF CONSENT IN WRITING MAY NOT AMOUNT TO CONCRETE HARM

In *Legg v. PTZ Insurance Agency (Legg)*, the plaintiffs alleged that they received advertising robocalls from a company that offered pet health insurance, reminding them to collect on 30 free days of health insurance that they had received for adopting a pet from an animal shelter. The evidence in the case demonstrated that although the putative class members had voluntarily given their phone numbers to the shelters during the adoption process after being advised that their information would be shared with third parties, and some had even verbally consented to receive calls, none of them had provided written consent in the form the TCPA and FCC regulations required. The plaintiffs argued that given the undisputed lack of prior express written consent, the consent issue could be determined on a class-wide basis.

The defendant – and the court – disagreed. Citing *Spokeo v. Robins*, a landmark 2016 decision by the U.S. Supreme Court holding that a plaintiff must demonstrate a concrete, particularized injury in order to bring a lawsuit in federal court, the Illinois federal judge held that any proposed class member who had *orally* consented to receive calls had suffered no injury under the TCPA, which was designed to prevent only unsolicited calls. The defendant's failure to adhere to the TCPA's technical requirements as to the *form* of consent was not enough to create actionable harm. Therefore, individual mini trials would have been required to determine which individuals had standing to be class members and which ones did not. Holding that this issue would predominate over others in the case, the court denied class certification.

CONCLUSION

The decision in *Legg* may represent a growing willingness by courts to take a more pragmatic approach to class action claims brought under the TCPA, looking beyond the technical requirements under the TCPA and focusing more on the goal it was designed to accomplish, examining whether the manner in which the TCPA is being invoked is truly serving its purpose.

FOR MORE INFORMATION

Marc J. Rachman
Partner
212.468.4890
mrachman@dglaw.com

David S. Greenberg
Senior Attorney
212.468.4895
dgreenberg@dglaw.com

or the D&G attorney with whom you have regular contact.

Davis & Gilbert LLP
212.468.4800
1740 Broadway, New York, NY 10019
www.dglaw.com