

Lessons from the TCPA Trenches



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- 47 U.S.C. § 227 & 47 C.F.R. § 64.1200
 - Prohibition on autodialed and/or prerecorded calls and texts to cell phones
 - Statutory consent-based exception
 - FCC-enacted levels of consent and other “exceptions”
 - Prohibition on prerecorded calls to residential lines
 - Statutory consent-based exception
 - FCC-created exceptions
 - Do-Not-Call and related restrictions
 - Restrictions on unsolicited fax advertisements



- The FCC (& FTC) enforce violations – fines/civil penalties up to \$16K per violation
- FCC rule violations enforceable by private suits
 - Statutory damages of \$500 – but up to \$1,500 for willful or knowing
- Fines/damages are *per call or text*



- **Legacy TCPA settlements:**

- Twentieth Century Fox (texts) (N.D. Ill.): \$16M
- Wells Fargo (S.D. Cal.): \$17M (+ \$4.275M attorneys' fees & \$3M forensics fees)
- Sallie Mae (W.D. Wash.): \$24M (recorded debt collection calls)
- Intuit (N.D. Cal.): \$10M (recorded calls)

- **Partial list of recent TCPA settlements:**

- Capital One (N.D. Ill.): **\$75M**
- Chase (N.D. Ill.) \$34M
- Bank of America (N.D. Ill.): \$32M
- Discover (C.D. Cal.): \$8.7M
- AmeriCredit Financial Services (now GM Financial Co) (S.D. Cal.): \$8.5M
- Bill Me Later (N.D. Ill.): \$9.9M
- Mortgage Investors (D. Ore.) \$7.4
- Walgreen's Pharmacy (N. D. Ill.) \$11M
- Jiffy Lube (S.D. Cal.): \$35M-\$47M
- Western Union (N.D. Ill.) \$8.5M
- Verizon (N.D. Cal.) \$4M
- Life Time Fitness (D. Minn.): \$15M
- Best Buy (W.D. Wash.): \$4.5M
- Papa John's (W.D. Wash.): \$16.5M (cash/merch vouchers)
- Domino's Pizza (M.D. La.): \$9.75M (cash/merch vouchers)
- Steve Madden (C.D. Cal.): \$10M
- Lucky Brand Jeans (N.D. Cal.): \$9.9M
- LA Clippers (C.D. Cal.): \$5M (tix/merch)
- Buffalo Bills (M.D. Fla.): \$2.5M (debit cards)

- **Also, two recent FCC settlements:**

- Dialing Services LLC: \$2.9M
- Sprint: \$7.5M (both do-not-call and do-not-text)



Type of Call	Non-sales autodialed or prerecorded call to landline	Sales/commercial prerecorded call to <u>residential</u> landline	Non-sales autodialed call or text or prerecorded call to cell	Sales/commercial autodialed call or text and/or prerecorded call to cell	Number on National Do-Not-Call Registry
<i>Requirements</i>	Allowed	Prior express <u>written</u> consent	Prior express consent	Prior express <u>written</u> consent	Prior express <u>written</u> consent

“Calls” includes text-messages, prerecorded/artificial voice calls, and auto/predictively-dialed live agent calls.



- Autodialers
- Clarified consent Issues
 - “Intended party”
 - Reassigned numbers – one “free” call
 - One-time on-demand text
 - Special exceptions for financial alerts and healthcare
 - Reinforced “legacy” consent exceptions
 - Wireless carrier calls/texts FTEU to subscribers
 - Debt-collection
 - Opt-out texts
 - Consent revocation



- TCPA represents a policy decision by Congress that:
 - Congress does not want corporations sloughing off their advertising costs on the recipients of advertisements.
 - And that marketing communications must be curbed (though not prohibited) given how invasive they can be.



- If you are going to do it, do it right.
- And make sure the Marketing Department gets the memo.



- Don't panic – gather facts, assess potential exposure
- Defenses
 - Do facts undermine the claim(s)?
 - Records that support the defense, when to share, and what it means procedurally
 - Procedural avenues
 - Grounds for stay?
 - Arbitrability
- Strategic settlement



- Consider whether a TCPA class action constitutes an opportunity to release expansive class-wide liability, and solve a business problem.
- Individual defenses – strategies in an individual lawsuit designed to attack class representative – may or may not be successful, but are unlikely to represent a long-term solution if the class is big enough and the defenses truly are unique to a class rep.



CASE	CLASS SIZE	AMOUNT OF FUND	RATE/MEMBER
Western Union	741,800	\$8,500,000	\$11.46
HSBC	9,065,262	\$40,000,000	\$4.41
Capital One	17,522,049	\$75,500,000	\$4.31
Bank of America	7,723,000	\$32,000,000	\$4.14
Bank of the West	871,836	\$3,400,000	\$3.90
Sallie Mae	8,000,000	\$24,200,000	\$3.03
Hollister	3,738,465	\$10,000,000	\$2.67
Comenity Bank	4,000,000	\$8,500,000	\$2.13
Chase	32,297,356	\$34,000,000	\$1.05

- ^[1] *Douglas v. W. Union Co.*, No. 14-CV-1741, 2015 WL 9302316 (N.D. Ill. Nov. 10, 2015).
- ^[2] *Wilkins v. HSBC Bank Nevada, N.A.*, No. 14 C 190, 2015 WL 890566 (N.D. Ill. Feb. 27, 2015).
- ^[3] *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 790 (N.D. Ill. 2015)
- ^[4] *Rose v. Bank of Am. Corp.*, No. 5:11-CV-02390-EJD, 2014 WL 4273358 (N.D. Cal. Aug. 29, 2014)
- ^[5] *Bayat v. Bank of the West*, No. C-13-2376 EMC, 2015 WL 1744342 (N.D. Cal. Apr. 15, 2015).
- ^[6] *Arthur v. Sallie Mae, Inc.*, No. 10-CV-00198-JLR, 2012 WL 4075238 (W.D. Wash. Sept. 17, 2012).
- ^[7] *Chimeno-Buzzi v. Hollister Co.*, No. 14-23120-CIV, 2015 WL 9269266 (S.D. Fla. Dec. 18, 2015).
- ^[8] *Couser v. Comenity Bank*, No. 12CV2484-MMA-BGS, 2015 WL 5117082 (S.D. Cal. May 27, 2015).
- ^[9] *Gehrich v. Chase Bank, N.A.*, No. 1:12-cv-5510, Dkt. No. 117 (N.D. Ill. Aug. 12, 2014).



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