

Litigation Update - The Telephone Consumer Protection Act - How Telemarketing Can Threaten Your Business

March 11, 2013

Answer the following question: Telemarketing is –

- a) The bane of modern existence
- b) An effective, inexpensive way to reach potential customers
- c) A potential source of significant legal liability
- d) All of the above

Congress and many states have, in the name of protecting personal privacy, implemented a number of laws that regulate how companies can use telemarketing to promote their goods and services. The most significant of these laws is the Telephone Consumer Protection Act, 47 U.S.C. § 227, (TCPA). If your company uses telemarketing, the TCPA affects you.

What does the TCPA prohibit?

The TCPA is a complex statute that is implemented by an even more complex set of regulations promulgated by the Federal Communications Commission. In general terms, the TCPA prohibits:

- Making non-emergency calls* using an automatic telephone dialing system and/or an artificial or pre-recorded voice (i.e., robocalls), without the prior express consent of the called party, to a mobile phone, residential phone line, emergency phone line, or telephone line of any guest room or patient room in a hospital, health care facility, or elderly home;
- Sending unsolicited advertisements to a fax machine unless the advertisement is from a sender with an established business relationship with the recipient.
- Pre-recorded health care-related calls and certain “informational calls,” such as calls by or on behalf of tax-exempt non-profit organizations, calls for political purposes, and calls made for non-commercial purposes that are made to a residential line are exempt from the TCPA.

The FCC has also adopted regulations that restrict the manner in which otherwise permissible robocalling may be conducted. These regulations require that persons receiving robocalls be provided with an interactive opt-out mechanism and also limit the frequency of “abandoned calls” (i.e., those irritating calls where you answer the phone only to be greeted by silence).

What is the risk?

The TCPA provides for recovery of damages in a suit by a person who has received a prohibited telemarketing solicitation in the amount of \$500 per violation or \$1,500 per violation in the case of a willful violation. Because telemarketing is typically conducted on a high volume basis, the TCPA has become increasingly popular fodder for “professional” class action plaintiffs and their attorneys, with claims often resulting in multi-million dollar settlements. For example, a federal court in California recently approved the settlement of a class action alleging that Wells Fargo had violated the TCPA. In approving the settlement amount of \$17.1 million (which included more than \$4 million in attorneys’ fees), the court noted that the defendants’ maximum exposure, at \$500 per call, was approximately \$2.9 billion. Given the financial incentives, it is perhaps not surprising that lawsuits alleging violation of the TCPA are reported to be on the rise.

The FCC has interpreted liability to extend not just to the entity that makes the call, but also the entity on whose behalf the call is made. The courts have extended liability to individual corporate executives who participated in business practices that were found to have violated the TCPA.

What can be done to reduce risk?

There are a number of steps that a business can take to reduce the risk of liability under the TCPA. Such measures include:

- Businesses that do their own telemarketing in-house should carefully review their telemarketing program with an attorney who is knowledgeable regarding the TCPA as well as other federal and state laws that apply to telemarketing. The statute and regulations are complex and technical in nature and legal counsel can help telemarketers assure that they are acting in a manner that complies with the law.
- Businesses that contract with telemarketers should: 1) do their due diligence to assure that they are dealing with a reputable company; 2) obtain representations and warranties regarding the telemarketer's legal compliance, specifically including compliance with the TCPA; and 3) include provisions in their contracts that require the telemarketer to defend and indemnify against any claims arising from alleged violations of the TCPA.
- All businesses that use telemarketing should review their insurance policies to determine whether any changes to coverage are needed. There have been a number of cases that address whether a TCPA claim is covered by insurance. The results in those cases have turned on a close reading and interpretation of the specific insurance policy language in order to determine the scope of coverage.

* "Call," for purposes of the TCPA, has been interpreted to include text messages.

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