Rumplestiltskin, LLP
The Dark Side of Dialers

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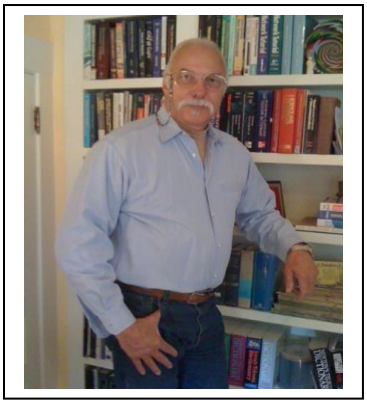

In an effort to address a growing number of telephone marketing calls and certain other telemarketing practices thought to be invasions of privacy, Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA), codified at 47 U.S.C. § 227. Most of us know, at least in general terms, about the restrictions on unsolicited telemarketing calls to consumers and the national Do-Not-Call (DNC) list designed to end those annoyances…or opportunities, depending on your perspective. Just to refresh your memory, the TCPA states "It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any *automatic telephone dialing system* [ATDS] or an artificial or prerecorded voice…(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call…." (47 USC 227(b)(1)(iii))

The second provision then incorporates that definition in setting out the scope of the prohibition: "It shall be unlawful for any person . . . to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system… to any telephone number assigned to a…cellular telephone service[.]" Id. § 227(b)(1)(A)(iii).

Words Matter

The TCPA defined the term *automatic telephone dialing system* (ATDS) to mean "equipment which has the *capacity*—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers" at § 227(a)(1).

By the way, a *call* has been interpreted as either a voice call or a text message. More recently, a *ringless* voice message or voicemail also has been interpreted as a call even though it involves a server-to-server data transfer rather than a *call* in the traditional sense of the word.

The FCC Weighs In

The FCC repeated and elaborated on the statutory language, stating "The Commission has emphasized that this definition covers any equipment that has the specified *capacity* to generate numbers and dial them without human intervention …."[1]

More recently, in the TCPA Omnibus Order[2] the FCC interpreted the term *capacity* to include *potential ability*, but noted that "We do, however, acknowledge that there are outer limits to the capacity of equipment to be an autodialer. … [T]he outer contours of the definition of 'autodialer' do not extend to every piece of malleable and modifiable dialing equipment that conceivably could be considered to have some capacity, however small, to store and dial telephone numbers— otherwise, a handset with the mere addition of a speed dial button would be an autodialer. Further, although the Commission has found that a piece of equipment can possess the requisite *capacity* to satisfy the statutory definition of *autodialer* even if, for example, it requires the addition of software to actually perform the functions described in the definition, there must be more than a theoretical potential that the equipment could be modified to satisfy the *autodialer* definition. Thus, for example, it might be theoretically possible to modify a rotary-dial phone to such an extreme that it would satisfy the definition of *autodialer*, but such a possibility is too attenuated for us to find that a rotary-dial phone has the requisite *capacity* and therefore is an *autodialer*." [*emphasis* added]

The FCC went on to state "The Commission has also long held that the basic functions of an *autodialer* are to 'dial numbers without *human intervention*' and to 'dial thousands of numbers in a short period of time.' How the *human intervention* element applies to a particular piece of equipment is specific to each individual piece of equipment, based on how the equipment functions and depends on human intervention, and is therefore a case-by-case determination." [*emphasis* added][3]

It's Not That Simple: Once Again, Words Matter

If you're not confused you should be. As per usual, neither Congress in the statute nor the FCC in its interpretations and elaborations defined critical terms like *automatic* and *human intervention*. Clearly, however, the more *human invention* required the less *automatic* the dialing process and the less the system looks like an ATDS.

All of that is set in the context of the *capacity* of the system and that is the subject of much debate and a lot of evolving and contradictory case law. The courts generally have taken the position that the *potential ability* (i.e., *potential capacity*) is a bridge too far and that the issue is around the *present capacity* of a given system. Some courts have taken the position that the actual manner in which the system is *used* is all that is relevant.

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[1] Notice of Proposed Rulemaking of May 22, 2012

[2] FCC 15-72, adopted June 18, 2015

[3] TCPA Omnibus Declaratory Ruling and Order (FCC 15-72), adopted June 18, 2015

Appellate Court Weighs In: Words Do Matter, Indeed

The aforementioned 2015 Omnibus Declaratory Ruling and Order was appealed in the matter of *ACA International, et al., v. Federal Communications Commission*, in which the Appellate Court set aside the FCC's overly expansive definition of *capacity*. Although the case did not challenge the FCC's interpretation of what it means to "make any call using any" ATDS, the Appellate Court mused about whether "bar against *making any call* using an ATDS appl[ies] only to calls made using the equipment's ATDS functionality … or … to all calls made with a device having that *capacity*, even ones made without any use of the equipment's *autodialer* capabilities … or … to calls made using certain *autodialer* functions, even if not all of them." (*emphasis* added) So, the Court noted the issue and acknowledged it might be asked to address that issue in a subsequent judicial review.

It's Not Over Yet: Case Law Continues to Evolve and Yes, Words Do Matter

Remember that the TCPA defined the term *automatic telephone dialing system* (ATDS) to mean "equipment which has the *capacity*—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers".

Despite the ACA decision, various lower courts have taken another swing at the law. Some have responded to issues arising from the placement of the comma ("…to be called, using a…"). (I don't make this stuff up.) In *Marks v. Crunch San Diego*[4] a three-judge panel held that the TCPA's definition of an ATDS includes telephone equipment that can automatically dial phone numbers stored in a list, rather than just phone numbers that the equipment randomly or sequentially generates. This decision departed sharply from post-ACA decisions by the Second and Third Circuits, which had narrowed the definition of an ATDS. In October 2018 the FCC issued a notice asking for comment on what constitutes an ATDS. Remain on your feet as the paint is still wet, so to speak.

> Note: Apologies for grinding through all the legislative, regulatory and judicial history, but this is more than context—it is important to understand the origin, evolution and current status of the laws and regulations that dictate what is and is not permissible.

So, How Does This Affect My Business?

If a plaintiff can prove the transmission of a single voice call or text message to their cell phone without the legally valid prior express consent of the owner (or principal user) of that phone (more correctly *phone number*), the prescribed penalty is $500. If the violation can be proved to be willful, the penalty is trebled to $1,500. You may think that $500 or even $1,500 is trivial. After all, that's the sort of issue that a really irate business person takes to small claims court, which is exactly where Senator Hollings, sponsor of the TCPA in the House of Representatives, said Congress intended these things to be resolved. But if you multiply those penalties by thousands, the numbers get really big and the matter becomes very serious, indeed. That's what happens if a law firm that specializes in suing businesses for huge recoveries prevails in a class action suit. Defending yourself can be a very expensive proposition and winning your case can be tough. (Note: A civil case is unlike anything you have seen on *Law and Order*. In a criminal case, the burden of proof is on the prosecution, which must prove the guilt of the defendant beyond reasonable

[4] 9th Cir. Sept. 20, 2018

doubt. In a civil case, the plaintiff must prove its case only on the balance of probabilities, which translates to more than 50%, i.e., more likely than not.)

Scenarios

A particularly nasty scenario may go something like this. Your company sold John Doe a suite of furniture on credit. John signed a sales contract including a clause that gives your company the right to contact him via multiple media, including using an autodialer to call his cell phone. John made only a few payments. Your employees made multiple call attempts and mailed multiple past due notices in attempts to make payment arrangements. Given John's persistent disregard for the obligation, you referred the matter to a third party collection agency that employs hundreds of agents in multiple call centers in the U.S. and The Philippines and serving hundreds of clients. The agency employs multiple multi-channel UC platforms for voice, text, fax and email communications.

You upload to the third-party collection agency, *Pay Me Now, Please*, a file from the database associated with your Customer Relationship Management (CRM) system. *Pay Me Now, Please* employs multiple software suites[5] that support multiple voice calling modes and multiple channels (e.g., voice, text and email). The account of John Doe includes a cell phone number and an indication that Mr. Doe clearly expressed in writing his consent to be called via an autodialer in service of the account. *Pay Me Now, Please* segments your list into multiple subsets, including one of numbers eligible for calling via autodialer. Some of those numbers, including Mr. Doe's, are organized into a campaign for dialing in Predictive Mode, which clearly is an autodial mode. After several calls, Mr. Doe answers the call, engages with a live agent and verbally revokes his consent to be called using an autodialer. From that point forward, *Pay Me Now, Please* agents place calls in Preview Mode, one of half a dozen other calling modes supported by the software suite at issue. In Preview Mode, the system presents the agent with a screen of account information, including contact history (e.g., date and time of recent calls and call resolutions such as Busy, No Answer, Voice Mail and Left a Message, (Live Person) Right Party Contact and Promise to Pay). The agent reviews the account history and double-clicks on the preferred contact number, which is identified as a cellular phone number, to launch the call. If the agent fails to click on the number, nothing happens—the software suite will not launch the call otherwise. John Doe doesn't dispute the debt but becomes irritated at the number and frequency of the collection calls, so he contacts an attorney, who files a class lawsuit on behalf of Mr. Doe and "all others similarly situated". (Note: At this point, the class action attorney commonly has no idea as to how many, if any, others are "similarly situated".)

The first few calls in Predictive Mode really are not at issue but what about the bulk of the calls, which are placed by an agent in Preview Mode? Clearly, human intervention not only was involved but also was required to launch those calls. The Plaintiff argues that the mode used to place the call is irrelevant and further alleges that the calls were placed via an *autodialer*, since the *system*, in the broadest sense, has the *capacity* to autodial. Indeed, the manufacturer (software developer) in its advertising and promotional materials touts the autodial features of the *system*. You disagree and retain legal counsel. The battle is joined. Attorneys for both sides file motions and pleadings and retain technology experts who variously analyze the facts of the case and prepare expert reports or declarations stating their opinions and the bases for those opinions. In some cases, there is some back and forth as the experts prepare rebuttals, as

[5] These software suites are commonly referred to as "dialers", a term with which I take issue, as it oversimplifies the nature and operational specifics of these complex systems.

well. Attorneys depose key members of your staff and that of *Pay Me Now, Please*, as fact witnesses. They then depose the technology experts on both sides of the case.

Through the discovery process, the plaintiff's attorney gains access to the larger set of call logs and contact notes, and establishes the fact that *Pay Me Now, Please* called as many as 5,000 other individuals in attempts to collect on past due accounts you referred to them. The Plaintiff argues that these 5,000 others are "similarly situated". If my math is correct, the exposure is in the range of $2,500,000 to $7,500,000, if the violations are proved to be willful. Note: Such cases often involve thousands of calls, thousands of passive (unnamed) plaintiffs across dozens of jurisdictions, and many millions of dollars of exposure.

If you are typical, you have no insurance coverage for this sort of litigations or the insurance company backs away, so the class action attorneys may well go after your corporate or even personal assets. These cases rarely go to trial but rather are settled out of court. In any case, so to speak, the class action attorneys at the firm of Rumpelstiltskin LLP seek to spin a few calls into robes of gold for themselves, perhaps leaving you dressed in rags as you appear in bankruptcy court.

> Note: This scenario is based on actual cases in which I was involved as a consulting/testifying expert. Once again, I don't make this stuff up.

Serial Plaintiffs

Serial plaintiffs are not uncommon in TCPA litigation—some have been named plaintiffs in dozens of such suits. Some allegedly have even purchased multiple cell phones, each with a unique cell phone number associated with a unique set of retail charge accounts or credit cards, thereby increasing the likelihood that they would receive an receive an *autodial* call. Such a serial plaintiff typically maintains detailed call logs for each phone in each case. Now, please understand that the recipient has every right to file a lawsuit under the TCPA for each and every occurrence. There also is a bit of financial encouragement to do so, as the named plaintiff in these class action suits generally receives a substantial cash incentive when the case settles or the Court renders a judgment in favor of the plaintiff. The settlements typically are sealed, but one can make an educated guess based on the incentives to the plaintiffs in published TCPA junk fax case settlements, which commonly are in the neighborhood of $7,500 and can run as high as $25,000, depending on factors such as the amount of effort expended by the plaintiff during the legal process. The settlements and plaintiff incentives must be approved by the court, so are not only completely legal but also based on precedents.

Protect Yourself

There are protective measures, of course. Carefully and objectively examine the customer contact system (aka *dialer*), subsystems and system components you employ to determine whether they might be characterized as an *automatic telephone dialing systems* under the TCPA definition, which can vary day by day and jurisdiction by jurisdiction. Carefully and objectively examine the capabilities of the associated CRM and other associated systems, as well. Finally, carefully and objectively examine your internal policies and procedures, user guides and all other relevant documentation in the context of the TCPA. Do not stop there!

Go through the exact same process for any and all third parties to whom you refer or outsource accounts for sales, survey, collections and any and all other outbound calling, texting, emailing activities they

perform on your behalf. The class action attorneys, of course, don't go after the third party, but rather your company based on the legal doctrine of vicarious liability, a form of a strict, secondary liability that arises under the common law doctrine of agency, which holds that the superior party is responsible for the acts of its subordinate. (Rumpelstiltskin LLP goes for the deepest pockets. After all, that's where the biggest payoff is to be found and we're talking potentially many millions and perhaps even billions of dollars.) So, you can do everything right and you're still screwed, so to speak.

Defend Yourself

Assuming you are sued despite your best efforts to avoid TCPA infractions, there are a variety of defenses that can be more or less successful, depending on the specifics of the case, the jurisdiction (e.g., state vs. federal or even federal district) in which it is filed, and the skill and experience levels of the attorneys for the plaintiff(s) and defendant(s). The attorneys representing the plaintiffs often are highly skilled and experienced in TCPA class action litigation—and they can be relentless. There also are excellent attorneys who have successfully defeated class action autodial claims and/or mitigated the damage. Attorneys for both the plaintiff and defendant often engage an expert witness, a role that I sometimes play—for the defense, so far.

Ray Horak is a seasoned author, telecom consultant, industry analyst. Ray provides litigation support services as a consulting and testifying expert across a wide range of telecom matters, including the TCPA. He also frequently conducts corporate compliance reviews to assess the risk level associated with customer contact and related systems, policies and procedures in the context of the TCPA, with the goal of minimizing, if not eliminating, the risk.

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