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PERSPECTIVE

Developments in consumer lawsuits over unwanted telemarketing calls

By Chet Kronenberg and Colin Rolfs

In 1991, Congress enacted the Telephone Consumer Protection Act to protect consumers from unwanted telemarketing calls. The Act restricts the use of automatic dialing systems, artificial or prerecorded voice messages, SMS text messages received by cell phones, and the use of fax machines to send unsolicited advertisements. Individuals may recover the greater of actual monetary los (typically nothing) or $500 for each violation, or $1,500 for willful violations.

These lawsuits run the gamut between the scandalous and the mundane. For example, on Jan. 27, in *Harris v. Starline Communications International Inc.*, a plaintiff sued the operator of a phone sex service in the U.S. District Court for the Central District of California because it allegedly sent unsolicited pornographic SMS text messages to plaintiff's cell phone, which were then viewed by the plaintiff's 10-year-old daughter.

Many cases, however, appear lawyer driven without any real victim. For instance, on Feb. 14, in *Delong v. AT&T Corp.*, a plaintiff filed suit in the U.S. District Court for the Southern District of California alleging that AT&T's collect call service violates the Telephone Consumer Protection Act because it uses an "artificial or prerecorded device" to contact cell phones in order to connect them with collect callers.

Class action claims brought under the Telephone Consumer Protection Act can be costly for defendants. In *Arthur v. Sallie Mae* Inc., plaintiffs filed a putative class action in the U.S. District Court for the Western District of Washington against Sallie Mae for allegedly making automated telephone calls to plaintiffs' and putative class members' cellular telephones without their prior express consent. In August 2011, Sallie Mae agreed to settle the case for more than $24 million. Court approval of the settlement is still pending.

The key for defendants in these class actions is to defeat class certification. Consider *FrickoInc. v. Novi BRS Enterprises Inc.*, 2011 WL 2079704 (E.D. Mich. May 25, 2011), where the defendants allegedly sent unsolicited advertisements by facsimile to 3,788 persons through a third-party fax broadcaster in violation of the Telephone Consumer Protection Act. Because "[t]he factual core of the case [wa]s not whether Defendants sent facsimile transmissions, but rather, whether each of the individual class members solicited the facsimiles," the court denied class certification. The court noted that while some courts had granted motions for class certification under facts similar to those in the case, other courts have held that such actions are not appropriate for class certification given the individualized nature of the alleged violations.

By contrast, in *Silbaugh v. Viking Magazine Services*, 2012 WL 76889 (N.D. Ohio Jan. 10, 2012), the court granted class certification in a lawsuit brought on behalf of recipients of text message calls from an automatic telephone dialing system. The defendant argued that class certification was inappropriate because the court would have to make an individualized inquiry as to each class member to determine whether there was express consent to the calls. The court disagreed, noting that the defendant's owner admitted at deposition that he did not have consent from any person, or take steps to confirm that consent was made.

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In *CE Design Limited v. King Architectural Metals Inc.*, 637 F.3d 721 (7th Cir. 2011), the 7th U.S. Circuit Court of Appeals addressed the class certification issue in the context of a serial plaintiff that had previously brought at least 150 lawsuits under the Telephone Consumer Protection Act. The 7th Circuit vacated the district court's certification of an "unsolicited fax" class action, holding that the district court had given insufficient attention to serious questions regarding the plaintiff's adequacy as a class representative. The plaintiff, a civil engineering firm, had listed its fax number on its website next to the message "Contact Us" and had published its fax number in a telephone directory used to facilitate marketing. Both actions, the court reasoned, could be construed as consent to receive the two faxes at issue, as each was sent by a manufacturer of metal building components.

Two recent legal developments have impacted these claims. On Jan. 18, in *Mims v. Arrow Financial Services LLC*, 132 S. Ct. 740 (2012), the U.S. Supreme Court held that federal district courts have original federal question jurisdiction over claims brought under the Telephone Consumer Protection Act. Several circuits, including the 9th U.S. Circuit Court of Appeals, had reached the opposite conclusion, reasoning that the Act's explicit grant of jurisdiction to state courts precluded federal question jurisdiction. Plaintiffs in those circuits were required to find some other basis for federal court jurisdiction, such as diversity or the Class Action Fairness Act. In the wake of *Mims*, federal courts may see more such lawsuits.

On Feb. 15, the Federal Communications Commission issued regulations that offer consumers greater protection from telemarketing calls. For example, the Telephone Consumer Protection Act precludes the use of autodialed or prerecorded calls to cell phones, and prerecorded calls to residential lines, without the "prior express consent" of the called party. However, the statute is silent on the issue of what form of express consent — oral, written or some other kind" is required. The FCC clarified that — consent is required for all autodialed or prerecorded telemarketing calls to wireless numbers, and all prerecorded telemarketing calls to residential lines. There remains some space to maneuver, however, as written consent is only required for telemarketing messages. Less formal forms of consent suffice for purely informational, non-marketing calls or text messages to cell phones, and no consent at all is required for non-marketing calls to residential lines.

In addition, there used to be an exemption for prerecorded telemarketing calls to residential consumers with whom the caller had an "established business relationship." The FCC eliminated this exemption, reasoning that a prior business relationship does not necessarily result in a consumer's willingness to receive prerecorded telemarketing calls. Elimination of the "established business relationship" exemption will require telemarketers to secure consent from consumers in some cases where they would not have needed to in the past.

The FCC's changes to the Telephone Consumer Protection Act's implementing regulations have heightened the risk such claims represent for companies communicating with current and potential customers. There likely will be increased federal court litigation in this area in the future, with class certification being a major battleground.

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