

CONSUMER FINANCE PODCAST

Recent Trends in TCPA Litigation

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[CHRIS WILLIS]

Hello and welcome to the *Consumer Finance Podcast*. I'm Chris Willis, the co-practice leader of Troutman Pepper's Consumer Financial Services Regulatory Practice. And today we have a great show for you about the statute that everybody loves to hate, the Telephone Consumer Protection Act. But before we get into that topic, be sure to visit and subscribe to our blog ConsumerFinancialServicesLawMonitor.com, where we keep you up to date on all relevant topics and developments for the industry. And don't forget to check out our other podcast, *FCRA Focus*, which is released monthly on every popular podcast platform. And if you like our podcast let us know. Leave us a review on your podcast platform of choice. Now as I said today, we're going to be talking about the Telephone Consumer Protection Act and the recent litigation trends that are going on there. And we have a great speaker to talk to you about that, my partner, Stefanie Jackman. So, Stefanie, thanks for being on the podcast today.

[STEFANIE JACKMAN]

Thanks for having me, Chris. Great to be here.

[CHRIS WILLIS]

Now I know that you handle and have handled lots of Telephone Consumer Protection Act litigation and it seems like maybe people thought that that was an area that was going away after the *Facebook* decision. So, can you tell our listeners is it really going away and how did the *Facebook* decision change the landscape for this litigation?

[STEFANIE JACKMAN]

I would say that it's not going away yet, but it has very much so changed the landscape. So, where *Facebook* I think has had the biggest immediate impact is quelling some of the litigation that we all understand was rampant for the last few years about what is or is not an automatic telephone dialing system or an ATDS. We developed the circuit split after the D.C. Circuit's opinion in the *ACA International* case on whether or not the FCC's July 2015 *omnibus* decision expanded the definition. I thought D.C. had pretty clearly said no, but then we had *Marks v. Crunch* in the Ninth Circuit, *Dominguez* in the Third Circuit, and then you have other circuits following suit so here we are in *Facebook*. In *Facebook*, the Supreme Court said a system, to be an ATDS under the TCPA must produce the numbers that will be dialed or texted, using a random or sequential number generator. And so what that means, and we've seen cases still trying to push on this, but they've been pretty soundly dismissed, what that means is that when you are creating the list of numbers to call or numbers to text in a separate system that's not integrated with your dialing system, and then loading it into your dialing system, because the numbers that are being contacted were not generated by your dialer, they weren't produced by your dialer using a random or sequential number generator. It doesn't make it an ATDS just because your system is now dialing them in some random or sequential way or texting them in some random or sequential way, which is what the Eighth

Circuit opinion held. But where we are seeing, I think, a real focus, an effort to keep things alive, is shifting. So, we're seeing ATDS start to kind of coalesce around the Supreme Court really meant what it said, and courts seem to be sticking to that pretty consistently at this point in my view. But where we're seeing an uptick are challenges to texts in order to classify them as pre-recorded or artificial voice messages, which can be sent without using a dialer and still be subject to the TCPA. And we're also seeing a big focus on the use of the IDRs in other automated messages, either as part of your dialing strategy, maybe you have one of the technologies that is part of pacing, will play a recorded message about we're just about to connect you hold please, or as part of an ongoing conversation with a consumer you're going to read a script. And your company has decided let's have that script be played by an automatic voice or a recorded voice because it will ensure consistency, seems like a good idea. But if there isn't consent, there is being attacks there. It doesn't mean that these are going to succeed, but IDRs and text messages and extent to which they may or may not be pre-recorded voice remains a real area of focus by plaintiffs' attorneys and then we're also seeing states begin to become focal points to keep litigation on the ATDS issue alive. For instance, Florida. We're seeing plaintiffs' lawyers argue that Florida, as I like to call it, mini-TCPA, isn't touched by *Facebook* because Florida statute doesn't define it as an ATDS, it uses a different term - an 'automatic dialing system' but doesn't have 'telephone' in it or something like that. And therefore, *Facebook* is specific to something that qualifies as an ATDS, Florida is not talking about an ATDS, it's talking about a different dialing system, and these are all still alive and well is the approach we've seen down there. So, it's remaining in flux Chris, and clients are still having to spend some time and money litigating these claims and while some of them strike me as silly, I thought we were done on the ATDS issue in 2018. It only takes one district court to adopt what I may think is a silly position and see that spread like wildfire into circuit-level decisions because that's what happened after the *ACA* opinion.

[CHRIS WILLIS]

Well thanks a lot for that. And so, you made some comments about what the litigation landscape looks like today and some of the theories that you're seeing the plaintiffs' lawyers push and even some courts entertain, are there other sort of TCPA theories that have come to the forefront in the aftermath of *Facebook* besides the ones that you just mentioned?

[STEFANIE JACKMAN]

Well, those are the main theories I'm seeing coming up because there were efforts to try to argue well, capacity right, because there is a footnote in the *Facebook* decision about we're not getting into capacity and what that means beyond the scope of this opinion and hypothetically if you can flip a switch does it become an ATDS? Those are things we saw be a really big focal point of the litigation in 2016, '17, '18, because you may be using a system that could flip a switch and start randomly and sequentially dialing but you're not using it in that mode. My sense is we're seeing those be argued from time to time, but I don't foresee them to be getting much traction, but I'm still advising clients that the more separation you can have between the system that is generating the list of numbers and the system that is contacting them, the better, right, to try to avoid just enterprising opportunities to argue about is this sufficient capacity. But I'm not seeing, when that does come up, I'm not seeing that get a lot of traction. Instead I think we're going to see a real switch to these types of claims if you can, what the TCPA is basically saying now, and I'm not advising anyone listening to do this without talking to your own counsel and really thinking it through, but if you're confident you're

not using an automatic telephone dialing system and you're not using a pre-recorded or artificial voice, in theory you could do whatever you want without consent, right? You don't need it to communicate and you know you might even see people start saying well and if they say stop calling me, it's not a violation of the TCPA to keep doing so. I guess that's actually correct under *Facebook*. So, what you're going to see is those claims about needing to have consent and certainly needing to honor revocation instead being brought under other statutes like the FDCPA state laws, whether they're state TCPA analogs or state collection laws, you're going to see UDAP based claims. You're going to see regulators pushing there on UDAP and you could see these claims being brought and we are, under state invasion of privacy and other tort statutes. So, I mean, it's great that we're not having to expend the amount of time, or I hope you're not having to expend the amount of time and money we did on litigating what is or is not an ATDS and what the capacity is or isn't, but I'm not telling clients to just turn up their dialers with abandon. And you certainly need to continue to be mindful of revocations because there are a number of other laws that can be used to argue that ignoring a request to not get a call or a text or continuing to call even without consent if it's at really high levels that the consumer feels are abusive or harassing, there's plenty of other laws available for which they can use to bring a suit against you.

[CHRIS WILLIS]

Let's talk about that for a second because one of the big things in TCPA litigation in the past has been the do-not call class action. You called me after I said don't call or I revoked my consent and there is all this case law under the TCPA about what constituted a revocation and whether it was effective or not. And you mentioned a minute ago that there are other laws, even if the TCPA doesn't apply, where plaintiffs might bring claims for calling me after I said don't call. What would those be?

[STEFANIE JACKMAN]

Well, it's like what I was mentioning. It's going to be state collection laws, the FDCPA, state invasion of privacy claims, state UDAP, state unfair business practices, you could even see equitable theories of, I'm not an equitable theory expert and I don't think we have to get that far, but you think they can put on their conversion of my phone for all the times that you took up. So, they're just going to migrate to different statutes. The good news, I think, is that in many instances, think about the FDCPA or some of the state FDCPA analogs, there's caps, right, there's caps. And that's the thing that was so powerful about the TCPA is that if you made a mistake there was no cap if a class is certified against you and you could be in the millions and even billions of dollars of potential damages. So that gives a little comfort, but they'll migrate, and you'll have state-based classes, you'll have individual matters. The plaintiffs' bar has gotten very adept at filing and litigating thousands of arbitrations when we are you know in a circumstance where we have an arbitration clause with a class action waiver. So that's where I think it will migrate to as opposed to going away.

[CHRIS WILLIS]

You mention state laws and particularly a Florida law earlier in the podcast, can you give the audience a sense for what's in these state TCPA analogs or mini-TCPA laws that companies need to watch out for?

[STEFANIE JACKMAN]

Florida is the one that comes to mind, and it has spawned the most litigation so far at the state level. I know Vermont was trying to pass kind of something similar, I don't think it happened. I'm trying to recall. So, Florida is where we've seen the most aggressive frontal attack, if you will, at trying to keep the TCPA alive in one jurisdiction, but it's an area to watch because there are a lot of state laws that are starting to, already exist, talking about different restrictions and requirements when you're using like ADADs, automatic dialing announcement devices, which can also be an ATDS but can also be something different. We're seeing caller ID laws, we're seeing anti-spoofing laws, and those are being passed with some frequency and regularity in the last few years. So, I think it's just a good time to be mindful of the state overlay here and just what telephony are you using and how it stacks up against those laws. There's contact restrictions, too. New York has a bill right now and D.C. has a bill where you're capping the amount of email or text or requiring consent and they're coming up in the collections context. But Florida for just a straight up TCPA analog is the one that we've seen the most action in to-date.

[CHRIS WILLIS]

So, seems like based on what happened in *Facebook*, a lot of companies may want to begin using their dialer systems on accounts where they don't have specific consent, the consent that we thought we would need under the TCPA. What are your thoughts on whether that's feasible and what risks might be involved if somebody goes and does that?

[STEFANIE JACKMAN]

Yeah, I mean it's a great question and I've been asked a lot and it's one of those areas where we can wear a compliance hat, which would have me say I wouldn't turn them up quite yet. There's a lot of uncertainty, there's a lot of evolving. Consideration at the state level. How confident do you feel that you can manage all that? There's also the reality and practical business strategies which are all right but you know texts can be a really great way to communicate with a consumer. A call can be a really great way to try to get in touch with somebody and I'm seeing a willingness to at least try once. I am of the mindset that having some level of consent for texts is still a really good idea because we're not, in my view, out of the woods on texts yet. I have lots of people tell me that the theories that are being made, that texts are pre-recorded or artificial voice are silly and ridiculous and stupid and I agree, those are actual words that have been used. I think the decision out of the Central District of California, *Reward Zone*, which is the only case I'm aware of to actually come to a decision on this, but it's not binding. It's a single district court decision, it's helpful it's from California, but they I think, actually use the word ridiculous in the opinion, but I can't get past what happened with the ATDS issues and divergence that got us to *Facebook* so I'm not quite ready to bless a text campaign without some basis for prior consent. For calls, I think it's something that more industry members are willing to do, calling a cell phone where you don't have consent in a transactional context – marketing still, the TCPA hasn't changed over there. I think it's a larger discussion about your overall contact frequencies and strategies and what do they look like. But I would say if you're going to get a little more aggressive from a TCPA-specific perspective it calls to cell phones where you probably have the best risk mitigation opportunities.

[CHRIS WILLIS]

Well thanks for that, and do you have any other best practice recommendations for TCPA compliance in today's world?

[STEFANIE JACKMAN]

Yeah, I mean you've heard me kind of start to hesitate, and you know you're asking a lawyer to give an opinion. I'm like well, maybe, possibly over here. I still think the best practice is to have consent. I think a best practice is to get consent before you contact people on their cell phones and send texts and send emails because of all these other ancillary statutes in the collections world, the invasion of privacy world, in the UDAP world, that are already starting to be used to come in and avoid what is the fear of consumer advocates that the TCPA will allow. Unfettered communications to numbers and by text on cell phones that are invasive and not desired, right. So, I'm expecting there will be aggressive and creative theories on why under those other statutes we still have to worry about the exact same things we did under TCPA. So, my best practice recommendation is still have some consent, some level of consent, some good faith consent, and then when you're attacked because you didn't or you missed a revocation, all these things we're talking about today can be really great litigation strategies. I just don't like to build my compliance programs based on a litigation defense strategy.

[CHRIS WILLIS]

Understood and that makes a lot of sense. And your years of litigation experience dealing with TCPA cases is clearly showing through in that answer and in fact all of the important insights that you shared with us throughout the podcast. So, Stefanie I want to thank you for being on today and sharing that wisdom with our audience. And of course, thanks to our audience for listening to the episode. Be sure to visit our blog ConsumerFinancialServicesLawMonitor.com. Subscribe so that you can get our updates, and go over to troutman.com and add yourself to our Consumer Financial Services email list so you can get our alerts and get invited to our webinars for industry folks. And stayed tuned for a great new episode of this podcast every Thursday. Thank you all for listening.

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