CLIENT ALERTS & INSIGHTS

Time of Day TCPA Cases Inundate the Federal Docket

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Authors: Mark S. Eisen

The Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, is always a hot topic. Over the course of the last four months, however, a new and novel theory of TCPA liability-time-of-day text message cases-has flooded the federal dockets from California to Florida. Dozens upon dozens of these cases have been filed in rapid succession. These cases, predominantly (if not entirely) filed by a single firm, allege a single claim: the receipt of text messages before 8:00 am or after 9:00 pm is outside of the TCPA's time-of-day regulation.

In short, a long-standing regulation under the TCPA found at 47 C.F.R. § 64.1200(c)(1), prohibits telephone solicitations to "[a]ny residential telephone subscriber before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location)…" Because the Federal Communications Commission has (i) determined that text messages constitute calls and (ii) that "residential telephones" can include cellular telephones, the door is open for plaintiffs to argue that this time-of-day provision applies to text messages. We will leave for another day whether the TCPA (in relevant part) applies to text messages and whether this provision in fact applies to cell phones-issues that are now back on the table following the elimination of *Chevron* deference and the forthcoming potential downfall of Hobbs Act abdication. The focus here will be on how to best handle cases of this nature.

Critically, in the vast majority of these cases (to date), the plaintiffs do not deny that they consented to or signed up for promotional advertisements with the defendants. Instead, they are carefully couching their allegations that they did not "consent" specifically to text messages between the hours of 9:00 p.m. and 8:00 a.m. Does this matter? Absolutely, it does.

While the terms "telemarketing" and "telephone solicitation" may often be used interchangeably from a lay perspective, they have different definitions under the TCPA. And the TCPA's time-of-day restrictions do not apply to all telemarketing calls, but instead, only apply to calls that constitute a "telephone solicitation." The definition of "telephone solicitation" *excludes* "a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax-exempt nonprofit organization." 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(15). In other words, if there is "prior express invitation or permission" or "an established business relationship," the underlying text or call, by definition, is not a telephone solicitation. (Keep in mind, of course, that "established business relationship" has its own definition and can be terminated).

The fact of the matter is that these cases are nascent. What it will take to push back against these cases is just that-pushing back. There are defenses. What is missing here is that despite years of substantial TCPA litigation, this time-of-day theory is relatively new. While much of the TCPA has volumes of case law, this theory does not yet. There is also, however, another window of opportunity to get in front of these cases. A petition is currently pending before the FCC to curb these cases. *See* https://docs.fcc.gov/public/attachments/DA-25-216A1.pdf

. The comment period on this petition closes on April 10, 2025.

We will continue to monitor developments in the case law and this petition. In the meantime, it is best to review current practices and evaluate precisely when text message campaigns are going out across the country.

Mark Eisen is Co-Chair of Benesch's Privacy Litigation & Compliance Practice Group. He can be reached at meisen@beneschlaw.com or 312.212.4956.

David Krueger is Co-Chair of Benesch's Privacy Litigation & Compliance Practice Group. He can be reached at dkrueger@beneschlaw.com or 216.363.4683.