School’s Out, But TCPA Class Action Continues

Class is dismissed, but there’s no vacation from consumers bringing class action lawsuits alleging violation of the federal Telephone Consumer Protection Act (TCPA). Because class actions, by definition, must be brought on behalf of a sufficiently large number of similarly situated individuals making individual lawsuits impractical, the potential liability is huge. Under the TCPA, a business generally may not place an autodialed call that delivers a prerecorded message unless the recipient has given express consent (written consent in the case of calls or texts made for sales or marketing purposes). Due to the TCPA’s broad definition of autodialer, almost every company that interacts with consumers by phone, fax or text –for sales or other purposes – faces the risk of a TCPA class action. Compliance can be tricky. Recent court cases continue to illustrate the unpredictability in TCPA litigation where decisions can vary depending on the jurisdiction. Cases involving post-contract calls: • In Stevens-Bratton v. TruGreen, Inc., the court held that a contractual provision providing express consent to call the customer doesn’t survive the expiration of the contract and therefore doesn’t permit post-contract calls for possible future services. • But in Van Patten v Vertical Fitness Group, LLC, the court reached a different conclusion on similar facts, finding that the scope of the consent given in a gym membership contract to receive texts about the member’s gym membership includes post-contract text messages to come back and reactivate gym membership. Cases involving revocation of consent: • In Reyes v. Lincoln Auto Fin. Services, the court held that the TCPA doesn’t allow a person to revoke consent when it is given as part of a “bargained for exchange.” In this case, consent to receive manual and automated calls about the lease was given in exchange for Lincoln’s agreement to lease. • But in Osorio v. State Farm Bank, the court concluded that a person who consents to be called in an application for a service or product can later revoke consent. The court in Reyes viewed the Osorio case and similar cases more narrowly as addressing only a situation where a consumer unilaterally and gratuitously consents to receive calls and is not consenting as the bargained for consideration in a bilateral contract. Don’t get schooled by a class action. To minimize your risk: • Assume the TCPA applies to any outbound calling, texting or faxing campaign or effort. • Develop a standard TCPA notice requesting consent that designates a legally sufficient method for giving consent. • Maintain a reliable method for tracking notice (including the content of the notice and receipt of a consumer’s consent), opt-out, revocation of consent, and when contact information ceases to apply to the person who gave consent. Lori Beam chairs the firm’s Advertising, Marketing and Promotions practice group. Contact her at lbeam@sb-kc.com or 816-265-4110. * This article is general in nature and does not constitute legal advice. Readers with legal questions should consult with an attorney prior to making any legal decisions.