

# CONSUMER CLASS ACTION ALERT

February 2017

## TCPA: The Next Wave of Class Action Lawsuits Asserts Consumer's Right to Withdraw Consent to Receive Text Messages

*Telephone Consumer Protection Act (TCPA) Claims Target Text Messaging Advertising Campaigns*

Last year, [we warned large and small companies](#) about the proliferation of class action lawsuits brought by plaintiffs alleging violations of the New Jersey Truth-in-Consumer Contract, Warranty, and Notice Act (TCCWNA), related to website terms and conditions. TCCWNA was an overlooked statute that the organized plaintiffs' bar attempted to exploit in the form of broad class action lawsuits and claims. The plaintiffs' bar is back at it in 2017, this time with a new spin on a familiar statute: the Telephone Consumer Protection Act (TCPA).

Over the past few months, we have observed a spike in TCPA class action lawsuits filed against companies that send automated text message advertisements to customers. Your company could be a target of this wave of litigation if it utilizes text message advertising campaigns and does not specifically offer customers the opportunity to withdraw their consent through "any reasonable means," or otherwise fails to recognize when a consumer withdraws prior consent, even through vague and ambiguous communications sent to the company.

These TCPA claims follow a familiar pattern. A prospective plaintiff will sign up or otherwise provide written consent to receive offers or other advertising via text message. The prospective plaintiff, after receiving such a message, will text words or phrases indicating that he or she no longer wishes to receive future text messages, but usually does not follow the specified instructions provided by the company to opt out. For example, if the company says type "STOP" to receive future offers, the customer may type "Please do not text me anymore" or even a cryptic message to indicate the revocation of prior consent. The company therefore does not register this withdrawal of consent, and often continues to send the customer text messages. The company then receives a demand letter or complaint alleging a violation of the TCPA.

While TCPA lawsuits are not new, the statute's broad scope and minimum penalties associated with potential violations continue to make these lawsuits a serious threat to any business that utilizes an automated text message system. Understanding the TCPA's broad application and your company's text message advertising system will help you avoid becoming a target. This alert will identify certain key issues to consider to avoid potentially costly class action litigation, provide strategies for defending a

TCPA claim if one is brought against your company, and summarize insurance coverage considerations for seeking reimbursement of potential defense and indemnity costs.

### Overview of the TCPA

Congress passed the TCPA more than 25 years ago to protect individual consumers from receiving intrusive and unwanted telephone calls (including facsimiles) from various marketers. See *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 372 (2012). The Act immediately led to a wave of litigation as businesses attempted to ascertain and understand the scope and provisions of the Act, and plaintiffs attempted to cash in on the statutory fines imposed for violations. As litigation involving the TCPA appeared to be stabilizing, the explosion of new technology in the form of mobile phones (whereby a consumer can be reached with a phone call, text message or web-based ad) created another wave of litigation. Now automated text messaging advertising campaigns are the latest target for TCPA class actions.

The TCPA provides that it is 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 automated telephone dialing system or an artificial or prerecorded voice to any telephone number assigned to a paging service, a mobile telephone service, a specialized mobile radio service or any service for which the called party is charged for the call. See 47 U.S.C. § 227(b)(1)(A)(iii). Congress authorized the Federal Communications Commission (FCC) to implement rules and regulations enforcing the TCPA. See 47 U.S.C. § 227(b)(2). Importantly, Congress also authorized a private right of action for individuals aggrieved by violations of the TCPA. The private right of action is the trigger that allows for sweeping putative class action lawsuits and imposes hefty statutory penalties. Specifically, the TCPA allows a plaintiff to recover actual monetary damages, or alternatively, \$500 in damages for each violation, whichever is greater, and up to \$1,500 if the court finds that such violation is "willful or knowing." See 47 U.S.C. § 227(b)(3).

### The TCPA's Applicability to Text Messaging and Opt-Out Provisions

The scope of the TCPA has grown over the years in response to new technologies. In *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009), the court expanded the TCPA's reach to

cover text messages, holding that a “call” under the Act includes text messages sent to consumers’ mobile phones. The FCC and other circuit courts, including the Third Circuit, subsequently adopted this ruling. See *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, SoundBite Communications, Inc.*, 27 FCC Rcd. 15391 (Nov. 26, 2012); *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 269 (3d Cir. 2013). Notably, the TCPA does not contain any express language granting consumers the right to revoke their prior express consent to receive calls or text messages, nor does the statute proscribe the manner in which such revocation must be expressed.

The Third Circuit and the FCC have nonetheless subsequently ruled that (1) a consumer can revoke consent under the TCPA once it has been given and (2) there is no temporal limitation on when a consumer may revoke his or her prior express consent by sending an opt-out message. See *Gager*, 727 F.3d at 269. In recent years, the FCC further expanded upon its prior guidance and issued a ruling that “consumers may revoke consent **through any reasonable means.**” See *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Omnibus Declaratory Ruling and Order*, 30 FCC Rcd. 7961 (July 10, 2015) (emphasis added). The FCC clarified that “consumers may revoke consent in any manner **that clearly expresses a desire not to receive further text messages**, and that **callers may not infringe on that ability by designating an exclusive means to revoke.**” See *id.* at 7993 ¶ 63 (emphasis added).

These TCPA provisions and FCC rulings have spawned the recent wave of class action lawsuits alleging TCPA violations related to revocation of consent. Plaintiffs’ lawyers are essentially trying to create a new vehicle for class action litigation from those portions of the FCC’s rulings, which provide that customers can withdraw consent using “any reasonable means,” and which ostensibly prevent companies from infringing upon a consumer’s ability to withdraw consent.

### What to Do if You Are Sued Under the TCPA

It is important to understand who is on the other side of a TCPA claim. These lawsuits have traditionally been brought by the organized plaintiffs’ bar. Certain plaintiffs’ firms are in the business of investigating (and, in some cases, arguably manufacturing) claims in order to secure a quick payday under the Act. This may be especially true in cases involving alleged violations of the TCPA pertaining to opt-out provisions. Indeed, many plaintiffs appear to be utilizing intentionally vague and ambiguous terms and phrases to purportedly withdraw their prior consent to receive text message advertisements. In addition, some plaintiffs may continue to purposely opt in and opt out of text message services once they find certain phrases that possibly evidence their intention to withdraw consent, but are not recognized as such

by the companies sending those text messages. Responding to these claims requires skilled class action litigation counsel who understands the TCPA as well as your adversaries and their potential motivations.

There are many ways to respond to TCPA claims, including, but not limited to, pre-answer motions to dismiss and motions to strike class claims. These cases may lend themselves to early resolution; exit strategies may vary depending upon details regarding your potential exposure, risk tolerance, and the specifics regarding your company’s policies and procedures for consenting to and opting out of text message advertisements. In addition, if your text message program contains a conspicuous arbitration agreement that is valid and binding under federal and state law, a motion to compel arbitration could result in a quick and efficient resolution. Early pre-class settlement may also be an option for reducing potential litigation exposure and adverse media attention, particularly if your company’s text messaging system can be updated quickly to recognize and implement various expressions of customers’ withdrawal of consent.

### Does Your Insurance Cover a TCPA Claim?

Upon receipt of the initial notice, even before a lawsuit is filed, companies facing TCPA claims should consider the scope of their available third-party liability insurance and the notice requirements in those policies. Some liability policies have problematic TCPA exclusions, and others do not. In certain cases, the coverage for third-party lawsuits provided to a privately held entity for “wrongful acts” under its D&O policies is actually quite broad, especially for defense costs. Commercial policies that could potentially respond to TCPA claims may also have strict notice provisions and be written on “claims made and reported” forms. If such forms potentially respond, notice should be provided promptly, within the policy period in which the initial notice of such a claim was received by the policyholder.

Liability carriers generally compare the underlying allegations with “the four corners” of the policy to assess whether there is any arguable obligation to fund defense costs under their insuring agreements. The scope of the factual allegations underlying a TCPA claim and the type of alleged damages may vary; therefore, the initial coverage position of the carrier will likely be case-specific and dependent on the language in the applicable policies. In some cases, a carrier could be asked to look beyond an initial demand or pleading to assess if the gravamen of the underlying TCPA claim is potentially covered and eligible for at least defense funding.

Indeed, even if your carrier asserts that indemnification coverage for a potentially adverse TCPA judgment or settlement is not available, your company may still be able to secure defense funding from certain types of carriers. Under certain policy forms, if some of the alleged damages are purportedly excluded, you may still be eligible to receive defense funding or reimbursement if the underlying allegations have not been fully adjudicated against your company and/or are otherwise proven to be groundless. Thus, even where an underlying plaintiff's lawyer decides (for expediency, class or other purposes) to limit the requested relief to any statutory damages that may be available under the TCPA, you should examine the potentially implicated policy language to assess your coverage options.

Depending on the nature of the underlying allegations, potential coverage for "right to privacy" claims may be found in certain "advertising injury" forms in commercial general liability (CGL) policies. Other CGL coverage for third-party property damage claims may also be triggered if the underlying claimant focuses on an alleged loss of property, such as the purported loss of ink and paper in a more traditional "blast fax" TCPA case or, in the context of the more recent text messaging cases, the alleged marginal loss of mobile phone battery power for recipients of allegedly unwanted and unauthorized texts. Moreover, marketing companies potentially affected by TCPA claims may have purchased stand-alone third-party policies for advertising liability exposures (which is different from the narrower traditional advertising injury coverage in the CGL policies referenced above). If so, companies should consider these forms and the endorsements often added to reflect a particular industry's advertising exposures.

These are just examples; insurance profiles and automated text messaging systems vary, and should be analyzed on an individual basis. Some insurers may not conduct the type of initial review required by corporate policyholders seeking liability coverage for TCPA lawsuits or similar underlying claims based on a company's automated text message advertising efforts and its withdrawal of consent practices. Our Insurance Recovery group can provide the type of fact-intensive counseling, advocacy and/or coverage litigation services required to enforce commercial policyholders' rights to coverage for TCPA claims.

### **Review Your Text Message Offers and Related Advertising Systems**

Companies should consult regularly with e-commerce

counsel familiar with the TCPA to determine whether their proposed text message advertising campaigns and related withdrawal practices comply with the Act. Specifically, consumer contracts and messages should contain conspicuous TCPA language indicating that the customer expressly consents to receive text message offers and other advertisements. Consumer contracts and messages should contain a conspicuous arbitration provision related to the company's text-based marketing and other related advertising activities. If possible, companies should periodically reconfirm that the customer expressly agrees to continue receiving text messages, in order to avoid inadvertently contacting customers who have taken over telephone numbers held by others, have signed up using incorrect numbers or have attempted to withdraw their consent.

Companies should also make relevant employees aware of the TCPA's requirements, and enable them to better identify when customers have attempted to withdraw their consent to receive text messages. This process should incorporate periodic review of the National Do Not Call Registry to confirm that customers have not revoked consent to receiving calls and text messages. The company should maintain an updated list of customers who have withdrawn their consent or otherwise opted out of receiving text message offers or other advertisements.

Regardless of the path you choose, McCarter & English's attorneys can effectively and efficiently respond to any TCPA claims that you may face, evaluate potential arguments under the TCPA involving text message advertisements, and advise on how to best position your company to comply with the TCPA's text messaging withdrawal requirements, so you can avoid becoming a target of TCPA litigation.

\* \* \* \*

McCarter lawyers on the Class Action and Insurance Coverage teams are happy to answer questions about TCPA claims. Please contact David R. Kott ([dkott@mccarter.com](mailto:dkott@mccarter.com)), Edward J. Fanning, Jr. ([efanning@mccarter.com](mailto:efanning@mccarter.com)), Gregory H. Horowitz ([ghorowitz@mccarter.com](mailto:ghorowitz@mccarter.com)), Matthew J. Tharney ([mtharney@mccarter.com](mailto:mtharney@mccarter.com)), Zane C. Riester ([zriester@mccarter.com](mailto:zriester@mccarter.com)), Chris A. Rojao ([crojao@mccarter.com](mailto:crojao@mccarter.com)), or the McCarter attorneys with whom you normally work.

Disclaimer by McCarter & English, LLP: This publication is for informational purposes only and is not offered as legal advice regarding any particular matter. No reader should act on the basis of this publication without seeking appropriate professional advice. Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision. If this publication is inaccurate or misleading, the recipient may make a report to the Committee on Attorney Advertising, Hughes Justice Complex, P.O. Box 037, Trenton, New Jersey 08625.

Copyright 2017. McCarter & English, LLP. All Rights Reserved.