

TCPA Class Action Surge Shows No Signs Of Abating

By **Allison Grande**

Law360, New York (May 24, 2013, 9:45 PM ET) -- The recent explosion of consumer class actions under the Telephone Consumer Protection Act is unlikely to die down anytime soon, as plaintiffs continue to be enticed by uncapped damages and unclear statutory language that allows them to easily accuse large corporations like The Coca-Cola Co. of unwanted contact, attorneys say.

The beverage maker is one of scores of companies currently facing nationwide consumer class actions accusing them of violating the TCPA by sending unsolicited text messages, faxes or phone calls to consumers. Attorneys say the claims are being brought to the court at a steady clip by plaintiffs eager to capitalize on uncapped statutory damages of between \$500 and \$1,500 per violation.

"It's clear that what is driving these actions is having significant uncapped damages that are untethered to any actual injury," Manatt Phelps & Phillips LLP partner Becca Wahlquist told Law360 on Friday. "Because companies have so many customers nationwide, and because of the statutory damages available for each call or text, classwide allegations of TCPA violations can create a threat of staggering damages, even when the claims lack merit."

Attorneys agreed that the prospects for a dip in TCPA litigation seemed bleak.

"That is one of the fundamental problems with the TCPA: The statutory damages are so disproportionate to any actual injury that it overincentivizes people to file suit," said Sedgwick LLP partner David Almeida.

Unlike in privacy cases that attack companies' data collection and use practices, plaintiffs bringing allegations under the TCPA need to show only that they received unsolicited communications, not that they were actually injured by them.

"Federal courts have uniformly held that actual damages on the part of the named plaintiff are not required under the federal legislation," DLA Piper managing partner and securities litigation global co-chairman Perrie Weiner said. "Consequently, we expect this uptick in TCPA class actions to continue and accelerate over the next several years."

Coca-Cola had trouble shaking one of these cases Wednesday, when a California federal judge refused to shut down a nationwide class action accusing the company of text-spamming consumers. The judge found that to plead a valid TCPA claim, the plaintiffs needed to allege only two things: that calls were made to their cellphone and that it was done using an automated dialing system.

TCPA cases are also easier to certify than traditional privacy cases because the statute provides a uniform standard that can be applied to all class members, Almeida added.

"In a data breach case, since there is no federal overarching privacy law, oftentimes plaintiffs' lawyers are left asserting either ill-fitting federal laws like the Computer Fraud and Abuse Act or ill-fitting common law claims," he said. "[But] since the TCPA proscribes various forms of direct marketing which often entail fairly standardized conduct, and since it is a federal law and thus provides a uniform standard of decision, cases are frequently certified."

Instead of risking being hit with massive statutory damage penalties, many companies choose to settle these actions quickly, attorneys noted.

In the past month alone, Papa John's International Inc. has agreed to pay \$16.5 million to resolve a nationwide class action alleging it advertised pizzas through unwanted text messages, and shoe retailer Steve Madden Ltd. settled a putative spam-texting class action for \$10 million.

With federal lawmakers and the courts unlikely to provide much help, litigants are left to rely on the Federal Communications Commission, which could make regulations clarifying uncertain and outdated provisions of the 1991 statute, according to attorneys.

"Many companies remain unaware of the TCPA's proscriptions, which are not a model of clarity," Almeida said. "The FCC should step in and clarify things like what constitutes consent so that the TCPA is not co-opted into a mechanism to enrich plaintiffs' lawyers and nothing else."

Several declaratory rulings the FCC has issued in recent years have attempted to clarify the statute's bounds. In a November decision, for instance, the agency found that text messages sent in confirmation of a consumer's opt-out requests did not violate the TCPA, which shut down a growing tide of confirmatory-text cases.

The FCC also issued a promulgation on consent in a recent case accusing the Los Angeles Lakers of sending unsolicited text messages, which a California federal judge dismissed in April on the grounds that the plaintiff had consented to receiving the confirmatory text message at issue in the suit because he had voluntarily sent the first message to the team.

But despite this guidance, attorneys remained skeptical that the agency would be willing to significantly limit plaintiffs' ability to file suits.

"The FCC has in its power the ability to interpret the TCPA and some of its undefined terms to at least better rationalize which suits should go forward and which should not, but I'm not convinced that the FCC at this point is willing to do that," Covington & Burling LLP communications and media practice group co-chair Yaron Dori said. "While the FCC might think that it's a good thing to do, it may be concerned about creating a perception that it is fostering a better environment for marketing."

Some agency rulings could actually open the door to more suits under the law, according to Locke Lord LLP litigation department co-chair and class action practice group leader Thomas Cunningham.

For example, the FCC's most recent declaratory ruling, released May 9, clarified that ordinary principles of vicarious liability applied in TCPA cases, which is likely to lead to "a lot of litigation about when those factors result in a finding of liability and when they do not," Cunningham said.

And an FCC rule that will require written consent for prerecorded and automated calls, scheduled to go into effect in October, is also likely to spur even more TCPA filings, Almeida noted.

“In terms of what is the horizon, I believe we will see even more TCPA cases filed,” he said. “From a plaintiff perspective, the cases are incredibly attractive. Discovery is minimal, and thus the case proceeds faster and is less expensive to prosecute than a typical class action, [and] the conduct can be fairly standardized.”

--Editing by Kat Laskowski and Elizabeth Bowen.

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