IADC COMMITTEE NEWSLETTER

CORPORATE COUNSEL

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IN THIS ISSUE

W. Jason Rankin and Charles N. Insler look at recent Supreme Court case law involving the Telephone Consumer Protection Act.

Please Call Again:
The Supreme Court Declines to Rein in TCPA Litigation

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For anyone hoping the United States Supreme Court might rein in litigation under the Telephone Consumer Protection Act (TCPA), that day has now twice come and gone this year.

By all accounts, litigation under the TCPA is out of control, with TCPA litigation having "blossomed into a national cash cow for plaintiff's attorneys specializing in [such] disputes." *Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 941 (7th Cir. 2016). In 2007, *fourteen* TCPA cases were filed. As of October 31, 2016, more than *four thousand* TCPA cases had been filed. WebRecon LLC, *TCPA Cracks 4k, Smashes Record with 2 Months Still to Go, 5k in Sight?,* available at https://webrecon.com/tcpa-cracks-4000-smashes-record-with-2-months-still-to-go-october-2016-stats-from-webrecon/.

TCPA litigation has impacted nearly every industry, from payment systems to ride sharing, and from pharmaceutical to social networking. *See, e.g., Roberts v. Paypal, Inc.*, 621 F. App'x 478 (9th Cir. 2015); *Lathrop v. Uber Techs., Inc.*, No. 14-CV-05678-JST, 2016 WL 97511 (N.D. Cal. Jan. 8, 2016); *Kolinek v. Walgreen Co.*, No. 13 C 4806, 2015 WL 7450759 (N.D. Ill. Nov. 23, 2015); *Sherman v. Yahoo! Inc.,* 997 F. Supp. 2d 1129 (S.D. Cal. 2014). Even the Los Angeles Lakers have faced a TCPA suit. *Emanuel v. Los Angeles Lakers, Inc.*, No. CV 12-9936-GW SHX, 2013 WL 1719035 (C.D. Cal. Apr. 18, 2013).

Because TCPA cases are generally brought as class actions, with statutory damages ranging from $500 to $1,500 for each call or text message, companies face tremendous exposure. In one such lawsuit, Chase Bank faced the specter of a $48 billion judgment – and bankruptcy – if a jury were to find it had willfully violated the TCPA. This exposure creates pressure to settle TCPA cases. And settle they have, sometimes for enormous sums. Capital One settled a TCPA case for $75 million; AT&T, for $45 million; Bank of America, for $32 million; MetLife, for $23 million; Papa John's Pizza, for $16 million; and Walgreen's Pharmacy, for $11 million. Adonis Hoffman*, Sorry, Wrong Number, Now Pay Up*, The Wall Street Journal (June 15, 2015).

This was never the intent of the TCPA. Passed in 1991, the TCPA was intended to help consumers recover from abusive telemarketers without needing to hire an attorney. *See* U.S. Chamber, Institute for Legal Reform, The Juggernaut of TCPA Litigation. But instead of capturing aggressive telemarketers (with small pockets), the law has ensnared business calls and text messages from legitimate businesses (with big pockets), simply because the calls or texts may be automated. The automated fraud alerts, prescription reminders, and coupons that come to our cellphones, the hallmarks of our modern technology-based society, have become the basis for TCPA litigation. These automated messages and alerts are a far cry from abusive robo-calls from marketers. *See id.*

This is why defendants had high hopes for two recent cases in the Supreme Court. *See Spokeo v. Robins,* 136 S. Ct. 1540 (2016); *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016).

In *Spokeo,* decided in May, the Supreme Court was asked to decide whether a plaintiff had standing to sue, when the plaintiff suffered no concrete injury, and could point solely to a violation of federal statute. *See id.* at 1549. Thomas Robins filed suit against Spokeo, alleging that information available through the company's people search engine was false. *Id.* at 1544. According to Robins, Spokeo's website indicated he was married with children, employed, held a graduate degree, and was relatively affluent. *Id.* at 1546. According to Robins, none of this information was accurate and was therefore a violation of the Fair Credit Reporting Act. *Id.* But whether these inaccuracies alone were enough to sustain a class action lawsuit was the question before the Supreme Court. *See id.* And if they were not – if a bare violation of a federal statute without more was not enough to invoke the jurisdiction of the federal courts – then litigation under the TCPA and other similar statutes might have been dealt a major blow.

While noting that a plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation" such as an "incorrect zip code," *id.* at 1550, and that "Article III standing requires a concrete injury even in the context of a statutory violation," *id.* at 1549, the Supreme Court also stated that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact," *id.* A concrete injury is a real injury that actually exists, *id.* at 1548, but it does not necessarily mean a tangible injury, *id.* at 1549 ("'Concrete' is not, however, necessarily synonymous with 'tangible.'"). Ultimately, though, the Supreme Court ducked ruling on the sufficiency of the injury before it, holding that the U.S. Court of Appeals for the Ninth Circuit had not properly analyzed the standing issue, "having failed to fully appreciate the distinction between concreteness and particularization . . . ." *Id.* at 1550. The Supreme Court vacated the Ninth Circuit's decision and remanded the case for additional analysis. *Id.*

In *Campbell-Ewald Co. v. Gomez*, decided in January, the Supreme Court faced the question of whether, in a class action case, a defendant could accept responsibility, pay the *named plaintiff* his or her statutory damages, and be done with the case. In *Gomez*, the issue was whether José Gomez had standing to maintain his class action TCPA case after Campbell-Ewald had offered him all of his alleged damages. 136 S.Ct. at 667-68. The Supreme Court said that he still had such standing. In an opinion that did not discuss the abuses of TCPA litigation, the Supreme Court held that an "unaccepted settlement offer – like any unaccepted contract offer – is a legal nullity, with no operative effect." *Id.* at 670. Accordingly, Gomez retained the opportunity to show

that his action could be maintained as a class action.

Those disappointed with *Spokeo* and *Gomez* may have one last chance to strike at TCPA litigation. In July 2015, the Federal Communications Commission issued a Declaratory Ruling and Order that clarified the TCPA's definitions of "automatic telephone dialing system" and created a "very limited safe harbor" for calls made to reassigned numbers. *Lathrop v. Uber Techs., Inc.*, No. 14-CV-05678-JST, 2016 WL 97511, at *2 (N.D. Cal. Jan. 8, 2016). According to one of the dissenting FCC commissioners, this Ruling and Order twisted the law's words even further and stood to make "'abuse of the TCPA much, much easier.'" *Fontes v. Time Warner Cable Inc.*, No. CV14-2060-CAS(CWX), 2015 WL 9272790, at *3 (C.D. Cal. Dec. 17, 2015) (quoting Dissenting Statement of Commissioner Ajit Pai). This FCC Ruling and Order is currently on appeal to the U.S. Court of Appeals for the District of Columbia Circuit: *ACA International v. Federal Communications Commission*, No. 15-1211 (D.C. Cir. 2015).

Even after *Spokeo,* some courts have decided to wait on a decision from the D.C. Circuit in *ACA International*, believing that a decision in that case has the potential to clarify and streamline important legal issues for TCPA litigation. *See Rajput v. Synchrony Bank*, No. 3:15-CV-1595, 2016 WL 6433150, at *1, *8 (M.D. Pa. Oct. 31, 2016) (lifting a stay following the *Spokeo* decision but then granting another stay pending the D.C. Circuit's disposition of *ACA International); Frable v. Synchrony Bank*, No. 16-CV-0559 (DWF/HB), 2016 WL 6123248, at *4 (D. Minn. Oct. 17, 2016) (staying TCPA case until the D.C. Circuit Court of Appeals issues a decision in *ACA International*).

A ruling in *ACA International* could also eventually find its way to the Supreme Court. But until then, businesses may want to keep their phone lines open; their law firms may need to reach them.

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