

Telephone Consumer Protection Act ("TCPA")

The Basics, Recent Regulatory Changes, and Class-Action Litigation Implications

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Definitions

- “*automatic telephone dialing system*” – equipment that can store or produce telephone numbers to call randomly or sequentially
- “*telephone facsimile machine*” – equipment that can transcribe text or images from paper into an electronic signal and send that signal over a regular telephone line

Definitions (cont.)

- “*telephone solicitation*” – the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services; however, it does not include a call or message to a person that gave prior express invitation or permission; any person with whom the caller has a prior established business relationship; or a tax exempt nonprofit

Definitions (cont.)

- “*unsolicited advertisement*” – any material advertising the commercial availability or quality of any property, goods, or services to any person without his or her prior express invitation or permission, in writing or otherwise

Restrictions on Use of Automated Telephone Equipment

- Prohibitions – no person may:
 - Make any call (other than an emergency call or one made with prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice
 - To an emergency telephone line
 - To a guest or patient room of a hospital, etc.
 - To any number assigned to a paging service, cellular telephone service, etc., for which the called party is charged for the call

Restrictions on Use of Automated Telephone Equipment (cont.)

- Initiate any call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party
- Use any device to send to a telephone facsimile machine an unsolicited advertisement unless
 - It is from a sender with an established business relationship with the recipient
 - The sender obtained the number voluntarily from recipient or a directory, website, etc., to which the recipient voluntarily agreed to its number being publically available
 - Note: exceptions do not apply if recipient requested not to receive future unsolicited advertisements from sender
 - Note: unsolicited advertisement must include proper notice

Private Right of Action

- A person or entity may bring:
 - An action to enjoin a violation of the Act
 - An action for actual monetary loss caused by a violation or violations, or to receive \$500 in damages for each such violation, whichever is greater
- If court finds that the defendant willfully or knowingly violated the Act, then the amount recoverable may be increased by up to three (3) times

Jurisdiction and Venue

- The district courts of the United States (including U.S. territories and D.C.) have exclusive jurisdiction over all civil actions
- Any civil action brought for violation of the Act may be brought
 - In the district where the defendant is found, is an inhabitant, or transacts business
 - In the district where the violation occurred or is occurring

Recent Regulatory Changes

- The Federal Communications Commission (“FCC”) is granted the authority to prescribe regulations to implement the Act’s requirements
- The FCC recently revised and amended its regulations with certain changes having become effective in October 2013.

Recent Regulatory Changes (cont.)

- The FCC now requires prior written consent to be received for automatic telephone dialing systems and artificial or prerecorded voice telemarketing or advertising calls to cell phones and residential lines
- Eliminates exceptions for prohibited calls, including elimination of established business relationship exception for artificial or prerecorded voice calls to residential lines

Obtaining Prior Written Consent

- Prior written consent must be clear and conspicuous
 - Clearly visible in appropriate offsetting font, not buried in terms and conditions language
 - Must evidence the member's agreement

Physical Forms

- Suggested Disclosure – **Paper Forms**
- By signing below, I consent to receive phone calls from [Credit Union Name], regarding [Credit Union's Name] products and services, at the phone number(s) above, including my wireless number if provided. I understand these calls may be generated using an automated technology and that my consent is not required to make a purchase.
- Signature
- Consumers must provide their actual signature.
- Recommend having the consumer's name printed somewhere for correct identification (recordkeeping)

Physical Forms (cont.)

- Suggested Disclosure – **Online Forms**
- By checking this box and submitting this form, I consent to receive phone calls from [Credit Union Name], regarding [Credit Union's Name] products and services, at the phone number(s) above, including my wireless number if provided. I understand these calls may be generated using an automated technology and that my consent is not required to make a purchase.
- Clear and Conspicuous Disclosures
- Disclosures should be made in immediate proximity to the “Submit” button.
- Affirmative Action and Signature
- Electronic signatures require the consumer to take an affirmative action.
- The use of a “Submit” button and appropriate disclosure language is sufficient when form is used exclusively for obtaining consent.
- If form serves a broader purpose, a separate checkbox should be used.

Physical Forms (cont.)

- Suggested Disclosure – **Phone Calls**
- Mr./Mrs. [Consumer's Last Name], [Credit Union Name] may occasionally have products or services that we think may be of interest to you. Do we have your consent to call you at your wireless number (###-###-####) regarding our products and services? These calls may be placed using automated technology. Please reply "Yes" if we have your consent.
- The consumer provides a clear and unambiguous "Yes" for the consent to be valid.

Physical Forms (cont.)

- Suggested Disclosure – **Email/Texts**
- [Credit Union Name] may occasionally have products or services that we think may be of interest to you. When we have a product or service that we think you may be interested in, would it be OK for us to call you at your wireless number? If yes, please reply to this e-mail with the phrase “I consent,” your wireless number, and your name. By replying, you consent to receive calls at the wireless number you provide. These calls may be placed using automated technology.
- Prompt consumers to reply to e-mails/texts if they would like to receive calls and/or text messages from your credit union.
- The consumer’s reply must include his or her wireless number.
- Lenders should require consumers to reply “I agree” or “I consent” and type their name to constitute a signature.

Record Keeping

- Maintaining records of prior written consent is paramount
- The records may be scanned and stored electronically (in accordance with standard practice), or they may be stored in original hard-copy form
- In the event of litigation, prior written consent is the key affirmative defense

Class Action Basics

- Generally, to obtain certification of a class in federal courts and many state courts, a member of the credit union who is seeking to become the class's representative must demonstrate the following:
 - numerosity—the class is so numerous that joining all of the individual plaintiffs into one lawsuit is impracticable;

Class Action Basics (cont.)

- commonality—there are questions of law or fact common to all;
- typicality—the claims of the representative party are typical of all others; and
- adequacy—the representative party will fairly protect the interests of the others.

Class Action Basics (cont.)

- Upon successfully demonstrating those four elements (numerosity, commonality, typicality, and adequacy), the Court will enter an order certifying a class.
 - The order must define the class, class claims, issues, and appointment of class counsel.
- If the Court determines that the four elements were not successfully demonstrated, then the order denying class certification may be appealed only with the permission of the federal appellate court.

Class Action Basics (cont.)

- Notice – upon obtaining class certification, the members of the class must be notified of the following:
 - The nature of the action;
 - The definition of the certified class;
 - The class claims and issues;
 - That a member may enter an appearance through his or her own attorney if so desired;
 - That the Court will exclude any member from the class if requested;
 - The time and manner for requesting exclusion; and
 - The binding effect of a class judgment on members.

Class Action Basics (cont.)

- Form of Notice
 - Class members are entitled to due process protection, because their rights are being adjudicated on a class-wide basis. Accordingly, the Court, when approving a specific form of notice, must consider the interests of each class member; the claims and relief requested on a class-wide basis; the expense related to notifying the members; the ability of the parties to incur the associated expense; prejudice that might occur to members that do not receive notice; and the binding nature of any judgment on each class member.

Class Action Basics (cont.)

- Settlement, Voluntary Dismissal, or Compromise
 - The claims and issues of a certified class may only be settled, voluntarily dismissed, or compromised with court approval.
 - The following procedures must be performed:
 - The court must direct reasonable notice to all class members who would be bound;
 - If the proposal binds class members, the court may approve it only after it conducts a hearing and finds that it is fair, reasonable, and adequate;
 - The parties seeking approval must file a statement identifying any agreement made in connection with the proposal;
 - The court may refuse to approve a settlement unless it affords class members a new opportunity to request exclusion; and
 - Provision of class members with an opportunity to object to any proposal.

Consumer Class Action Example

- A credit union member obtained a HELOC secured by a deed of trust that required payment of a “reconveyance fee” when the loan was paid off. Upon refinancing, the member received a payoff statement that included a non-itemized \$85.00 Release Fee/Reconveyance. The fee included recording costs, a processing agent’s fee, and the credit union’s own \$26 processing fee. In her class action lawsuit, the member alleged that the \$85.00 fee was not specifically identified or authorized by the deed of trust and that the credit union’s \$26 processing fee was unfair and deceptive in violation of the State of Washington Consumer Protection Act. She requested damages for violation of the law. A class was certified, and the trial court entered judgment for her and 428 other class members on the WCPA claim related to the credit union’s \$26 reconveyance fee.
- The Court of Appeals of Washington reversed the trial court’s judgment, because the deed of trust did not define the “reconveyance fee,” and it was unclear whether it included the processing agent’s fee, the credit union’s fee, or both. The case was returned to the trial court for a trial on that issue. *Peterson v. Kitsap Community Federal Credit Union*. The fees and costs associated with such litigation are staggering.
- This case is an example of how a minor fee included in a loan agreement can cause costly class action litigation. The question becomes: Is there a simpler way to avoid being involved in class action litigation? The answer turns, in part, upon the scope of a recently decided United States Supreme Court decision.

Class-Action Waiver Provisions

- In *American Express Co. v. Italian Colors Restaurant*, the United States Supreme Court agreed to review the following issue: “Whether the Federal Arbitration Act permits courts ... to invalidate arbitration agreements [that] do not permit class arbitration of a federal-law claim.”
- **Holding:** The Federal Arbitration Act does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff’s cost of individually arbitrating a federal statutory claim exceeds the potential recovery.
- Credit Unions may consider reviewing their form agreements, analyzing their arbitration provisions, and potentially including waivers of class arbitration.

Class Action for Losses Due to Payment Card Information Data Breach

- Background

- The increased collection, accumulation, storage, use, and transmission of private and confidential information in electronic form by companies in diverse lines of business has resulted in greater vulnerability to data breaches and a significant increase in the volume and size of such breaches.
- Data breaches not only create embarrassment for, and damage the reputation of, the breached companies, but they also expose the breached companies to significant direct and indirect costs in addition to potential fines, penalties, and civil liability.
- Companies experience direct breaches of their own data, as well as indirect breaches that occur to third-parties that collect, accumulate, store, use, or transmit private and confidential information.
- State and federal statutes and regulations have proliferated in response to the increased disclosure of personally identifiable information, which creates the possibility of identity theft, financial loss, and reputational damage. As the statutory and regulatory landscape expands and evolves, compliance is becoming more challenging and fines and penalties have begun, and will continue, to impact companies.
- Moreover, the plaintiffs' class action bar has pursued vigorously novel legal theories to demonstrate standing to sue and demonstrate cognizable damages that have been incurred on a class-wide basis. In short, the practice area has grown rapidly, continues to grow rapidly, and evolves almost daily.

Payment Card Information Data Breach (cont.)

- Payment Card Information (“PCI”) data has significant value on the black market.
- As a result, the card industry has devised its own standards, which must be followed.
 - Payment Card Industry Data Security Standards (PCI-DSS)— requirements created to protect the security of electronic payment card transactions that include personal information of the cardholders. Basically, industry standards applicable to entities that store, transmit, or process cardholder data. Requirements include security management, policies and procedures, network architecture, and software design. If a breach occurs and it is determined that the standards were not followed, the penalties and fines are very substantial.

Payment Card Information Data Breach (cont.)

- Target Breach
 - On December 19, 2013, Target posted a message on its website stating that it experienced a data breach between November 27, 2013 and December 15, 2013, during which approximately 40 million customers' payment card information was exposed.
 - Second largest data breach of this variety in history.
 - If it is shown that Target was not in compliance with PCI standards, then not only will Target be fined by the payment card industry, but it also likely will be on the hook for significant defense costs and civil litigation damages already claimed in class action lawsuits filed across the country.

Credit Union Files Class Action Against Target

- At the beginning of this month, Alabama State Employees Credit Union (“ASECU”) filed a class action lawsuit against Target over costs and losses caused by its payment card information breach.
- ASECU seeks to represent a class of all financial institutions that incurred losses as a result of Target’s breach.



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