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Capital One Sets Record With $75M TCPA Deal

In what is believed to be the largest Telephone Consumer Protection Act (TCPA) settlement on record, Capital One Bank, related companies, and their third-party collection vendors reached a $75 million deal to settle suits on behalf of a class of customers who received calls at over 21 million distinct cellular telephone numbers.

The case involved four class action suits consolidated in Illinois federal court. The plaintiffs alleged that the defendants – Capital One, and vendors Capital Management Systems, Leading Edge Recovery Systems, and AllianceOne Receivables Management – violated the TCPA by making prerecorded calls to cellular phones without prior express consent.

Although the bank argued that its customer agreements provided it with the necessary consent to make the automated calls at issue, the parties reached a deal after multiple mediation sessions and months of negotiation.

Pursuant to the settlement agreement, Capital One will pay approximately $73 million to a settlement fund with the other defendants adding around $2 million. A nationwide class of plaintiffs who received a challenged phone call attempting to collect on a credit card debt that was placed either by Capital One (between January 18, 2008, and June 30, 2014) or by the vendor defendants (between February 28, 2009, and June 30, 2014) are eligible to submit a claim.

Class members are entitled to one cash award each, calculated by a formula detailed in the agreement. The parties have estimated that the cash payout will be between $20 and $40 for each class member submitting a valid claim.

While individual cash awards will thus be small (and do not take into account the number of calls received), the parties told the court that "the core relief" under the settlement was Capital One's business practice changes. "As a benefit to all Settlement Class Members, Capital One has developed and implemented significant enhancements to its calling systems designed to prevent the calling of a cellular telephone with an autodialer unless the recipient of the call has provided prior express consent," according to the joint motion in support of preliminary approval of the deal.

Class counsel will not face objections to attorneys' fees up to 30 percent of the settlement fund, and class representatives will each seek $5,000. The final approval hearing is set for December 2014.

To read the proposed settlement agreement in *In re: Capital One Telephone Consumer Protection Act Litigation,* click here. Link: I sent PDF

To read the court's order granting preliminary approval, click here. Link: I sent PDF

Why it matters: U.S. District Court Judge James F. Holderman granted preliminary approval of the settlement on July 29 allowing "the largest settlement cash sum – by far – in the 22-year history of the TCPA," according to the memorandum in support of the motion for preliminary approval. However, while the settlement fund is large, with over 21 million telephone numbers covered in the settlement agreement, the anticipated payment per class member is nowhere near the $500-per-call violations often sought for violations of the TCPA. This case will be one to watch to see if final approval is indeed achieved.

Sixth Circuit: State Procedural Rules Don't Prohibit TCPA Class Actions

A Michigan procedural rule does not preclude TCPA class actions, the Sixth U.S. Circuit Court of Appeals has ruled, refusing to dismiss a lawsuit and affirming class certification.

In yet another unsolicited facsimile TCPA case based on the operations of fax blaster Business to Business Solutions ("B2B"), American Copper & Brass sued after receiving an unsolicited fax ad in 2006. Defendant Lake City had paid $92 for B2B to send roughly 10,000 faxes advertising its pipe-thread sealing tape.

A federal district court granted class certification and granted American Copper's motion for summary judgment. Lake City appealed, arguing that the class definition included members who lacked standing to assert claims under the statute because it was not clear whether they actually received a fax. In addition, Lake City said TCPA class actions are prohibited in the state per Michigan Court Rule 3.501(A)(5).

Neither argument swayed the federal appellate panel.

American Copper provided an expert witness report which concluded, based on a review of B2B's fax records, that a total of 10,627 successful transmissions of the Lake City ad were sent and received by 10,627 unique fax numbers. Lake City questioned the phrase "successfully sent," suggesting that a fax could be sent and not actually received. But the panel said the defendant "offers no support for this purported distinction," and that any suggestion that B2B's records were erroneous was "wholly speculative."

Turning to Michigan's Court Rules, the panel again rejected Lake City's contention. MCR 3.501(A)(5) provides that "[a]n action for a penalty or minimum amount of recovery without regard to actual damages imposed or authorized by statute may not be maintained as a class action unless the statute specifically authorizes its recovery in a class action." Because the TCPA

contains a damages provision providing for a minimum amount of recovery ($500 per violation) without regard to actual damages, Lake City argued that TCPA suits cannot be maintained as class actions in Michigan state or federal court.

But the panel disagreed. Interpreting the TCPA's language that "[a] person or entity may, if otherwise permitted by the laws or rules of court of a State," file suit under the statute, the court said the provision did not indicate that Congress intended for state procedural rules to apply in all TCPA suits.

"The better view of this state-oriented language relied on by Lake City, however, is that Congress simply intended to 'enable[] states to decide whether and how to spend their resources on TCPA enforcement,' " the panel said. Although recognizing that this interpretation could lead to forum shopping, the court then affirmed class certification and summary judgment for the plaintiff.

To read the decision in *American Copper & Brass v. Lake City Industrial Products*, click here.

Why it matters: The Sixth Circuit disagreed with Lake City's contention that Michigan state rules barred TCPA class actions, particularly in light of the Supreme Court's 2012 decision in *Mims*. The decision is in line with a ruling from the Second Circuit, which reversed a New York federal court judge who twice found that New York's Civil Practice Law and Rules prevented TCPA class actions in federal court. The trend is thus to allow TCPA classes to proceed, even if state law would prevent such actions from being brought.

Hospital Admissions Form Evidenced Consent for Later Collections Calls, Southern District of California Court Holds

A plaintiff agreed to be contacted on her cell phone when she completed paperwork upon admission for medical services, a California federal court has ruled when dismissing a putative class action complaint alleging violations of the TCPA.

Seeking treatment for possible food poisoning, Jane Hudson and her child went to Sharp Grossmont Hospital in San Diego. Upon admission, Hudson received and acknowledged several documents, including an admission agreement, an attestation, and a notice of privacy practices. In the attestation, Hudson verified her cell phone number as her sole point of contact with Sharp by initialing the number and signing the same page.

The privacy notice stated that Sharp might disclose information for billing purposes. A dispute about payment arose and Sharp made a series of autodialed calls to Hudson's cell phone, some referencing her payment and other payments for her child. Hudson filed suit alleging the calls violated the TCPA, and both parties moved for summary judgment.

Finding both that Sharp had prior express consent to call Hudson's cell phone and that the purpose of the calls was within the scope of consent, U.S. District Court Judge Michael M. Anello sided with defendant.

The hospital provided evidence that its admissions policies were followed with regard to Hudson and her paperwork, the court noted. Relying upon Federal Communications Commission regulations – and not *Mais v. Gulf Coast Collection Bureau Inc.,* a Florida case with similar facts that the judge described as "an outlier decision" – the court said Sharp "provided substantial evidence" that it had prior express consent to call Hudson, particularly as she conceded in her deposition that she may have provided her number and simply forgot.

Hudson's argument that Sharp must have obtained her number from another source was "wholly speculative," Judge Anello wrote, noting that her initials appeared directly adjacent to her telephone number on the attestation form, which she also signed. Such "verifying" of a cellular number "does not substantively differ from 'providing' that number for purposes of determining prior express consent," the court said.

Turning to the scope of Hudson's consent, the court rejected her contention that it was limited to phone calls regarding test results or medical information. The TCPA does not require that calls be made for the exact purpose for which the number was provided, Judge Anello said, but must bear "some relation" to the product or service.

"The Court concludes that the subject calls were within the scope of consent," he wrote. "Regardless of what Plaintiff may have believed regarding Sharp's reason for having her cellular telephone number, the Court finds that the calls were directly related 'to the product or service for which the number was provided.' "

Did Hudson revoke her consent? She claimed that she did during multiple phone conversations with Sharp representatives, although she agreed that she never stated "Don't call me on this cell phone anymore!" or words to that effect. The court bifurcated the calls she received and concluded that Sharp stopped placing calls to Hudson regarding her own account after she confirmed healthcare coverage.

As for calls relating to her child's account, Judge Anello reviewed the transcripts and found "no evidence of any agreement to actually remove Plaintiff from the dialer, nor did Plaintiff ask to be removed from the dialer." The Sharp representative indicated that she did not think Sharp should be calling Hudson, but merely stated that she would send an e-mail to see if Hudson could be taken "off the dialer," the court noted.

"There is no evidence that Plaintiff demonstrated any unwillingness – through words or conduct – for Sharp to continue calling her cellular telephone number to obtain payment," the judge wrote. "Although the Court recognizes that Sharp agents believed Plaintiff should not have been called, those agents merely indicated they would 'send an e-mail' or 'suppress calls' for a period of time."

To read the order in *Hudson v. Sharp Healthcare,* click here.

Why it matters: The *Hudson* decision takes a different approach than that recently seen in a Florida federal court, and affirms that consumers provide consent for later calls by verifying their contact information. More importantly, the *Hudson* decision held that affirmative steps can aid in

arguments about consent to receive calls at a telephone number, such as having a customer initial by his or her phone number with a signature on the same page. The court also adopted a broad interpretation of the scope of a customer's consent and set a standard for revoking consent.

Massachusetts Judge Holds That Capability, Not Actual Use, Determines Question of ATDS

Courts across the country have been split on whether it is the hypothetical capacity of equipment to autodial, or the actual use of that equipment, that renders calling equipment an "autodialer" under the TCPA. Recently, a federal court judge in Massachusetts held that a predictive dialer that has the capability to store numbers constitutes an automated telephone dialing system ("ATDS") under the TCPA – regardless of whether the defendant took advantage of that feature.

To make its collection calls, defendant Diversified utilized a telephone system operated by cloud-based server LiveVox. The LiveVox system could dial numbers sequentially, but Diversified did not use that function. Diversified argued that because it did not make use of the sequential dialer, or store the numbers in the LiveVox system for more than a single day, the equipment it used for its calls failed to meet the definition of an ATDS in the statute.

But the court disagreed.

"The undisputed evidence here clearly establishes that the LiveVox system has the capacity to store telephone numbers," said U.S. District Court Judge F. Dennis Saylor IV. "[I]t is undisputed that the system stores numbers for at least the course of a single day. The TCPA, on its face, does not require storage for any length of time. In any event, the system here has the capacity to do so."

Calling the question of whether the LiveVox system has the capacity for random or sequential number generation "a somewhat murkier question," Judge Saylor nonetheless said Diversified's evidence was insufficient to raise a dispute of material fact to prevent summary judgment. "[I]t is undisputed that LiveVox is a 'predictive dialer' that dials from lists of numbers," the court said. "The FCC rulings specifically account for the fact that technology has developed such that lists of numbers are more cost-effective than random or sequential numbers. The agency concluded that a 'predictive dialer' that relies on lists of numbers qualifies as an ATDS under the TCPA," a ruling entitled to deference.

Granting summary judgment for the plaintiff, the court said a question remained as to whether Diversified could be on the hook for treble damages under the statute, questioning whether the violations were willful or not.

To read the order in *Davis v. Diversified Consultants, Inc.*, click here.

Why it matters: The battle over ATDSs continues. Disagreeing with other courts, the Massachusetts court believes that FCC regulations establish that the capacity to store or function as a predictive dialer is sufficient to meet the statutory definition of an ATDS, no matter how a

company uses the dialing system. In addition, the court noted that the TCPA does not define the length of time a number must be "stored" by a system, and the period of a single day is therefore sufficient. Not all courts agree with the *Davis* decision: a Pennsylvania federal court reached a contrary conclusion earlier this year. Seeking clarity, multiple entities have filed petitions with the FCC for clarification of the issue, but companies face continued uncertainty from the courts until the agency chooses to respond.