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TCPA & Consumer Calling

Monthly TCPA Digest

FEBRUARY 2018

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We are pleased to present the latest edition of our *Monthly TCPA Digest*, providing insights and news related to the Telephone Consumer Protection Act (TCPA). This month's issue examines an FCC rulemaking proceeding concerning whether providers should be required to establish a challenge mechanism for incorrectly blocked robocalls. In addition, we examine the factors defendants should consider in deciding whether to make an early offer of judgment (a "Rule 68" offer) in a TCPA class action and relevant case law about early offers.

If you have suggestions for topics you'd like us to feature in this newsletter, or any questions about the content in this issue, please feel free to reach out to an attorney on Mintz Levin's TCPA and Consumer Calling Practice Team. You can click here to subscribe to the *Monthly TCPA Digest*.

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Part I – TCPA: Regulatory

Commission Releases and Actions

BY ELANA R. SAFNER

The Federal Communications Commission's November 16, 2017 *Report and Order* aimed at combatting unlawful robocalls was published in the Federal Register on January 12, 2018 and becomes effective on February 12, 2018. More details on the *Report and Order and Further Notice of Proposed Rulemaking* ("FNPRM") can be found in our November TCPA Digest.

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On January 23, 2018, the comment window closed on the FNPRM which accompanied the November 16 *Order*. In the FNPRM, the Commission sought comment on whether providers should be required to provide a formal challenge mechanism for incorrectly blocked robocalls and whether it should implement reporting obligations on all voice service providers in order to measure the effectiveness of industry efforts. Many commenters expressed skepticism with the Commission's approach, instead supporting a mitigation process and requesting flexibility to pursue industry-led efforts. The Federal Trade Commission's staff submitted a comment in the proceeding arguing that, because the types of calls that can be blocked are very limited, the record does not support requiring "a formal challenge mechanism for errors resulting from provider-based call blocking authorized by this *Report and Order*." In contrast, companies which interface directly with consumers as part of legitimate business or marketing transactions voiced concerns regarding the potential for frequent and inaccurate call labeling leading to the incompletion of their calls. They asked the Commission to adopt a simple and streamlined policy that would ensure the completion of legitimate business calls. Reply comments will be due on February 22, 2018.

Additionally, the FCC released a Public Notice announcing a February 26, 2018 meeting of the Consumer Advisory Committee, where it is expected to consider a recommendation from its Robocalls Working Group regarding call authentication.

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Part II – TCPA: Class Action & Litigation Updates

For a TCPA Class Action Settlement Strategy to Stick, a Rule 68 Offer Remains a Valuable Tool

BY NATALIE A. PRESCOTT

When a business is faced with a TCPA or a privacy class action, getting rid of the lawsuit is its number one priority. This is why it is important to entrust the case to highly experienced counsel, well versed in defending class actions. Together, the lawyers and the clients can work on developing the best approach for defending against TCPA allegations. The strategy varies widely, depending on the merits of the case and whether the plaintiff and their lawyers are open to an early and reasonable settlement. In many such cases, however, an early offer of judgment (a "Rule 68" offer) should continue to be a part of the case strategy from its early stage.

The offer of judgment gives any defendant in a federal court (but not the plaintiff) the right to "serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued." Fed. R. Civ. Proc. 68. If the plaintiff accepts the offer within 14 days, the case ends, and the "clerk must then enter judgment." *Id.* If an offer is not accepted, it "is considered withdrawn, but it does not preclude a later offer." *Id.* However, if a plaintiff who failed to accept a Rule 68 offer later loses — or prevails, but obtains a judgment that "is not more favorable than the unaccepted offer, [the plaintiff] must pay the [defendant's] costs incurred after the offer was made." *Id.*

In other words, Rule 68 of the Federal Rules of Civil Procedure provides the defendants with an opportunity to attempt to dispose of a costly lawsuit in just two weeks (if the plaintiff accepts the offer). The purpose behind this rule is to encourage early settlements and to avoid protracted litigation. It is especially effective in TCPA class actions that may not have merit, insofar as it allows

a defendant to offer the plaintiff to settle for a specified sum, plus costs or including costs. If the plaintiff realizes that his case is frivolous, it is in his best interest to accept. Then the case ends, and the defendant is responsible for the amount it had offered. Depending on the wording of the offer, the defendant may also have to pay an additional amount for the costs the plaintiff may have incurred to date. *See McCain v. Detroit II Auto Fin. Ctr.*, 378 F.3d 561, 563-64 (6th Cir. 2004) (quoting *Marek v. Chesny*, 473 U.S. 1, 6 (1985) ("If an offer recites that costs are included or specifies an amount for costs, and the plaintiff accepts the offer, the judgment will necessarily include costs; if the offer does not state that costs are included and an amount for costs is not specified, the court will be obliged by the terms of the Rule to include in its judgment an additional amount, which in its discretion, it determines to be sufficient to cover the costs.") This is why making an early and clearly worded offer of judgment is often most advantageous.

If, on the other hand, the plaintiff rejects or ignores the offer, the defendant now has greater leverage. When and if that defendant later prevails (or if the plaintiff wins but recovers less than was offered), the plaintiff then becomes liable for some of the defendant's post-offer litigation costs allowable by Rule 54 of the Federal Rules of Civil Procedure. This includes, for example, such costs as photocopying, transcripts, filing fees, mileage fees paid to the witnesses, and, most notably, the very costly expert witness fees.

Given its potential cost-shifting "bite," it becomes readily apparent that the greatest advantage of the Rule 68 offer is that it can end litigation quickly and efficiently. It is especially beneficial in cases where liability is clear or in lawsuits that are obviously frivolous. Rule 68, to a certain degree, allows the defendant to control the outcome of the litigation at its early stage, before the costs and the attorney's fees skyrocket. As discussed, it also creates significant leverage for the defendant whenever the plaintiff fails to accept the offer. This, in turn, may help settle the case more favorably at a later stage of the litigation.

Admittedly, a Rule 68 offer in class action cases previously provided far more advantages to defendants than it does today. In the past, class action defendants used Rule 68 rather creatively — tendering a settlement offer to the named plaintiff at the pre-certification stage, in the hopes that it would moot all class claims entirely. Though some lower courts accepted this reasoning, the Ninth Circuit ultimately rejected this approach in a TCPA class action. In *Pitts v. Terrible Herbst*, Inc., 653 F.3d 1081 (2011), it held that an unaccepted Rule 68 offer did not moot the class action complaint. Rather, "[i]f the named plaintiff can still file a timely motion for class certification, the named plaintiff may continue to represent the class until the district court decides the class certification issue." *Id.* at 1092. As the court explained, "an offer to one cannot moot the action because it is not an offer to all." *Id.* at 1090.

One year later, the U.S. Supreme Court decided *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2012). Although *Genesis* was an FLSA class action, which the Court observed was "fundamentally different" from Rule 23 class actions, the Court impliedly agreed with the lower court that the defendant's offer of judgment that fully satisfied the named plaintiff's claim rendered the claim moot.

Finally, in 2016, the Supreme Court revisited this issue, giving it a closer look in *CampbellEwald Co. v. Gomez*, 136 S. Ct. 663 (2016). In *Gomez*, the Court held that an unaccepted Rule 68 offer does not moot the claims of the lead plaintiff because an unaccepted offer has no binding effect. The Court left open the question raised by the dissent — whether the result would be different if the defendant took an extra step of depositing the actual sum offered into the named plaintiff's account

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or the court’s registry. Since then, various lower courts around the country have grappled with this issue, though many have rejected this creative approach as well.

Nevertheless, despite the recent wave of cases limiting the power of an offer of judgment in the class action context, Rule 68 offer continues to be a part of a strong and successful litigation strategy. In a case where the named plaintiff does not wish to risk having to pay the defendant’s costs later, he or she may simply decide to accept an offer and thus walk away from the case. If no other named plaintiffs remain, the putative class action can then be dismissed. In some TCPA cases and privacy class actions, a Rule 68 offer, therefore, continues to be a powerful tool that businesses and the defense counsel can use to resolve class actions prior to certification.

About Our TCPA & Consumer Calling Practice

In an economy where timely and effective communication with both current and prospective customers is vital to the success of nearly every business, modern technology, such as autodialers, recorded and artificial voice messages, text messaging, and e-mail provide companies the ability to reach large numbers of people with increasingly smaller up-front costs. But, companies cannot afford to overlook the hidden costs of using these mass communication methods if the many regulations that govern their use are not carefully followed.

Companies have been hit with class action lawsuits under the Telephone Consumer Protection Act (TCPA) for tens or even hundreds of millions of dollars. Mintz Levin's multidisciplinary team work tirelessly to help our clients understand the ever-changing legal landscape and to develop workable and successful solutions. TCPA rules can apply to certain non-sales calls, such as a recorded call to employees about a new work schedule or a text to customers about a new billing system. We advise on how to set up calling campaigns that meet state and federal requirements as well as how the Federal Communications Commission and the Federal Trade Commission apply their rules on calling, faxing, and texting. Given the uncertainties surrounding the TCPA as a result of the FCC's extensive and confusing rulings, we work with clients across many industries, health care, retail, communications and financial services, on matters relating to the following issues:

Compliance: Our TCPA team routinely advises companies on compliance with federal and state sales and marketing requirements. We also know what type of consumer consent is needed for each type of call and how specific consents must be worded. We know when and how to apply a do-not-call list and when and how an opt-out provision must be afforded.

Consumer class action defense: We've been called upon to handle TCPA class actions across all industries and in federal courts across the nation. Our seasoned litigators know the serial plaintiffs and counsel well and are unfazed by their schemes. Fortunately for our clients, our team has succeeded in winning at the motion stage or earlier in the vast majority of TCPA matters we have defended. That is what truly sets us apart. And if a case must go to trial, we have the experience and strength to follow it to the end.

Insurance coverage disputes: We know the arguments insurers use to deny coverage in TCPA suits because we've defended against them. More important, we have a long track record of convincing carriers to fund the defense of these actions and, in some cases, to pay significant

portions of settlements. Our goal is to help secure insurance protection and to see to it that carriers make good on their coverage obligations when a claim arises.

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