

TUESDAY, AUGUST 12, 2014

## Unwanted calls, texts inspire more lawsuits



Kevin Lee / Daily Journal

Rodger R. Cole, a Mountain View-based partner with Fenwick & West LLP, attributes the large increase in the number of suits alleging Telephone Consumer Protection Act violations to the law being a strict liability statute.

By Hadley Robinson  
Daily Journal Staff Writer

**W**hen the Los Angeles Clippers encouraged fans to send messages that might be featured on the big screen at a basketball game, most didn't realize the team would store and later use the phone numbers to send promotional messages. The fans sued the Clippers for sending them unauthorized texts, violating the Telephone Consumer Protection Act, or TCPA, and recently reached a \$5 million deal that gives each fan two basketball tickets or a voucher for merchandise.

A group of customers at Best Buy Co. Inc. were also upset by unwanted calls and sued the electronics retailer for automatically signing them up for a loyalty program, then contacting them repeatedly about it. The company settled for \$4.5 million in June.

The companies join pizza chains, automotive services and banks that have settled lawsuits involving the TCPA for millions of dollars in the past year. Two weeks ago, Capital One Financial Corp.

agreed to pay \$75 million, the largest settlement to date, to resolve a putative class action claiming the financial institution autodialed people without their consent.

The rapid growth of TCPA lawsuits reveals a modern rift between consumer privacy and companies' desire to target advertising directly to customers' cell phones. The statute, with damages of up to \$1,500 per call, has become a powerful tool for plaintiffs' attorneys, who first

took on cases for consumers barraged with debt collection calls, but have now filed lawsuits against any company directly marketing to customers through unwanted messages.

Defense attorneys say plaintiffs are taking advantage of the large monetary awards to apply an old law to new technology.

"It's a lucrative area for the plaintiff's bar because the statute is a strict liability statute, with no injury required,"

said Rodger R. Cole, a Mountain View-based partner at Fenwick & West LLP. “The plaintiff lawyers use the TCPA against technology that wasn’t even contemplated by the smartest of entrepreneurs when the TCPA was passed.”

TCPA lawsuits have proliferated in recent years, growing by 69 percent in 2013 from the year before, with no sign of slowing this year. In 2008, plaintiffs filed 14 cases involving the 23-year-old statute. Last year that number grew to 1,862 filings, and close to 1,400 have been filed already in 2014, according to WebRecon LLC, a company that tracks consumer litigation trends.

“There has been a significant explosion of these cases because they involve any company that is communicating in large volumes with consumers,” said Abraham J. Colman, Los Angeles-based partner at Reed Smith LLP.

The TCPA provides for statutory damages of \$500 per call, and that number triples if it was a willful violation of the law.

Though many cases arise from people being hounded by debt collection agencies with dozens of calls per day, the TCPA is now being used to combat messages or calls from any company trying to directly market to customers’ phones.

“The consuming public is using their cell phones more frequently than their laptops or desktops,” said Ari N. Rothman, a partner at Venable LLP in Los Angeles. “As a result, companies — from brick and mortar stores to start up technology companies — are want-

ing to get consumers’ attention through mobile devices.”

Consumer attorneys say the TCPA is a potent weapon to help their clients get relief from invasions of privacy in the form of incessant phone calls and messages.

“This is really about stopping the most abusive practices and stopping the situation where somebody is getting tens or hundreds or thousands of calls without their consent at all,” said Daniel M. Hutchinson, a San Francisco-based

partner at Lieff Cabraser Heimann & Bernstein LLP who helped negotiate the recent Capital One settlement on behalf of a proposed class.

The law arose out of a desire to slow the amount of calls people received on their home phones in the evening and during dinner. Companies increasingly used automatic dialing technology to make the calling more efficient.

The law was also designed to prevent junk spam faxes, which were eating up people’s ink and tying up their phone lines. In recent years, the law extended to text messaging, broadening the litigation.

“Now it’s being applied to new technologies which in my view are relatively harmless,” Cole said. “A text message saying you have a doctor’s appointment or an oil service next week is something I like, not an invasion of privacy.”

Telemarketing, or calling or texting individuals is not in itself illegal, but there are several rules under the TCPA. Companies are not allowed to use automated dialing systems to contact individuals

and they need consent.

A clarification provided by the Federal Communications Commission in October 2013 specified prior, written consent is necessary for debt collection.

But defense attorneys are looking for more clarity, and have had some success

staying proceedings while the FCC considers petitions on issues such as what constitutes prior consent and the definition of an automated dialing system. They argue if a phone number is given to a company, consent is implied.

Attorneys for consumers see less need for more input from the FCC.

“I honestly don’t see it as an effort to clarify but rather to change what already is clear,” Hutchinson said about the petitions pending.

Brian S. Kabateck, a Los Angeles-based consumer attorney at Kabateck Brown Kellner LLP said these lawsuits are successful because so many people have experienced such calls and messages.

“The statute itself is a perfect recipe for a plaintiff class action lawyer,” Kabateck said. “It has something people actually care about, even judges don’t like these calls. They’re bothersome, troubling and they invade your privacy.”

[hadley\\_robinson@dailyjournal.com](mailto:hadley_robinson@dailyjournal.com)

TCPA cases filed in US from 2008-13	
2008	14
2009	31
2010	345
2011	825
2012	1,101
2013	1,862
TCPA cases filed in California from 2010-13	
2010	27
2011	45
2012	141
2013	313
Source: WebRecon LLC	

---

The plaintiff lawyers use the TCPA against technology that wasn’t even contemplated by the smartest entrepreneurs when the TCPA was passed.

---

- Rodger R. Cole