

Am Law Firms See Opportunity in Rising TCPA Tide

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Annoyed by what they believe is an onslaught of unsolicited telemarketer calls, consumers have increasingly been fighting back over the past few years by bringing class actions against companies under the Telephone Consumer Protection Act (TCPA). As a result, some Am Law firms have begun to market their expertise in the area, including at least two that have created practice groups dedicated to the defense against TCPA consumer class actions.

Locke Lord and Reed Smith have both launched such practice groups this year. And though Chicago-based financial services litigator Henry Pietrkowski—one of the leaders of Reed Smith's TCPA group—says he and other Reed Smith attorneys have been doing work related to the act for several years, what he describes as the recent "explosion of cases" convinced firm leaders that the creation of a formal practice group was warranted. Reed Smith's website now lists more than 35 attorneys who are a part of the firm's TCPA group.

Thomas Cunningham—the leader of Locke Lord's class actions practice group, which includes the newly formed I9-lawyer TCPA section—agrees that such cases are the latest to dominate a consumer class action category that tends to be cyclical. "You see a certain kind of case or a certain statute that plaintiffs lawyers sort of fall in love with, and the latest darling of the plaintiffs' class action bar is the TCPA," Cunningham says.

The statute itself dates to 1991 and was enacted to give consumers a reprieve from overzealous telemarketers—particularly those employing automatic telephone dialers. The point is to prevent consumer companies from making unsolicited phone calls or sending faxes to any consumer with whom the company has no prior business relationship or who has specifically requested to be placed on a so-called Do Not Call list.

Martin Jaszczuk, who heads Locke Lord's TCPA class action practice section, says early litigation in the area mostly involved unwanted faxes. As technology evolved, he says, the work "began to include cellphones, and now the hottest area is text messages." (In 2009 the U.S. Court of Appeals for the Ninth Circuit found that text messages sent to consumers by companies and advertisers fall into the same category as phone calls and are therefore covered by the TCPA.)

According to WebRecon, an online tracker of litigation data, the number of TCPA-related claims filed in 2012 increased 34 percent compared to the previous year and was more than triple the number

brought in 2010. Cunningham attributes the uptick to plaintiffs counsel and their clients seeing TCPA cases as "relatively easy money." The draw for the lawyers bringing the case, he says, is that there is no real cap on damages in such suits, meaning class actions can seek big money and result in major settlements.

Each TCPA violation—each individual text message, fax, or call—can result in damages from \$500 to \$1,500, and there is no limit on the number of alleged violations that can be included in an individual suit. Cunningham says it is "very rare" to see a TCPA case that involves fewer than 10,000 alleged violations and not uncommon to see that number climb into the tens of millions. Once the alleged violations are collected, the class claim is relatively simple for plaintiffs lawyers to plead, Cunningham says: If a client gets a call, text, or call that they did not agree to receive, then it is likely a claim will survive a motion to dismiss. "As long as the plaintiffs can get a claim past the summary judgment phase, that's going to force a large settlement," Cunningham says.

Scott Owens, a Hallandale, Florida-based attorney who focuses on TCPA and other consumer protection-related suits, agrees that the number of class actions filed under the TCPA has been on the rise in recent years, as more attorneys become aware of the statute and its guidelines. The lack of a cap on potential damages, he says, is indeed another likely reason for the spike. At the same time, he adds that the ability to stack violations of the act in each class action suit also makes the TCPA more effective at curbing illegal behavior by creating a substantial risk for companies that violate the statute. "I've seen people curb their behavior merely on the basis that they were served with a lawsuit," he says. "And that speaks volumes for the effectiveness of the TCPA."

Along those lines, Owens points specifically to a recent \$6 million settlement between Google and a plaintiff class—for which Owens served as cocounsel—in a suit brought over unsolicited text messages the Internet company sent consumers through a group-texting service called Disco, which was shut down not long after the suits were filed in 2011.

Given the high volume of TCPA-related violations that could result from a typical company's marketing campaign, the overall potential damages in a such case can escalate to staggering totals—one reason that defendants often look to settle. "A settlement in the range of \$20 million doesn't look all that bad when we're looking

at potentially company-crushing \$500 million to \$1.5 billion in damages," Jaszczuk says.

In May, Papa John's International agreed to pay \$16.5 million as part of the settlement of a TCPA class action stemming from claims that the pizza company sent unsolicited text messages to more than 200,000 individuals through a third-party marketer (\$2.86 million of that proposed settlement actually came in the form of certificates for free pizzas). Rival pizza maker Domino's Pizza has had its own TCPA trouble, reaching a settlement in January under which it agreed to pay \$9.75 million—some of which also includes coupons for pizza—to a class of customers in Alabama, Louisiana, and Mississippi who received telemarketing calls with a prerecorded advertising message. Dorsey & Whitney represented Papa John's, while Williams & Connolly advised Domino's.

Also in May, a federal judge in California granted final approval to a \$10 million settlement proposed by Steve Madden Ltd. related to a TCPA class action involving allegedly unlawful text messaging with a class size estimated at about 200,000 people. Attorneys at Wilson Elser Moskowitz Edelman & Dicker had been representing Steve Madden in connection with that case.

The Coca-Cola Co. is currently facing its own TCPA suits after another California federal judge rejected the beverage giant's bid to dismiss a class action claiming the company sent unwanted texts advertising Coke Zero and other Coca-Cola products. (Lawyers at King & Spalding and Wilson Turner Kosmo are representing the beverage company in that suit.) And a Reed Smith team that includes Pietrkowski is representing ePrize, a digital marketer, in connection with another ongoing TCPA case involving Coca-Cola advertisements, this one in Alabama, according to court filings.

In the past, Reed Smith has successfully defended clients such as Bank of America and Barclays Bank against TCPA claims related to phone calls and text messages. (Pietrkowski would not comment on ongoing litigation, but other court filings show he has also recently worked on TCPA-related litigation involving clients such as marketing company Search Cactus and a division of GE Capital.)

Meanwhile, court filings show that Locke Lord's current TCPA work has included defending clients such as DirectBuy, J.C. Penney Corporation, home security company Vivint, and Zydus Pharmaceuticals.

While Locke Lord and Reed Smith aren't the only Am Law firms tackling TCPA class actions, it appears they are the first two Am Law firms to form and market practice groups entirely devoted to the area (the two Locke Lord partners and Pietrkowski could not name any others).

"I realized that essentially 100 percent of my practice was devoted to TCPA class actions," says Jaszczuk, explaining what prompted him to approach Locke Lord's executive committee earlier this year with the idea of forming an official TCPA practice for himself and the other 10–15 attorneys across the firm's offices that are working on such matters. Cunningham and Jaszczuk expect the practice group to grow as TCPA litigation continues to increase and companies seek help with defense and compliance issues.

Pietrkowski says Reed Smith's practice extends beyond just litigation and compliance work, pulling in attorneys who specialize in FCC regulatory issues and insurance recovery work. Pietrkowski says many firms with lawyers who do TCPA work are not always able to handle companies' insurance recovery issues because of conflicts that arise from having insurance companies as clients. "There's only a few [firms] that do the underlying litigation and also are policyholder-side insurance lawyers," he says, adding that this allows Reed Smith to work every level of a TCPA case so clients don't have to bring in multiple firms.

Jaszczuk says companies that are "ahead of the game" tend to reach out to lawyers to make sure they are in compliance with TCPA rules before they get hit with a lawsuit. Generally, consumer companies are the ones named as defendants in TCPA cases, even if they are unaware that a third-party vendor working for them delivered an allegedly illegal call, text, or fax.

Cunningham says clients do sometimes succeed by claiming they were ignorant of a third-party contractor's violating actions and therefore should not be held accountable for alleged TCPA violations. (Fast food restaurant chain Taco Bell won dismissal of a TCPA case last year with such a defense.) But the FCC has also ruled in previous cases that "you can't hire someone else to violate the TCPA for you," Cunningham says, adding that companies have to at least make an effort to ensure that there are no violations when they hire outside contractors. "You can't put your head in the sand and go hire another company and say 'Go promote my company and I don't want to know anything about how you do it,'" Cunningham says.

Jaszczuk agrees that companies often get into trouble trying to walk that line. They don't want to look like they have too much control over contractors' behavior because that would open them up to various liabilities. But if they don't take action to ensure that the vendors they employ do not violate the TCPA, they can also be found liable on the basis of "willful blindness."

For companies worried about violating the TCPA, getting a customer's consent to be contacted is really the best defense, Pietrkowski says. He adds that some recent rulings have shown that simply proving a customer voluntarily handed over his or her phone number is enough to constitute prior express consent to receive messages from that company. "The number one thing is to try to get your customer's consent before you send out text messages or faxes or do any type of auto-dialing," he says.

But obtaining that consent may prove to be more difficult as soon as this fall, with new FCC rules set to go into effect in October. The regulatory body's new definition of "prior express consent" will include getting a signed, written agreement under which customers give the go-ahead to phone calls or texts relying on methods like auto-dialing and prerecorded messages.

Stricter interpretations of the TCPA could lead plaintiffs attorneys to become even more aggressive when it comes to bringing class actions, meaning that it's possible that an already busy practice area could soon get busier—and spur other Am Law firms to follow Locke Lord and Reed Smith's lead.