

Wrapping Paper Update: Avoid a Class Action Lawsuit Landing in Your Holiday Stocking



THIS SERIES OF UPDATES contains information regarding issues and trends facing the retail industry during the holiday season.

The holidays are quickly approaching, and shoppers are expected to spend in excess of \$600 billion this season. The holiday season is shaping up to become a winter wonderland for retailers. However, brands that market or conduct business by telephone and are not mindful of telemarketing and call-recording laws could wind up with a lump of coal in their holiday stocking in the form of a class action lawsuit.

In this installment of “Perkins Coie Wrapping Papers,” we discuss two key areas of class action litigation, the Telephone Consumer Protection Act and the California Invasion of Privacy Act, California’s state telephone recording and monitoring law, and the impact they can have on companies conducting business by telephone.

THE TELEPHONE CONSUMER PROTECTION ACT

The Telephone Consumer Protection Act (TCPA) sets ground rules for those who use a telephone to communicate with the public and for those who outsource telephone communications to third parties. The TCPA restricts the use of automatic telephone dialing systems (ATDS) (the definition of which has received broad treatment by some courts), artificial or prerecorded voice messages, text messages to cell phones, and unsolicited fax advertisements. The TCPA also regulates the content of artificial or prerecorded voice messages and requires those making commercial solicitation calls to residences to maintain and honor a Do Not Call list. Government enforcement and private TCPA lawsuits are on the rise, and several businesses have recently settled class action suits in the multimillion-dollar range.

One potential trap under the TCPA is the treatment of consent under the act. The TCPA requires a business to obtain prior express consent of the “called party” (the definition of which has been debated in the courts) to send nonmarketing text messages and make nonmarketing cell phone calls using an ATDS or artificial or prerecorded voice, with some exceptions. The definition of prior express consent is the subject of much litigation. In addition to prior express consent, a business needs prior express *written* consent where the call or text message “includes or introduces advertising or constitutes telemarketing,” again, with some exceptions. Prior express written consent is also required for advertising or telemarketing calls to residential lines made using an artificial or prerecorded voice.

The TCPA has been construed broadly in many respects, and both government agencies and courts have applied principles of vicarious liability, meaning those partnering with others who actually make the calls or send the texts could still be subject to claims in some instances. For example, if Brand X outsources its calling or texting campaign to ABC Marketing, if ABC Marketing calls or texts numbers without the required consent or otherwise violates the TCPA, Brand X would also likely be liable for the TCPA violations.

The TCPA provides a private right of action for injunctive relief, actual monetary loss or \$500 per violation and up to \$1,500 for knowing or willful violations. This means claimed statutory damages can be substantial, especially for large calling or texting campaigns.

Automatic Telephone Dialing Systems

An automatic telephone dialing system means equipment that has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers. 47 U.S.C. § 227(a)(1); 47 C.F.R. § 64.1200(f)(2). Courts have taken a broad view on “capacity,” meaning plaintiffs can claim violations where a defendant did not



actually randomly or sequentially store or call numbers, but rather used technology that had the capacity to do so. The FCC has been asked to provide clarification on this definition, and the definition is the subject of litigation, but businesses should exercise caution with respect to use of calling technology.

Prior Express Written Consent

Where written consent is required, it must: (1) clearly and conspicuously authorize the seller (i.e., the person or entity on whose behalf a call or message is initiated) to deliver or cause to be delivered, to the person called, ads or telemarketing messages using an ATDS or an artificial or prerecorded voice; (2) include the phone number to be called; (3) clearly and conspicuously disclose that consent is not required as a condition of purchase; and (4) be signed, although electronic means such as emails, text messages, and web form submissions may be sufficient. Businesses should review whether their calls are subject to the written consent requirement and if so, should obtain such consent. Businesses should also review record retention processes to ensure that records of consent are maintained.

CALIFORNIA INVASION OF PRIVACY ACT

Those doing business by telephone this holiday season should also be mindful of the California Invasion of Privacy Act (CIPA) and other related state laws. As interpreted, CIPA prohibits recording or monitoring of telephone calls without the consent of both parties.

CIPA includes a private right of action for injunctive relief and/or damages of either \$5,000 or three times actual damages, whichever is greater. Hundreds of cases have been alleged and/or filed in last two years, and this law is similar to the TCPA in that statutory damages claimed can be very high. While California's legislative history shows that the Legislature did not intend for CIPA to cover calls recorded for quality assurance, current case law is unsettled, and filings of cases with respect to such calls continue.

Risk of CIPA claims may be minimized in a number of ways, including by ensuring that a disclosure is provided at the outset of calls informing parties that the calls may be monitored or recorded for quality assurance, or by not recording calls where notice is not given.

HOW TO MINIMIZE RISK

There are several steps businesses can take to avoid TCPA and CIPA claims, including:

- Review calling and texting practices to determine whether they are subject to the TCPA and/or CIPA. Obtain and retain proof of prior express written consent for automated advertising and/or telemarketing calls or texts. Ensure that there is a mechanism for tracking and abiding by revocation of consents and opt-outs. Provide clear and prominent disclosures where recording or monitoring calls.
- Consider contracts with third parties relating to the provision of calling and texting services; review compliance and risk allocation provisions.
- Consider contracts with customers relating to calling and texting services, including disclosures and dispute resolution mechanisms, e.g., mediation, arbitration.
- Follow FCC and case law developments as well as industry guidance.

Retailers should consider reviewing their telephone and text practices to ensure compliance with the TCPA, CIPA and related laws, and minimize the risk of a lump of coal, in the form of a class action lawsuit, ruining this holiday season.

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