

THE BUSINESS OF SELLING ENERGY:

Navigating Pennsylvania Regulatory Compliance In Today's Post-Polar Vortex World and Avoiding or Defending Telephone Consumer Protection Act Claims

Presented by:

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November 29, 2016

INTRODUCTION & WELCOME

- ❑ ESCM is national law firm with over 365 attorneys located in offices throughout the eastern US
- ❑ State capabilities include: DE, DC, MD, MA, NJ, NY, OH, PA, RI, VA, WVA. Federal capabilities include FERC. Litigation capabilities include local, state, federal and appellate courts.
- ❑ ESCM has a strong utility practice group with well-rounded knowledge and expertise in both the industry and the policy/regulatory environment in which competitive suppliers operate. Energy & Utilities Blog:
<http://www.eckertseamans.com/stay-informed/blogs/energy-utilities>
- ❑ ESCM's Class Action Litigation Group handles a variety of product liability, consumer protection, and securities matters. In recent times, our group has helped clients defend against an increasing number of price gouging cases and TCPA claims.

PURPOSE OF PRESENTATION

- Navigating Regulatory Compliance Post Polar Vortex
 - Discussion of the Challenges for Suppliers
 - Summary of Lessons Learned and Lingering Issues
 - Tips for Handling PUC Matters Going Forward
- Good Practices to Avoid TCPA Actions and the Anatomy of Defending TCPA Claims
 - Overview of Telephone Consumer Protection Act
 - Regulatory, Compliance and Litigation Avoidance
 - Anatomy of TCPA Actions, Litigation Defense Tactics and Mitigation

NAVIGATING REGULATORY COMPLIANCE POST POLAR VORTEX

Presented by:

Karen O. Moury, Esq.

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Overview

- ❑ The Post Polar Vortex environment raises new challenges for suppliers
- ❑ Lessons have been learned and some issues are still lingering
- ❑ Suppliers need to:
 - Be Proactive
 - Be Prepared
 - Be Responsive



Polar Vortex – What Happened?

Extreme Weather

- Record-setting, prolonged low temps
- Demand records
- Significant generation outages
- Gas constraints and price spikes



8 of 10 Highest
Winter Peaks Set

Extreme Wholesale Energy Prices

- Natural Gas prices reached as high as \$123/MMBtu in Eastern markets (compared to \$4-5 a few weeks earlier)
- Load-weighted average LMP for January 2014 was \$126.75/MWh compared to \$38.67 for calendar 2013
- In January, instances where LMPs due to emergency conditions exceeded \$1800/MWh

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Polar Vortex – What Happened?



❑ Supplier Impact:

- Some suppliers fully exposed to wholesale volatility
- Other suppliers less impacted due to wholesale hedges

❑ Retail Customer Impact:

- Many customers on variable priced products experienced significant cost increases in January and February bill
- Record levels of informal complaints filed with PUC, rising from 473 in 2013 to 5,626 in 2014, over 1000% increase

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Polar Vortex – What Happened?

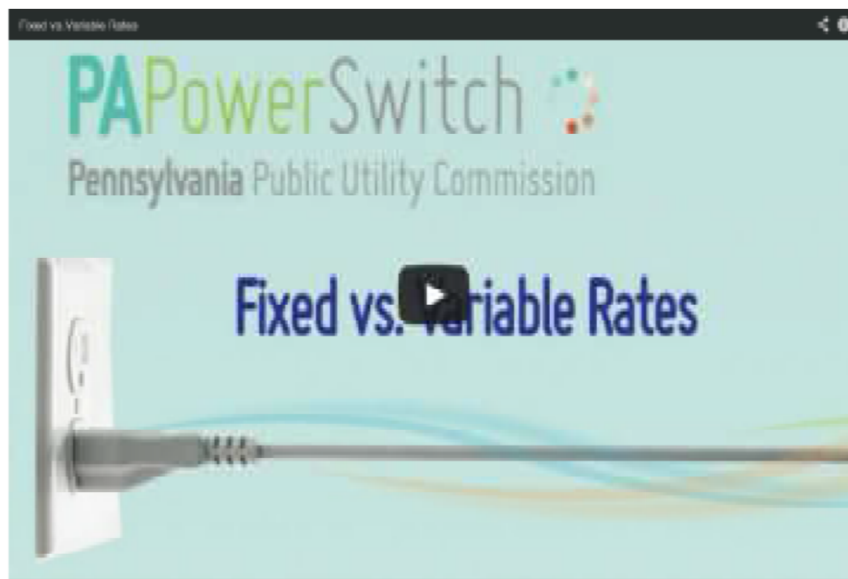
- Various Legal Proceedings
 - Aggressive Enforcement by State Commission Prosecutory Staff
 - Complaints Filed by Consumer Advocates
 - Attorney General Administrative Subpoenas
 - Class Action Law Suits
- Issues of Concern
 - Promises of Savings
 - Use of Variable Rates
 - Interpretation of Contract Requirements



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Polar Vortex – Pennsylvania Response

□ PaPUC Undertook Significant Consumer Education



- Issued consumer alert warnings to consumers about price fluctuations that could occur with variable contracts
- Published detailed information outlining difference between fixed and variable-priced contracts (text and videos)

See <http://www.papowerswitch.com/shop-for-electricity/understanding-fixed-and-variable-rates/>

□ Variable Rate Investigation Initiated March 4, 2014 (Docket No. M-2014-2406134)

Polar Vortex – Pennsylvania Response

□ New Customer Disclosure Regulations

- Purpose to ensure “adequate & accurate” information in an “understandable format”
- Applicable to residential & small business customers



□ Key New Provisions:

- Standardized Form to Provide Key Contract Terms
- Various Sections Specifically Aimed at Variable Rates
- Notices to Customers of Contract Expiration or Any Change in Terms

Polar Vortex – Pennsylvania Response

□ Standardized Form to Provide Key Contract Terms

Electric Generation Supplier Information	Name, telephone number, website, etc.; Plain language statement that EGS is responsible for generation charges.
Price Structure	Fixed or variable. If variable, based on what? If variable, how often is the rate expected to vary? If variable, give any applicable ranges/ceilings. If no ranges/ceilings, a plain language statement indicating this fact. If variable, describe when the customer will receive notification of price changes in relation to time of month, final monthly meter read, billing cycle or when the price takes effect.
Generation/Supply Price	\$/kWh or ¢/kWh. If variable rate, the first billing cycle's rate. Any introductory rate with length of term.
Statement Regarding Savings	Plain language that the supply price may not always provide savings to the customer
Deposit Requirements	Any deposit requirements necessary for a customer and any terms associated with that deposit, in plain language.
Incentives	Any bonuses, discounts, cashback, etc. offers and any associated terms, in plain language.
Contract Start Date	Plain language regarding start of EGS service (meter reads/billing cycles/etc.)
Contract Term/Length	In months, billing cycles, etc.
Cancellation/Early Termination Fees	Yes or no. If yes, describe the amount of the fee and how to avoid that fee, if possible.
Renewal Terms	Treatment of customer at end of contract. Timing of notices. No cancellation/early termination fees. In plain language.
Electric Distribution Company Information	Name, telephone number, website, etc. Plain language statement that EDC is responsible for distribution charges, as well as any emergencies/outages/etc.

Polar Vortex – Pennsylvania Response

□ Various Sections Specifically Aimed at Variable Rates

Explain any limitations
on price variability
OR
“clearly & conspicuously”
state that there is no limit
on price variability

Provide 24 months of
average monthly billed
prices via phone & internet

- If customer “auto-renewed” to month-to-month contract, then

30 days notice
required before
any price change

Polar Vortex – Pennsylvania Response

□ Notices to Customers of Contract Expiration Or Any Change in Terms

“Initial Notice”

- (1) To be sent 45-60 days prior (may send electronically)
- (2) Must include description of change & when become effective
- (3) Must include a statement when options notice will be sent
- (4) Statement regarding any cancellation fee & how to avoid fee

“Options Notice”

- (1) To be sent 30 days prior (must be first class mail)
- (2) Envelope must clearly state that it contains important info about electric supply contract
- (3) Statement of customer's options
- (4) Renewal contract price
- (5) Info re: PaPUC & OCA phone & internet

- If customer fails to respond, then fixed term contract may be converted to:

- (1) Month-to-Month Contract as long as there are no Cancellation Fees
- (2) Another Fixed Term Contract, as long as there is a customer-initiated cancellation provision allowing customer to cancel at any time with no cancellation fee

Challenges Of The Post Polar Vortex Environment

- Pennsylvania regulators appear to be somewhat less focused on promoting retail competition
 - They may be still be digging out from the Polar Vortex
 - Commissioners and staff have reviewed more complaints against suppliers than in the past
 - The composition of the PUC has changed, naturally shifting priorities and agendas
- The result - less activity aimed at moving forward on retail competition issues



Challenges Of The Post Polar Vortex Environment

- Office of Competitive Market Oversight's focus appears to have broadened



- Originally established as electric choice ombudsman

- Respond to questions from suppliers
- Facilitate informal dispute resolution between suppliers and utilities
- Monitor competitive market complaints

- Recent focus is on consumer protections

- When Dan Mumford was named Director in June 2016, Chairman Brown emphasized his lengthy career in the Bureau of Consumer Services and his work for OCMO in strengthening consumer protections after the Polar Vortex

Challenges Of The Post Polar Vortex Environment

- ❑ New rules that are more complex and more onerous
- ❑ Pennsylvania has always relied on secretarial letters and interim guidelines to supplement regulations
- ❑ As a result of the Polar Vortex litigation, we now have guidance and interpretations of rules appearing in individual supplier decisions



- PUC-approved settlements (includes ones approved with a record and others resolved informally)
- Administrative Law Judge decisions in consumer complaint cases approved without PUC review or modified by the PUC upon review

Challenges Of The Post Polar Vortex Environment

- Enforcement groups are on high alert watching supplier activities in the market
 - Office of Attorney General
 - Office of Consumer Advocate
 - PUC's Bureau of Investigation and Enforcement



- Media is watching for any missteps by suppliers
- Disgruntled former employees and others with business relationships (i.e. vendors) may be anxious to provide an anonymous tip

More Focus On Informal and Formal Complaints Filed Against Suppliers

- Since the Polar Vortex, the Commission has made informal and formal complaint activity against suppliers accessible by the public
 - Providing instructions on the website as to how to search a supplier by name for the number of formal complaints
 - Reporting the number of informal complaints filed against suppliers in its Utility Consumer Activities Report and Evaluation published on the PUC's website
- No evaluation is performed as to merits of complaints against suppliers



http://www.puc.state.pa.us/General/publications_reports/pdf/UCARE_2013.pdf

http://www.puc.state.pa.us/General/publications_reports/pdf/UCARE_2014.pdf

I&E Has Many Sources for Referrals

- ❑ Bureau of Consumer Services
- ❑ Office of Competitive Market Oversight
- ❑ PA Power Switch
- ❑ Legislature
- ❑ PUC Webmaster
- ❑ Media
- ❑ Electric Distribution Companies
- ❑ PUC Employees
- ❑ Anonymous Tips



Referrals to I&E

- Independent prosecutory bureau with the PUC
- Utility rate issues
- Enforcement matters
 - Informal Investigations
 - Formal Complaints
- What happens upon referral?
 - Nothing
 - Informal Investigation
 - Formal Complaint



I&E Informal Investigation

- I&E initiates informal investigation by letter to the company containing data requests
- Possible outcomes:
 - Nothing
 - Proposed joint settlement filed with PUC
 - Formal complaint filed against company with PUC



I&E Formal Complaint

- May follow an informal investigation or be filed in lieu of conducting informal investigation
- After complaint is filed, it can be settled or litigated before an Administrative Law Judge:
 - Prehearing conference
 - Discovery
 - Evidentiary Hearings
 - Briefs/Reply Briefs
 - Initial Decision
 - Exceptions/Replies
 - PUC Order
 - Compliance
 - Recon./Appeal



What Can Suppliers Do?

- ☐ Be Proactive
- ☐ Be Prepared
- ☐ Be Responsive



Be Proactive

□ Don't wait for them to call you – call them!

- A new and innovative product offering
- Disputes with utilities (i.e. access to data)
- Concerns about existing barriers in the market
- A need for a renewed commitment
- Starting a new marketing campaign
- Your company has made an error



OCMO Composition

- ❑ Dan Mumford, Director
- ❑ Kriss Brown, Deputy Director (Law Bureau)
- ❑ Matt Hrivnak (Bureau of Consumer Services)
- ❑ Dave Hixson (Office of Communications)
- ❑ Ghena Redman (Bureau of Technical Utility Services)



For EDI/EDEWG Issues:

- ❑ Lee Yalcin (Bureau of Technical Utility Services)
- ❑ Jeff McCracken (Bureau of Technical Utility Services)

Key BCS Contacts

- ❑ For matters involving residential regulations, customer information, marketing etc. , contact Matt Hrivnak
- ❑ To provide door-to-door notices, contact Annette Falcone
- ❑ For questions involving informal complaints, contact the investigator listed on the complaint
- ❑ To escalate matters involving informal complaints, contact Kevin Ford



Be Prepared

- ❑ Check the rules and regulations before you act
- ❑ Ask questions when you are unsure of the rules
- ❑ Understand what the PUC expects from suppliers



Some Lessons Learned From Polar Vortex Litigation

- ❑ PUC has relied on consumer claims of what sales agents told them to rewrite contracts, order refunds and impose fines
- ❑ Recommended supplier actions:
 - Make sure sales agents are adequately trained and records are kept
 - If you are telemarketing - record sales calls, do routine compliance monitoring and follow the three Cs:
 - ❑ Consequences – ensure agents know consequences of violations
 - ❑ Clarity – make sure documents are as clear as possible
 - ❑ Cover – include all key terms in verification process
 - If you are engaged in door-to-door marketing:
 - ❑ Make sure you know local ordinance restrictions
 - ❑ Follow the three Cs on steroids



Some Lessons Learned from Polar Vortex Litigation

- Huge emphasis on vendors and agents
 - Contracts with vendors
 - Training of sales agents
 - Discipline/termination of sales agents
 - Compliance monitoring efforts
- Marketing materials under scrutiny
 - Any words like “savings” or “competitive prices”
- Disclosure statements under microscopes
 - Font size and pre-approved wording or language



Some Lessons Learned From Polar Vortex Litigation

- Enrollment and verification process
 - Verifying that family member is authorized to enroll
 - Providing clarity with online enrollments
 - Making it clear that the supplier is not the utility
 - Ensuring that customers speak English
 - Monitoring how quickly agents speak
 - Taking steps to avoid aggressive sales tactics
 - Avoiding having agents present during verification



Some Lessons Learned From Polar Vortex Litigation

- Customer service and complaint handling requirements, under Chapters 56 and 111:
 - Investigate matter using reasonable methods
 - Make a diligent attempt to negotiate a reasonable payment agreement
 - Provide customer with information necessary for an informed judgment
 - Provide a report to the customer within 30 days



Be Responsive

- Know who you may hear from at the PUC or elsewhere within state government
- Respond timely
- Provide requested information or seek legal consultation as necessary



People You May Hear From At The PUC

- ❑ BCS – Informal Complaint
- ❑ OCMO – Immediate Concern or Complaint Trend
- ❑ I&E – Informal Investigation
- ❑ Secretary – Formal Complaint
 - Consumers
 - I&E, Office of Attorney General, Office of Consumer Advocate or Office of Small Business Advocate
- ❑ Commissioners – Informal Inquiries/Discussions



Office of Attorney General

- ❑ You may also hear directly from the Office of Attorney General, who has subpoena powers during an investigation
- ❑ This tool was used with several suppliers during the Polar Vortex



Do Not Ignore These Contacts!

- ❑ You have obligations to respond within set time periods, which vary
- ❑ The manner of responding varies from informal to formal

Respond

- ❑ The instructions will advise you how to respond and when to respond
- ❑ Some situations require legal consultation
- ❑ Failure to respond could forfeit legal rights

Some Lingering Issues From The Polar Vortex Litigation

- Does the PUC have authority to require suppliers to issue refunds to customers?
 - The PUC thinks it does
 - The Commonwealth Court has not been asked to review
 - Most refunds have been the result of settlements
 - Other refunds have involved bad facts/minimal amounts



Some Lingering Issues From The Polar Vortex Litigation

- Does the PUC have authority to revoke a supplier's license and prohibit principals from applying again?
 - OAG/OCA think it does
 - Two ALJs think it does
 - Still pending before the PUC



Some Lingering Issues From The Polar Vortex Litigation

- Does the PUC have authority to prohibit supplier's owners from participating in competitive telecommunications market?
 - OAG/OCA think it does
 - Two ALJs think it does not, unless supplier fails to pay fine and issue refunds
 - Still pending before the PUC



Some Lingering Issues From The Polar Vortex Litigation

- Does the PUC have statutory authority to enforce the Telemarketer Registration Act?
 - The PUC previously said it does not, but left the door slightly open due to its regulations requiring compliance with the TRA
 - OAG/OCA are urging the PUC to enforce the TRA and require suppliers to obtain written signatures following telemarketing sales
 - ALJs agreed, ignoring exception in TRA for sales regulated by a Commonwealth agency
 - Still pending before the PUC
 - Could continue to be unclear after PUC's ruling if it agrees that it does not have authority to enforce the TRA and suppliers need to deal directly with the OAG



You've Got A Friend in Pennsylvania!

(PA slogan in the mid-80s)

- Pennsylvania is still a fairly supplier-friendly state in which to do business
 - However, the shifting priorities of the PUC/OCMO needs to be kept in mind
 - The secretarial letters, interim guidelines, changing rules and precedent established in cases involving complaints against suppliers can make it difficult to navigate
- We are here for you! Relying on our legal expertise, operational knowledge and relationships, we can:
 - Answer questions on a case-by-case basis
 - Review your documents and processes for compliance
 - Provide consultation if you receive BCS informal complaints, notices of I&E informal investigations and OAG subpoenas
 - Represent you if formal complaints are filed



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GOOD PRACTICES TO AVOID TCPA ACTIONS AND ANATOMY OF DEFENDING TCPA CLAIMS

Presented by:

Peter J. Horne, Esq.

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Agenda

- ❑ What is the TCPA?
- ❑ Regulatory Environment (FCC and FTC)
- ❑ TCPA compliance and litigation avoidance
- ❑ Anatomy of TCPA actions
 - ATDS calls, Prerecorded messages (and texts), Do-Not-Call List violations, and Unsolicited Faxes.
- ❑ Litigation Defense Tactics and mitigation
- ❑ Questions

A recent description

“[T]he TCPA has become the poster child for lawsuit abuse.”

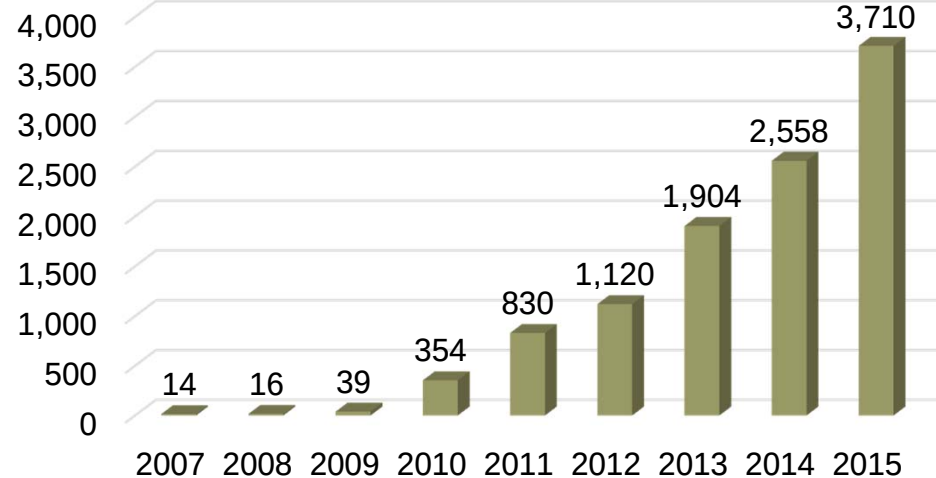
~ Ajit Pai

FCC Commissioner



Image from the WSJ

TCPA Actions Filed in Federal Court
2007-2015



Data from www.webrecon.com

The Statute Itself, 47 USC § 227

- ❑ Enacted in 1991
- ❑ Intent was to reduce costs and privacy intrusions associated with unwanted calls
- ❑ (Aside from “junk fax” amendment) no material legislative changes
- ❑ Congress granted regulatory authority to FCC



Cell phone technology in 1991

TCPA General Provisions

- ❑ Restricts telemarketing calls and text messages to cellphones and landlines
- ❑ Limits calling times (before 8am or after 9pm) (state-specific legislation exists as well)
- ❑ Created the National Do-Not-Call Registry
- ❑ Mandated internal, organization-specific Do-Not-Call lists
- ❑ General prohibitions are: calls/messages without recipient's prior express consent, communications using certain automated systems and/or caller ID blocking technology, and
- ❑ General exceptions are: purely non-marketing calls, alerts from schools, healthcare entities, financial institutions and others, and loan servicer calls

Penalties

- TCPA
 - Statutory damages of \$500 per violation
 - No cap exists for statutory damages
 - Treble damages are available for willful violations
 - Affected individuals hold a private cause of action
- Telemarketing Sales Rule (FTC regulation at 16 CFR 310)
 - No statutory damages
 - Cause of action exists only if amount in controversy exceed \$50,000 in actual damages per person

Regulatory Environment: FCC increasing security

- 2013: Prior Express Consent Requirements
 - in writing, single phone numbers, identify use of ATDS or prerecorded message, no purchase obligation.
- 2014: Unsolicited Faxes Must Contain Opt-Out Notice
- 2015: July 10th Declaratory Ruling
 - ATDS definition expanded to include any technology with the present or potential capacity to dial random or sequential numbers
 - One call/One strike policy for reassigned numbers
 - Consent can be revoke through any reasonable means

2016: FCC Reprieve for Utilities

- In a declaratory ruling released August 4, 2016, the FCC found that:

"in the absence of facts supporting a contrary finding, prior to the termination of a customer's utility service, a customer who provided a wireless telephone number when he or she initially signed up to receive utility service, subsequently supplied the wireless telephone number, or later updated his or her contact information, is deemed to have given prior express consent to be contacted by their utility company for calls that are closely related to the service[.]"

- Calls that are "closely related to the service" include calls that:

- Warn about planned or unplanned service outages,
- Ask for confirmation of service restoration or information about lack of service,
- Provide notification of meter work, tree trimming, or other field work,
- Notify consumers that they may be eligible for subsidized or low-cost services as a result of certain qualifiers,
- Provide information about potential brown-outs because of heavy energy usage, or
- Inform customers that a debt is owed (pre-termination of service).

2016: FCC Reprieve for Utilities (con't)

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 - Provide information about potential brown-outs because of heavy energy usage, or
 - Inform customers that a debt is owed (pre-termination of service).
- With consent implied, ATDS calls and prerecorded messages are permitted.

2016: FTC Is Becoming More Active

- ❑ March 21, 2016: \$1.2 million civil penalty against Lilly Management and Marketing, LLC
- ❑ June 6, 2016: FTC issues a Comment to the FCC to “recommend that the FCC proceed with caution, and only incrementally, with any expansion of permissible robocalling.” The FTC also indicated that it would be increasing its enforcement activities under the TCPA and TSR.
- ❑ And to top it off, effective 10/31/2016, the FTC increased the access fee for entities to access the National DNC Registry to “scrub” phone lists

Types of TCPA Claims

- Calls and Prerecorded Messages to landlines:
 - “It shall be unlawful ... to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless. . . [emergency calls and debt collection calls are exempt].” § 227(b)(1)(B).
 - ATDS is not an element.
 - However, must be mindful of converted landline numbers. See Lynn v. Monarch Recovery Management, Inc., No. 13-2358, 2014 U.S. App. LEXIS 18858 (4th Cir. Oct. 2, 2014) (ATDS calls prohibited when landline converted to VoIP service).

Types of TCPA Claims

- ATDS Calls and Prerecorded Messages to wireless lines:
 - “It shall be unlawful ... to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an ATDS or a prerecorded voice to ... any cellular telephone service ... or any service for which the called party is charged for the call.” § 227(b)(1)(A)(iii).
 - ATDS is an affirmative element where Plaintiff carries the burden.
 - Prior express consent has been construed as an affirmative defense, not an element of the claim.

Types of TCPA Claims

- Do-Not-Call List Violations (landlines and wireless lines):
 - Section 227(c) sets forth the statutory guidelines and rule making authority for the National Do-Not-Call Registry.
 - Section 227(c)(5) provides the same \$500/\$1,500 statutory violations for calls made to phone number listed on the National (or State-specific) DNC Registry.
 - Safe harbors can apply – “scrubbing” becomes vital.

Substantive Litigation Defense Tactics

- Obtain prior express consent, if possible (in writing with all notice provisions)

“By signing/checking the box below, I consent to receive sales calls and text messages from ABC COMPANY on the landline or wireless number I provide(d) even if I’m on a federal or State Do-Not-Call list. I understand these sales calls may be generated using an autodialer or similar technology and/or may contain prerecorded messages and, also, that my grant of express consent is not required to purchase this good or service.”

Potential Issues with Consent

- What if a number is reassigned or simply incorrect?
 - FCC July 10, 2015 Declaratory Ruling—one call/one strike
- Who is the “called party” and “actual recipient”?
 - (utility contract may be in one person’s name but phone owner may be different)
- Is consent implied for being a customer?
 - FCC Aug. 4, 2016 Declaratory Ruling; Jackson v. Safeway, Inc., 2016 WL 5907917 (N.D. Cal. Oct. 11, 2016) (consent granted for “closely related calls”); Elkins v. Medco Health Sols., Inc., 2014 WL 1663406 (E.D. Mo. Apr. 25, 2014) (consent implied).

Potential Issues with Consent

□ Can consent expire?

- Van Patten v. Vertical Fitness Group, LLP, 22 F. Supp. 3d 1069 (S.D. Cal. 2014) (no expiration); Murphy v. DCI Biologicals Orlando, LLC, 2013 WL 6865772 (M.D. Fla. Dec. 31, 2013) (no expiration).

□ Can consent be revoked?

- Gager v. Dell Financial Services, LLC, 727 F.3d 265 (3d Cir. 2013) (revocation can be done in any reasonable method)

Substantive Litigation Defense Tactics

- For wireless lines calls, dispute the use of an ATDS—under the statutory definition
 - 1) Is there “human intervention”?
 - 2) FCC July 10, 2016 Declaratory Ruling has not been universally accepted by the courts.
 - Distinction between “present” and “potential” capacity.
 - Modern calling technology likely does not fit with the statutory definition of ATDS:
 - The term “automatic telephone dialing system” means equipment which has the capacity—
 - (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
 - (B) to dial such numbers.

Technical Litigation Defense Tactics

□ Vicarious Liability

- Who actually places the calls for your company?
- What amount of instructions or training does your company provide to the call center?
- Do you have a written agreement with the call center?
- Is indemnification available?
- Decision will turn on principles of agency and control.
 - Thomas v. Taco Bell, 2014 WL 2959160 (9th Cir. July 2, 2014) (Taco Bell was not liable for call center's text messages); Gomez v. Campbell-Ewald, 2014 WL 4654478 (9th Cir. Sept. 19, 2014) (vicarious liability attached).

Technical Litigation Defense Tactics

- Article III Standing: proof of a concrete and particularized injury-in-fact
 - Developing case law may show no injury occurred:
 - Spokeo, Inc. v. Robins, __ U.S. __, 136 S. Ct. 1540 (2016) (holding that a plaintiff could not satisfy the injury-in-fact demands of Article III standing by alleging a statutory violation alone);
 - Romero v. Dep't Stores Nat'l Bank, 2016 WL 4184099 (S.D. Cal. Aug. 5, 2016) (citing Spokeo and stating, “the Court must determine whether Plaintiff has evidence of an injury in fact specific to each individual call, and not in the aggregate based on the total quantity of calls[;] Plaintiff does not satisfy this burden.”);

Technical Litigation Defense Tactics

- Developing case law may show no injury occurred con't:
 - Smith v. Aitima Med. Equip., Inc., 2016 WL 4618780 (CD. Cal. July 29, 2016) (finding, in a TCPA case, that “Plaintiff's de minimus injury is not sufficient to confer standing.”);
 - Olmos v. Bank of America, N.A., 2016 WL 3092194 (S.D. Cal. June 6, 2016) (finding the fact “that Plaintiff received two short text messages insufficient to convey standing because the loss of battery life and bandwidth as a result of these two messages was de minimis.”).
- Plaintiffs now plead invasion of privacy, depleted battery-higher electric bills, distraction and/or agitation, other emotional problems.
- Mitigation of damages?

What to watch for

- Appeals challenging the FCC's expansive interpretations.
 - e.g. ACA Int'l v. FCC, No. 15-cv-01211 (D.C. Cir. 2015) (definition of ATDS).
- FTC's scrutiny of "lead gen providers" (announced in March 2016).
- How will call blocking technology progress?
- Will the election results impact the makeup of the FCC?

Questions?

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