



Recent Court Ruling Lowers Threshold for Obtaining Treble Statutory Damages in Class Actions Brought Pursuant to the Telephone Consumer Protection Act

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The Telephone Consumer Protection Act ("TCPA") makes it unlawful for companies to use any telephone, fax machine, computer or other device to send unsolicited phone, text or facsimile advertisements, which are defined as materials advertising the commercial availability of any property, goods or services sent without the recipients' prior express invitation or permission. Originally passed in 1991, the TCPA provides for recovery of either actual damages or statutory damages ranging from \$500 to \$1,500 per unsolicited advertisement. In deciding whether to treble the statutory damages, courts are instructed to consider whether the defendant "willfully" or "knowingly" violated the TCPA. Neither the Federal Communications Commission – the federal agency charged with regulating telemarketing – nor the TCPA itself provides a definition for "willfully" or "knowingly." Given the considerable number of putative class action lawsuits brought pursuant to the TCPA (particularly so as a result of recent court decisions applying the TCPA to text messaging), it is imperative for companies to be aware of all potentially applicable marketing regulations, as well as the manner in which courts have interpreted them.

Recently, a federal district judge in a putative TCPA class action in Chicago (where the vast majority of such litigation is centered) issued an opinion awarding treble damages based on its conclusion that the defendant willfully violated the law. In *Sengenberger v. Credit Control Services, Inc.*, Plaintiff filed suit claiming that Credit Control Services placed numerous telephone calls to Plaintiff in violation of the TCPA. See No. 09-cv-2796, 2010 WL 1791270 (N.D. Ill. May 5, 2010). Noting that the TCPA does not define willfulness, the Court first observed that other courts grappling with the willfulness issue in deciding whether to treble damages equated willfulness with intentional conduct. The Court went on to note that the Communications Act of 1943 (of which the TCPA is a part) does not impose a mental state requirement in that it defines willful conduct as "the conscious or deliberate commission or omission of such act, irrespective of any intent to violate any provision, rule or regulation." Thus, the *Sengenberger* Court concluded that since Credit Control Services voluntarily made the calls in question, willfulness was established and treble damages were appropriate.

The import of the *Sengenberger* decision is potentially far-reaching. The greater availability of trebled statutory damages can lead to potentially annihilating damages for many companies. Indeed, based on this ruling, a mobile marketing campaign that

sends, for example, 10,000 text messages in violation of the TCPA could be subject to \$15 million in statutory damages if a willful violation is shown (as opposed to \$5 million for non-willful violations). Notably, in a similar statutory scheme, the Fair and Accurate Credit Transaction Act ("FACTA") – which regulates the information that can be displayed on credit and debit card receipts provided to consumers – courts have required plaintiffs to allege and, ultimately, to prove a much higher standard of willfulness. For instance, in *Safeco Insurance Company of America v. Burr*, the Supreme Court clarified that a defendant does not willfully violate the Fair Credit Reporting Act (of which FACTA is a part) if its actions were based upon an objectively reasonable interpretation of the law. 1275 S. Ct. 2201 (2007). Although the Supreme Court's objective standard of reasonableness is a more appropriate (and higher) standard for plaintiffs to meet in TCPA cases (particularly so in light of the fact that plaintiffs have minimal – if any – actual damages), companies engaging in marketing campaigns must be aware of the potential for treble damages upon a showing of merely intentional or voluntary – as opposed to objectively unreasonable – conduct. In many instances, companies are not even aware of the TCPA, and certainly not its potential applicability to emerging technologies like mobile marketing; however, under the *Sengenberger* analysis, such lack of knowledge is immaterial.

Amanda Streff, Summer Associate, also contributed to this article.

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