

# Like to Live Dangerously? Have I Got a Deal for You!

Do you have too much positive goodwill in the community and marketplace? Need to shed some so you can pump up your bad boy or girl image? How would you like to engage in some illegal conduct that will result in claims of invasion of privacy, harassment, aggravation, and disruption in the daily life of thousands of consumers?

And, best of all, do you just happen to have a few million bucks burning a hole in your pocket? If so, have I got a deal for you! Just start a telemarketing campaign or, better yet, hire a third party to start a telemarketing campaign for you, and start calling and texting consumers' cell phones without doing your legal homework. That's just what happened to one Florida Ford dealership that recently settled, for millions of dollars, a federal class action suit for allegedly violating the federal Telephone Consumer Protection Act.

## Here's what happened.

In May 2018, Vincent Papa filed a class action lawsuit in the U.S. District Court for the Southern District of Florida, accusing Grieco Ford Fort Lauderdale, LLC, of engaging in "unsolicited marketing directly to consumers' cellular telephones, harming thousands of consumers in the process."

Papa argued that the dealership called and texted him concerning an offer to purchase his vehicle, all without getting his prior express consent to do so. He alleged that the illegal conduct "resulted in the invasion of privacy, harassment, aggravation and disruption of the daily life of thousands of individuals." On behalf of two different class action classes, he sought up to \$1,500 in statutory damages for each call made in violation of the TCPA.

Grieco Ford's telemarketing campaign was reportedly designed by a third-party marketing firm with offices in another state. Guess who wasn't named in Papa's suit? You guessed it - the marketing firm. The dealership was left to defend itself and the actions of the marketing firm against the claims in the lawsuit.

The TCPA regulations distinguish between sales calls and non-sales calls to cell phones that are placed using an autodialer or a prerecorded message. The rule requires "prior express consent" for non-sales calls and requires "prior express written consent" for sales calls. The "prior express written consent" standard applies when a person initiates, or causes to be initiated, any telephone call to a cell phone that includes or introduces an advertisement or constitutes telemarketing (i.e., sales calls) using an autodialer or an artificial or prerecorded voice (i.e., prerecorded message). The Federal Communications Commission regulates text messages as telephone calls. As a result, the consent standards described above apply equally to text messages that are sent using equipment that satisfies the TCPA's "autodialer" standard.

One of the most significant features of the TCPA is the creation of a private right of action that comes with statutory damages, even if the consumer did not sustain any economic harm as a

result of an improper or "illegal" call or text. Courts **must** award \$500 per violation under certain provisions and **may** award up to \$500 per violation under other provisions. Courts also may triple the statutory damages award to \$1,500 per violation for willful or knowing conduct. As you might expect, plaintiffs' attorneys love to bring TCPA cases due to the possibility of class action status and nine-figure statutory damages awards.

Grieco Ford agreed to settle the federal class action suit five months after the suit was filed. The plaintiffs' tally for only five months' worth of work? The dealership agreed to pay \$4,781,160, with the recipients of the unwanted calls and text messages getting up to \$180 each. If you're a plaintiffs' attorney, not a bad day at the office.

So, what lessons can you learn from this poor dealership that will be paying recipients of the unwanted calls and texts almost \$4.8 million? The most important lesson is that it is ultimately the dealership's responsibility to ensure that it has the prior express written consent to call or text a consumer for marketing purposes. Don't rely on a third party to ensure that you have that consent. The best course of action a dealership can take is to engage a lawyer who is knowledgeable about TCPA requirements to review the marketing program on the dealership's behalf.

If you don't heed my warning and hire an attorney knowledgeable about TCPA compliance to review your program, at the very least, make sure you press for an indemnity from the third party and confirm that the company has the proper insurance coverage in case things go wrong. An indemnity won't buy you a cup of coffee if the vendor isn't on a firm financial footing, so check its financial wherewithal to pay.

Finally, if you buy marketing lists, make sure the vendor has assured you that it obtained the proper consents for the calls and/or texts, and get proof of that fact for your files. You've worked hard on your reputation and business; don't make yourself an easy target for plaintiffs' attorneys.



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*Papa v. Grieco Ford Fort Lauderdale, LLC*, 2018 U.S. Dist. LEXIS 209834 (S.D. Fla. December 11, 2018).

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