

## **TELEPHONE CONSUMER PROTECTION ACT (TCPA)**

### **OVERVIEW**

We offer a full-service approach to the Telephone Consumer Protection Act (TCPA), proactively advising clients on compliance strategies to mitigate the risk of litigation or regulatory action and defending clients targeted by lawsuits or claims in arbitration. Our seasoned compliance and litigation attorneys deliver timely and thoughtful advice and work to resolve litigation quickly and cost-effectively.

### **TELEMARKETING AND DEBT COLLECTION**

Our Telemarketing and Debt Collection Team focuses on legal issues arising from the use of technology for marketing and debt collection. Statutes and regulations governing the use of technology for these purposes include the TCPA, CAN-SPAM Act, FTC Telemarketing Sales Rule, Fair Debt Collection Practices Act, and state-level “Do Not Call” and debt collection statutes. These statutes and regulations are complex and the law is constantly evolving. We assist clients in staying on top of these emerging developments.

### **COMPLIANCE**

We help businesses proactively limit liability for violations of the TCPA by taking a holistic approach, including updating or introducing robust compliance policies. In particular, we focus on both substantive and procedural aspects of consent management, Do-Not-Call compliance, and managing opt-outs.

We also provide training to businesses and their employees to avoid liability for TCPA violations. As part of our full-service offering, we help our clients stay up to date on the latest statutory and regulatory requirements, and we monitor federal and state-level customer complaints in order to identify potential issues and client risks at the earliest possible stage.

### **LITIGATION**

We have represented numerous clients in telemarketing and debt collection lawsuits in industries ranging from healthcare to banking to construction. We regularly defend large class actions as well

as individual claims and arbitrations.

Our lawyers, including a number designated as Fellows of The American College of Trial Lawyers (ACTL) and The Best Lawyers in America®, defend consumer class actions every day for some of the country's largest corporations. We have substantial experience in proceedings before the Judicial Panel on Multidistrict Litigation. We have successfully defeated class certification in hundreds of would-be class actions in both state and federal courts. Where we have not defeated class certification, we have tried and won summary judgment motions and have successfully taken many class action cases to trial before judges and juries. When circumstances warrant, we negotiate favorable settlements for our clients, often using creative settlement structures to achieve the best possible outcome.

## COST-EFFECTIVE

We are cost-effective, using the most efficient mix of resources in various firm geographies to minimize expense and maximize efficiency. With experienced compliance and trial lawyers throughout our offices, we can provide clients with the best service at the best possible rates when issues arise under the TCPA.

## DATA PRIVACY, TELECOMMUNICATIONS AND COLLECTIONS

BCLP's Data Privacy, TCPA & FCRA Litigation Team focuses on the ever-increasing litigation risk relating to data privacy and security

## MEET THE TEAM



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## **RELATED PRACTICE AREAS**

- Appellate
- Business & Commercial Disputes
- Class Actions & Mass Torts
- Consumer Finance Disputes
- Data Privacy & Security
- Data Privacy, Telecommunications & Collections
- M&A & Corporate Finance
- Financial Services
- Franchising
- Litigation & ADR
- Marketing & Advertising
- Retail & Consumer Products
- Financial Institutions
- Food & Agribusiness
- Food & Beverage
- Healthcare & Life Sciences
- Hotels and Hospitality
- Insurance
- Sports & Entertainment

## **EXPERIENCE**

### **COMPLIANCE**

- We provide ongoing TCPA compliance assistance to major US retailers. This includes drafting compliant Do Not Call policies and SMS/text messaging opt-in language, structuring opt-out processes, advising on Do-Not-Call issues, negotiating with vendors, and assisting with integration with mobile applications. In addition, we have advised on CTIA/MMA industry standard compliance regarding opt-in language, double opt-in, and opt-outs. We have worked closely with multiple teams throughout the enterprise, including not just Legal, but Marketing and IT.
- We represent a national sports team in all of its TCPA compliance issues, including advising on SMS/text messaging campaigns, obtaining the requisite prior express written consent

under the TCPA, and complying with opt-out and Do Not Call requirements. We have also drafted the team's publicly-available Do Not Call Policy and Text Messaging Terms and Conditions.

- We advise a digital insurance company on an ongoing basis regarding the TCPA, CAN-SPAM, and related issues. We've drafted compliant consent language under the TCPA and have revised SMS/ text message campaigns to comply with the TCPA as well as CTIA and MMA industry requirements. In addition, we have validated and tested opt-out processes to ensure compliance with required opt-out commands, as well as advised on Do Not Call requirements and the factors needed to establish an Established Business Relationship exemption.
- We advise a national food packager on nuanced issues concerning SMS/text messaging to employees under the TCPA and the level of consent required for different types of messages (informational, emergency, promotional). We've drafted "prior express written consent" language under the TCPA for use in various scenarios and provide ongoing compliance advice for specific messages as questions arise.
- We advise a national vacation rental company on TCPA and CTIA/MMA compliance regarding text messaging, including drafting compliant consent language and advising on opt-out processes and vendor selection.

## LITIGATION AND ARBITRATION

- We successfully defended a leading provider of healthcare software and technology solutions against a series of putative class action suits seeking approximately \$40 million under the TCPA. The BCLP team defeated all of plaintiffs' class certification attempts by developing significant fact support and using new developments in TCPA law during the life of the case. The BCLP team then won summary judgment against the individual claims of the named plaintiffs who received the fax through an online fax service and also defeated the last plaintiff's motion for summary judgment on his individual claim of receiving the fax on a traditional fax machine. The remaining plaintiff's \$500 claim was resolved by agreement before trial. The Court's class certification and summary judgment decisions have been cited favorably by several federal courts.
- We represented a publishing company defendant in class action alleging the defendant violated the TCPA relative to advertising of goods or services offered.
- We represented a healthcare apparel retailer in a class action lawsuit alleging violations of the TCPA and the Illinois Consumer Fraud Act related to unsolicited fax advertisements.
- We defended a leading American provider of on-demand Internet streaming media in connection with a lawsuit alleging violations of the TCPA, the Illinois Prizes and Gifts Act, and

the Illinois Consumer Fraud Act concerning alleged unauthorized text messages received related to supposed prize/contest/gift card/rewards winnings.

- We represented a national fashion retailer against claims involving loyalty program text messaging.
- We represented an automotive finance company against claims involving collection calls.
- We defended a durable medical equipment sales company against claims involving faxed communications with customers.
- We defended an insurance company against claims arising out of telemarketing calls.
- We represented a pharmaceutical company against claims arising out of faxed communications.
- We represented a trucking equipment and parts company against claims arising out of faxed communications and negotiated a favorable settlement in mediation.
- We defended a service provider for a restaurant chain in a TCPA indemnification claim, and negotiated a favorable settlement with the plaintiff.
- We represented an online directory for healthcare providers in a TCPA fax case and successfully removed the case to federal court after years of languishing in state court litigation, using the Class Action Fairness Act.
- We are currently defending a major home furnishing retailer in multiple TCPA arbitrations alleging the failure to acknowledge a request for revocation.
- We are currently defending a durable medical equipment supplier in a TCPA case involving prerecorded calls to cellular phones.

## RELATED INSIGHTS

Insights

Feb 16, 2024

### **New TCPA opt-out rules coming as FCC adopts report and order on revocation of consent**

On February 15, 2024, the Federal Communications Commission (“FCC”) adopted the Draft Report and Order and Further Notice of Proposed Rulemaking (“Report and Order”)[1] that it released last month under the Telephone Consumer Protection Act (“TCPA”). The Report and Order, along with the new Rules, will have major impacts for senders of marketing text messages. Under the TCPA, businesses cannot text marketing messages, make

marketing robocalls, or send fax advertisements to a consumer without having obtained their “prior express written consent.”[2] The new ruling imposes strict requirements for revocation of consent. Businesses should take note and ensure their opt-out procedures comply with the new rules. Failure to do so may result in a class action lawsuit, as the TCPA provides for a private right of action with statutory damages of \$500-1,500 per violation, per consumer, with n...

Insights

Feb 06, 2024

## **Fourth Circuit holds faxes received online not subject to TCPA**

A fax is a fax is a fax or is it? In a recent ruling in the long-running TCPA junk fax case *Career Counseling, Inc. v. AmeriFactors Financial Group*, the Fourth Circuit Court of Appeals held that the statute’s prohibition against uninvited fax advertisements does not apply to faxes received through online fax services. In a very positive development for TCPA defendants, the Court affirmed the denial of class certification for a proposed class including both members who used a traditional fax machine and those who used an online fax service. The Court reasoned that identifying the traditional fax machine users would require individualized inquiries, which rendered the proposed class unascertainable. While consistent with the Federal Communication Commission’s declaratory ruling from *In the Matter of AmeriFactors Financial Grp., LLC Petition for Expedited Declaratory Ruling* (“FCC Ruling”),[1]the decision marks a d...

Insights

Dec 15, 2023

## **Not to be a Grinch, but... is your business TCPA compliant? (with apologies to Dr. Seuss)**

Insights

Jun 29, 2021

## **TransUnion v. Ramirez: The Supreme Court Further Narrows Article III Standing And Rejects “No Injury” Class Actions**

Insights

Apr 02, 2021

## **Supreme Court Issues Game Changing Definition of ATDS Under TCPA**

On April 1, 2021, in *Facebook v. Duguid*, 592 U.S. \_\_ (2021), the Supreme Court issued a unanimous and long-awaited ruling clarifying the definition of an “automatic telephone dialing system” (“ATDS”) under the Telephone Consumer Protection Act of 1991 (“TCPA”), 47 U. S. C. § 227(a)(1): an ATDS is a system that uses a random or sequential number generator to dial or store telephone numbers for call. The key piece of this holding is that the “random or sequential” phrase applies to both storing the telephone numbers and dialing the telephone numbers. Otherwise, the Supreme Court reasoned, any phone capable of storing numbers (e.g., “virtually all modern cell phones”) would be subject to the TCPA’s onerous prior written consent requirements. Instead, unless the device has the capacity “to store . . . telephone numbers to be called, using a random or sequential number generator” or to “produce telephone ...

Insights

Mar 26, 2020

## **Lead Gen and the TCPA: How to Protect Your Company from Downstream Bad Actors**

Blog Post

Feb 14, 2020

## **FCC Urged to Take Action on Litigation-Fueling Autodialer Issue Under TCPA**

Blog Post

Apr 06, 2018

### **D.C. Circuit Rejects FCC's Interpretation of Automatic Telephone Dialing System Under TCPA**