

# Consumer Protection Project

Nicole Gordillo, Tyler Ballesteros,  
Simone Singh, & Jackson McDonough

# The Telephone Consumer Protection Act of 1991 (TCPA)

- 47 U.S. Code § 227 The Telephone Consumer Protection Act (TCPA) is a federal statute enacted in 1991 designed to safeguard consumer privacy.
- This statute restricts telemarketing communications via **voice calls, SMS texts, emails, and fax.**
- TCPA makes it unlawful for “any person,” absent the “prior express consent of the called party,” to make any non-emergency call “using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a cellular telephone service.” 47 U.S.C. § 227(b)(1)(A)(iii).
- **Consequences:** Anyone who violates the TCPA may be sued in state or federal court for “actual monetary loss” or \$500 in damages for each violation, “whichever is greater.” § 227(b)(3)

# Prior Expressed Consent within the TCPA

- **Prior Expressed Consent Language**
  - *Cf. In the Matter of Rules & Regulations Implementing the TCPA*, 7 F.C.C. Rcd. 8752, 8769, 1992 WL 690928 (1992)
  - “Persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.”
- **ATDS**
  - The term “automatic telephone dialing system” means equipment which has the capacity—
    - to store or produce telephone numbers to be called, using a random or sequential number generator; and
    - to dial such numbers.

# Transactional Context

SAMPLE

# Van Patten v. Vertical Fitness LLC (2017)

- The scope of a consumer's prior express consent under the TCPA, is dependent on the transactional context in which it is given.
- The call or text message must be related to the circumstance in which the consumer gave his or her number; if the transactional context of the call/ message placed is unrelated, then the call/message would be in violation of the TCPA.
- **Effect on statute:** By specifying that prior express consent is dependent on the transactional context of the call/ message the courts narrow the reach of the FCC definition of prior express consent under TCPA

# Mais v. Gulf Coast Collection Bureau, Inc. (2014)

- The analysis under the FCC's rulings turns on whether the called party granted permission to be called concerning a particular topic and not on how the calling party received the number.
- An individual provides prior express consent it is regards to a specific topic; “if the wireless number was provided by the customer to the creditor and if such number was provided during the transaction that resulted in the debt owed.”
- Subject Matter > Over Method of Contact
- **Effect on statute:** By specifying that prior express consent is limited to the specific topic (transactional context) of the call/ message and not necessarily who is the caller the courts narrow the definition of prior consent of the FCC reach of the TCPA.

# Vicarious Consent & Affiliates

# Satterfield v. Simon & Schuster

- Satterfield agreed to receive messages from Nextones and affiliates but received marketing materials from Simon & Schuster in the form of SMS messages.
- The TCPA exempts those calls “made with the prior express consent of the called party,” 47 U.S.C. § 227(b)(1)(A). Express consent is “consent that is clearly and unmistakably stated.”
- Affiliate refers to a “corporation that is related to another corporation by shareholdings or other means of control.”
- Brand is commonly defined as “a class of goods identified as being the product of a single firm or manufacturer.” Webster’s Third New International Dictionary 268 (2002).
- **Effect on Statute:** Defined Affiliate and Brands when it comes to expressed consent and when consent is given to multiple companies



# Fober v. Management and Technology Consultants, LLC.

- The U.S. Court of Appeals, 9th Circuit refers to persuasive precedent from the 6th Circuit and 11th Circuit respectively in *Baisden v. Credit Adjustments, Inc.*, and *Mais v. Gulf Coast Collection Bureau, Inc.* The 6th circuit explained, “the FCC's rulings in this area make no distinction between directly providing one's cell phone number ... and taking steps to *make that number available* through other methods, like consenting to disclose that number to other entities for certain purposes”.
- **Effect on Statute:** Narrowed the reach of the statute. It did so but expanding the effect of providing prior express consent to include not just the original party but also, “a party that receives an individual's phone number *indirectly*”.

# Revoking Consent

SAMPLE

# Schweitzer v. Comenity Bank

- Schweitzer applied for a credit card with Comenity, and provided her cell phone number. She went delinquent on her payments and received multiple phone calls. She tried to revoke partial consent to receive phone calls during work hours.
- Found that a consumer may revoke consent to receive automated phone calls either fully or partially through any means so long as it is expressed clearly
- Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., allows for the oral revocation of consent
  - *Osorio v. State Farm Bank*
- **Effect on Statute:** Common law rules are applicable to the TCPA and a consumer may revoke consent partially or fully

# Van Patten v. Vertical Fitness LLC (2017)

- Van Patten signed up for a gym membership where he provided his cellular phone number; he canceled his membership three days later. (He claimed that constituted him revoking consent)
- The consumer may revoke his or her consent at any given time; however, must “clearly express that he or she no longer wants to receive the text messages or calls.”
- The court interpreted Van Patten’s cancellation of his gym membership to be too vague to constitute a revocation of prior express consent.
- **Effect on statute:** The case law that resulted narrows the TCPA regulation regarding revoking prior express consent by requiring the revocation to clearly express the recipient’s desire for the messages/ calls to stop.

# McMillion v. Rash Curtis & Associates (2018)

- It utilized the precedent set in *Van Patten* that stated that in order to revoke prior express consent a plaintiff must “clearly express his or her desire not to receive further calls;” clarity is crucial in revocation of consent.
- The Ninth Circuit has held that “prior express consent is a complete defense to a TCPA claim.”
- If a debtor owes multiple debts, they must revoke consent to be called for EACH INDIVIDUAL debt, they cannot revoke consent to be called from the entire collection company. (Transactional Context)
- **Effect on statute:** By specifying that in order to revoke prior express consent the specific topic (transactional context) of the call/ message must be specified who is the caller the courts narrow the reach of the TCPA specifically regarding the revocation of consent.

# Government Contractors

SAMPLE

# Campbell - Ewald v. Gomez

- Yearsley Doctrine - a government contractor is not subject to suit if (1) the government authorized the contractor's actions and (2) the government 'validly conferred' that authorization, meaning it acted within its constitutional power.
- "Derivative immunity"
- **Effect on Statute:** Narrows the reach of the statute to exclude Government Contractors who are acting within the guidelines of work they have been contracted to do by the government.

# Debt Collection

SAMPLE



# Voluntary consent: HAYSBERT, v. NAVIENT SOLUTIONS, INC.

- When debt is owed, the relationship between debtor and creditor can become skewed.
- Unconscionability Doctrine
  - “do not impose terms that have been variously described as overly harsh, unduly oppressive, so one-sided as to shock the conscience, or unfairly one-sided.”
- consent must not be through force, coercion, rushing, bullying, or trickery of the subject into submitting consent.
- **Effect on Statute:** Applies Unconscionability Doctrine to TCPA debt cases in California, and establishes some precedent on how it manifests.

# Shields v. Sonora Quest Laboratories LLC

- Debt in relation to a medical setting
- Like other advertisement cases, the consent has to be acquired during the transaction.
  - BUT what does a medical transaction look like?
- Begins at the treatment of an issue.
  - Even if location of clinic changes, if they are referred then consent is transferred over.
- **Effect on Statute:** Applies previous transactional law into a medical setting. This is important to explain the relationship between hospitals and clinics.

# Fused Rule

*Within the boundaries of the 9th circuit and Fed. District Courts in N.D. and C.D. California*

**IF** a person or entity delivers a non emergency call, text, email, or fax to another person using an automatic telephone dialing system or prerecorded voice messages, or telephone facsimile machines; and the receiver did not provide prior express consent to be called to:

- (a.) the caller,
- (b.) an affiliate of the caller, or
- (c.) or the entity that contracted the caller;

- (1) AND that consent was not revoked in part or full by the receiver of the call for the individual transaction pertaining to that call.
- (2) OR if the subject of the call differs from the scope of the transactional context of the consent which was granted when the contact information was provided;
- (3) OR the caller did not obtain voluntary consent as prescribed in the Unconscionability Doctrine.

**UNLESS** the caller is a government contractor that has been contracted by the Sovereign, acting within the guidelines of that contract, to make the call to the receiver; or if the call is solely to collect a debt owed or guaranteed to the United States.

**THEN** the caller violated TCPA thus, the caller is subject to pay the recipient just damages of up to \$10,000 for each violation and not to exceed a total of \$1,000,000 to any single act or failure to act.

# Where the Law is Heading

- Rights to privacy of individuals are being placed above Free speech rights of corporations
  - The Scope of the TCPA is ever expanding to combat problems.
  - consumers are granted additional powers in revoking consent either in full or partially
  - Increased demand to regulate these advertisements

# Legislative Recommendations

- Recommend to the legislature to create an amendment to the TCPA which mandates that telemarketers request consent on each automated call at the beginning of the call.
- Add a provision regarding automatic messages being sent through social media, whether comments or direct messages. Prior expressed consent must be received regarding the medium in which the message is sent.