

Telephone Consumer Protection Act (TCPA)



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Overview

Many businesses today still attract customers the old-fashioned way: by calling them. Customer solicitation/retention studies show that among the most successful methods for businesses to win and retain customers is by telephone call, which is why telemarketing remains a major source of new and repeat customer business in the US.

With the widespread use of smartphones and the rise of text messaging as an inexpensive advertising tool, consumers have become highly accessible to businesses seeking to market their products and connect with their potential customers. In an effort to maintain consumer privacy in the face of this rapid transformation, the Federal Communications (FCC) Commission has made significant revisions to the implementing rules of the Telephone Consumer Protection Act (TCPA) of 1991.

In July 2015, the FCC vastly expanded the TCPA, potentially opening a floodgate of litigation. The new rules indicate that companies are barred from using "autodialers"; must honor a customer's request to stop receiving calls; and cannot make more than one call to numbers that have been reassigned, regardless of whether the previous number-holder subscribed to the calls. These rules expand the October 2013 rules restricting the use of automated systems when contacting consumers, thus placing the onus on the caller to obtain consent and protecting consumer's privacy rights. Telemarketers are required to obtain "prior express written consent;" no longer use an "established business relationship" as a substitute for consent, and to provide an "opt-out" mechanism.

The TCPA has become a major litigation risk for companies who use text messages, artificial or pre-recorded voice messages, and other automated dialing technologies to reach its customers for advertising, informational and debt collection purposes, as hundreds of class action lawsuits have been filed in recent years seeking damages that amount to millions of dollars in TCPA violations. The Act permits a harmed "person or entity" to bring an action to recover monetary loss from such violations, and statutory penalties of \$500 per violation, and up to \$1,500 per knowing or willful violation. This costly reason alone should motivate companies to review their policies and practices and ensure their compliance with the TCPA.

Our cross-disciplinary team has handled dozens of cases over the years, including both plaintiff and defense representation. Representing one of the largest wireless carriers in the world, Dentons was at the forefront of litigating against spammers, telemarketers and other perpetrators who improperly exploited the company's network in violation of the TCPA, the Computer Fraud and Abuse Act, and other common law causes of action. In our plaintiff's representation, we have obtained judgments, monetary settlements, and preliminary and permanent injunctions, and have negotiated with state Attorneys General and the Federal Trade Commission. On the defense side, Dentons has represented clients in TCPA class actions and provided strategic compliance counseling related to the TCPA and other consumer privacy laws such as "Do Not Track" and behavioral advertising.

Our team is known for:

- Defending TCPA class actions in jurisdictions around the country;
- Representing clients in connection with subpoenas issued in underlying TCPA class actions;
- Advising clients on compliant TCPA marketing strategies and campaigns;
- Counseling clients on FCC regulations affecting TCPA enforcement;
- Advising companies on “Do Not Track” and behavioral advertising, and industry best practices;
- Representing wireless telecommunications providers in dozens of complex TCPA actions and related compliance matters; and
- Obtaining injunctive relief and payments from telemarketers, spammers and spoofers.

Dentons lawyers are well-versed in the nuances of the TCPA, providing counsel to corporations of all sizes. Combining that with our robust class action practice and deep bench of professionals across the US and around the world, our team provides you with the strength and experience for every stage of the game.

Representative experience

- Defending longtime insurance client against an alleged violation of the TCPA through unsolicited faxes in the Northern District of Illinois. (*Byer Clinic of Chiropractic*, No. 1:2014cv06247).
- Lawyers at Dentons defended provider of annuity products and defeated class certification of US\$200 million “junk fax” class action alleging violations of the TCPA, which was upheld by the Ninth Circuit Court of Appeals. (*Gibson & Co. Ins. Brokers, Inc. v. American Equity Invest. Life Holding Co.*, No. 2:06-CV-05401 (9th Cir. Feb. 9, 2009)).
- One of Dentons lawyers represented Avaya, Inc., a telecommunications company, against a putative class action alleging that an Avaya reseller, DJJ Sales Associates Inc., violated the TCPA section by sending a fax to the claimant, Mr. Bonime, without permission. We prevailed upon the Eastern District of New York to dismiss the complaint because New York law does not permit private actions for violations of the TCPA to be brought as class actions. The Second Circuit affirmed the subsequent appeal, resulting in a complete victory for our client. (*Bonime v. Avaya*, 07-1136-CV (2nd Cir. Oct. 31, 2008)).
- Represented BodyWise International, a vendor of dietary supplements and settled a putative class action in Illinois state court on favorable terms in its junk fax class action. The case involved an independent contractor that faxed over 150,000 advertisements. (*West Washington Building LLC v. BodyWise Int'l, Inc.*, No. 03-CH-18809, Nov. 6, 2007, granting final approval).
- Defending the world’s largest airline against an alleged violation of the TCPA through unsolicited text messages in the District of Minnesota.
- Represented a national apparel chain in a putative class action for alleged violations of the TCPA in the Southern District of Indiana.
- Obtained early dismissal for the NFL in consumer class action under TCPA in Los Angeles County Superior Court based on evidence that established no violation of statutory law.
- Successfully defeated class certification of claims for a national retail client in the Central District of California brought by consumers nationwide for violation of the TCPA for alleged improper telemarketing.
- Defending Midwest Nutritional in a putative class action in the Northern District of Illinois alleging that a provider of seminars and information on nutrition and diet violated the TCPA and is liable under Illinois common law conversion for sending unsolicited faxes that failed to contain a requisite opt-out disclaimer. (*Greg’s Greater Chicago Chiropractic, LLC v. Midwest Nutritional Service, Inc.*, No. 13-06400 (N.D. Illinois)).
- Secured a voluntary dismissal with prejudice for a nonprime credit provider in a putative class action brought in a Georgia state court for alleged violations of the TCPA. After securing an order to remove the case to the US District Court for the Northern District of Georgia, our team discovered the named plaintiff’s sordid criminal history, which included shoplifting and aggravated assault. This prompted our client to investigate the claims alleged in the complaint for potential fraud, either by the plaintiff and other members of the plaintiff’s family. Within a week of our engagement, we negotiated the voluntary dismissal of the claims made by the named plaintiff with prejudice.
- Secured a victory for a payday lending company in a certified class action in the US District Court District of Nevada. A class of approximately 100,000 cell phone users alleged that our client (along with other defendant: two other payday lenders, a lead generator and a lead compiler) had texted them short-term loan advertisements in violation of the TCPA. However, because our client, the payday lending company,

did not physically send the text messages, our team successfully argued that it could not be held liable for the actual sender's acts. We obtained a summary judgment on all claims, avoiding potential damages of between US\$50 million and US\$150 million and dealing a blow to the TCPA plaintiffs' bar.

- Defending two TCPA class actions in the Northern District of Illinois alleging violations of the TCPA through "click to call" or "pay per call" campaigns. In one, we convinced the federal court that a major national insurer could not be held vicariously liable for allegedly unlawful telemarketing calls placed by a third party. The District Court agreed with Dentons that the seven named plaintiffs failed to allege a plausible basis for holding our client liable for telemarketing calls placed by a third-party lead-generator marketing company.
- One of Dentons lawyers defended health and medical companies Sciton Inc., Syneron Inc., Iridex Corp. and Intralase Corp. against separate putative class actions in the Eastern District of New York, each of which alleged that the companies faxed unsolicited advertisements "junk faxes" in violation of the TCPA. We were able to have the matter dismissed by the court on the basis of lack of subject matter jurisdiction. (Nos. 1:2005-CV-02533; 1:2005-CV05299; 1:2005-CV-01254; 1:2005-CV-02529).
- Successfully defended several TCPA actions in Missouri, including cases in St. Louis County. A St. Louis-based packaging supplies and equipment company filed a putative class action alleging that it received unsolicited facsimiles in violation of the TCPA. Shortly thereafter, another plaintiff, a travel consultant agency, filed a similar suit. Dentons defeated the first action's class certification motion, and the case proceeded on an individual basis. The court entered judgment in favor of the health club chain. Thereafter, the second plaintiff dismissed its case, with prejudice, and the litigation was successfully ended.

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