

Business-Oriented Solutions for Nuisance Litigation

“Nuisance” Litigation Overview

What “nuisance” litigation do you encounter in your practice?

“Nuisance” Litigation Overview *(cont’d)*

Types of Nuisance Litigants

- Law Firms
- “Rental” Plaintiffs
- Lawyers as Litigations
- Vexatious Litigants
- “Loud” Plaintiffs

Common Nuisance Type Claims

Examples of Specific Claim Types

- Food/Product labeling (i.e., Sugar; Healthy or Healthy inference; “Natural” and “All Natural”; “Organic”; GMO ; Real Food; Authentic; Country of Origin; “No Preservatives”; “No Artificial or Synthetic Ingredients”)
- Pricing (“Phantom Discounts”)
- Slack-fill (product packaging)
- Website Claims/Language (i.e., automatic renewal subscriptions; consent to be called/texted; website accessibility)



Representative Example: Slack-Fill

- **Class action lawyers are increasingly bringing claims alleging that a product’s packaging or empty space misleads consumers to believe there is more product inside than the package actually contains, despite new safe harbors in California.**
- **California law has two separate provisions regulating nonfunctional slack-fill.**
 - 1) Section 12606.2 of the California Business & Professions Code governs nonfunctional slack-fill regarding food products, and
 - 2) Section 12606 governs non-food products.
- **A container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack fill.**
- **Slack-fill is functional if it falls under one of many enumerated exceptions:**
 - Protection of the contents of the package
 - Requirements of the machine used to enclose the contents
 - Settling during shipping and handling
 - Need for packaging to perform a specific function
 - Food packaged in a reusable container with empty space as part of the presentation
 - Inability to increase the fill level because the size is necessary to accommodate labeling requirements
 - Additional exemptions with new law:
 - Online sales: packaging sold in a way that “does not allow the consumer to view or handle the physical container or product.”
 - Fill-line containers: packaging that, at the point of sale, “clearly and conspicuously” depicts the “fill line.”
 - “Actual size” food containers: food containers for which the “actual size” of the product or immediate product container is “clearly and conspicuously” depicted on any side of the exterior packaging (excluding the bottom), if accompanied by a disclosure that the depiction is the “actual size” of the product or immediate product container. [this exemption previously was applicable to only non-food items].
 - See-through packaging: food containers for which the dimensions of the product or immediate product container are visible through the exterior packaging. [previously applicable only to non-food items]



Slack-Fill (cont'd)

Examples of Slack-Fill Litigation

- Products that have been targeted include: food products (candy, potato chips, etc.), cosmetics, drugs, deodorant, lip balm, and laundry detergent.
- Some courts dismiss slack-fill claims when the product packaging accurately displays content on front of packaging (e.g. net weight or total number of products included) because consumers cannot be deceived by admittedly accurate disclosures of content. Other courts have allowed slack fill claims to move forward when plaintiffs allege that empty space in products is non-functional slack fill.
- Since AB 2632 went into effect, about a dozen new slack-fill cases have been filed in California state and federal courts. The majority of these cases concern opaque packaging, which plaintiffs allege prevents them from directly seeing or handling the product, thereby leading a reasonable consumer to believe that the package contains significantly more product than it actually does.
- Some slack fill lawsuits have settled for significant sums or confidentially, while other settle for a nominal basis pre or post litigation.
- Consider designing product packaging to take advantage of one or more of the above safe harbors to avoid claims or increase chances of dismissal/resolution (avoid opaque product packaging unless it also uses a fill line or depicts and discloses the actual size of the product within the package; set the line at the lowest possible point to account for product settlement)



Representative Example: Automatic Renewal Subscriptions

- **California's Automatic Renewal Law "ARL" (CA Bus & Prof Code Section 17602) requires businesses that sell goods, products, or services on a recurring basis to:**
 - 1) Disclose their terms clearly and conspicuously;
 - 2) Obtain affirmative consent prior to charging the consumer a non-discounted or promotion price;
 - 3) Provide an acknowledgment capable of being retained by the consumer that includes terms, a cancellation policy and information on how to cancel.
 - If the business offers a free trial, the business shall also disclose in the acknowledgment how to cancel, and allow the consumer to cancel, the automatic renewal or continuous service before the consumer pays for the goods or services.
 - 4) Provide a cancellation method which is (a) a toll-free telephone number; (b) an email address; (c) a postal address, if the seller directly bills the consumer; or (d) another "cost-effective, timely, and easy-to-use mechanism.
- **The ARL also requires that:**
 - A consumer who accepts an automatic renewal or continuous service offer *online* shall be allowed to terminate the automatic renewal or continuous service *exclusively online*, which may include a termination email formatted and provided by the business that a consumer can send to the business without additional information.
 - An offer that includes a free gift or trial must have a "clear and conspicuous explanation" of the offer's pricing or change in pricing after the trial ends.

Automatic Renewal Law (“ARL”)

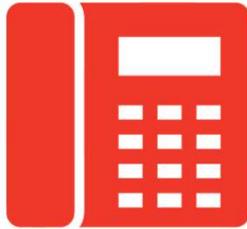
Surge of ARL Litigation

- Class action litigation under the ARL is growing. Many prominent technology firms have faced litigation, including Spotify, Google, Apple, Yahoo, Hulu and Blizzard.
- Although courts have held that the statute only applies to California consumers, any Californian consumer who enters into an auto-renewal or subscription agreement may bring an action under the ARL. Therefore, companies that offer their goods or services on an automatic renewal basis in California should comply with the ARL.
- **Common Allegation in ARL-based complaints:**
 - Failure to provide automatic renewal or continuous service terms in a clear and conspicuous manner.
 - Failure to provide the terms in visual proximity to the request for consent
 - Failure to provide acknowledgement of the terms,
 - Failure to provide an easy mechanism for the consumer to cancel the subscription.
- **Exposure under the ARL can be quite substantial, with settlements in the tens of millions of dollars, or they can be dismissed/resolved early on (pre or post litigation), especially with proper remediation.**

Representative Example: The Telephone Consumer Protection Act - TCPA

- **Authority:**
 - Statute: 47 U.S.C. § 227.
 - FCC Regulations: 47 CFR § 64.1200 et seq.
- The TCPA is premised on the concept of prior consent: businesses are **prohibited** from making any call or sending any text message using an autodialer, artificial voice, or prerecorded message to a consumer's mobile phone or residential landline without the consumer's "**prior express consent**."
- The TCPA **does not** cover telephone calls or text messages that are **manually dialed or made by a live agent** (i.e., made without the use of an autodialer).
- Also applies to faxes
- Consent rules vary based on the type of call made when using autodialers or artificial/prerecorded voices:
 - **Non-telemarketing calls:** Non-telemarketing calls do not include commercial or advertising information. Examples include debt collection calls, flight notifications, bank alerts, school closings and customer satisfaction surveys.
 - **Telemarketing calls:** Messages contain statements promoting the availability and quality of a good or service. Examples include: messages with coupons/discounts, messages offering increased services, rewards programs and any content construed as "selling" or "advertising." 47 C.F.R. Part 64.1200(f)(1), 47 C.F.R. Part 64.1200(f)(12).
 - **Mixed Message Calls:** Messages that have both informational and telemarketing messages are treated as telemarketing calls for purposes of the TCPA's requirements.
- **General Exceptions Under the TCPA:**
 - Manual dialing: not using an ATDS, 47 U.S.C. § 227(b)(1)(A).
 - Utility companies to place calls "closely related to the utility service." 31 FCC Rcd. 9054.
 - Certain calls by healthcare providers: FCC Ruling, 30 F.C.C. Rcd. 7961, 8030 (2015).
 - Debt Collection calls by federal government. 47 CFR 64
 - Informational calls with no advertising: 47 U.S.C. § 227(a)(5) *But prior oral or written consent for calls made to cell phones, unless exempt.
 - Certain calls from schools. 31 FCC Rcd. 9054.
 - Emergency calls: 47 U.S.C. § 227(b)(1)(A), (B).
 - Messages from cellular carriers when not charging the party to be called: FCC Ruling, 77 FR 34233, 34235-34236 (2012).
 - Calls for "exigent circumstances:" fraud alerts, data security breaches, money transfers (no prior express consent necessary; no more than 3 calls over 3 days; cannot charge consumer), FCC Ruling, 30 F.C.C. Rcd. 7961, 8025 (2015).

A Closer Look at the Nature of Telephone Calls



Residential calls

- Trigger is *artificial voice or prerecorded message: Is it informational or commercial?*
- **Autodial Exception:** Calls made by live operators or autodialers do not trigger the consent requirements for landlines.
- If the call is a prerecorded telemarketing message, company must have **prior express written consent**.
- If the call is informational, no consent is necessary.



Mobile calls

- Trigger is *artificial, prerecorded voice or "automatic telephone dialing system."*
- Calls made by live operators that are "manually dialed" do not trigger the consent requirements for mobile calls.
- If the call is a prerecorded telemarketing message or autodialed telemarketing call (i.e., connecting with an agent), company must have **prior express written consent**.
- Bar is higher for **telemarketing calls**.
- If the call is informational, company must have oral or written consent.

TCPA Compliance and Settlement

TCPA litigation is viewed as easy money for plaintiffs

Plaintiffs are filing lawsuits at a prolific space (14 in 2007 vs. approx 5,000 in 2017)

Why comply with the TCPA?

- The greater of \$500 per call, text message or fax or actual damages.
- \$1,500 per call, text message or fax for "willful" or "knowing" violation.
- E.g., 1,000 telephone calls = possible exposure of \$1.5 million!
- **Strict Liability**
 - Lack of knowledge or intent not a defense (with exception of "one call" safe harbor).

Nominal Settlements for Boilerplate Demand Letters/Complaints, especially with proper remediation

Headline-Grabbing Settlements, Orders, and Jury Verdicts



• **\$76 million:** *Aranda v. Caribbean Cruise Line, Inc.* No. 1:12-cv-04069 (N.D. Ill.)



• **\$75.5 million:** *In Re: Capital One TCPA Litigation*, No. 1:12-cv-10064 (N.D. Ill.).

• **\$280 million:** FTC, and the Attorneys General of California, Illinois, North Carolina and Ohio received \$280 million civil penalty against Dish.



• **\$61 jury verdict:** *Kraukauer v. Dish Network*, No.1:14-cv-00333 (M.D.N.C.)

• **\$40 million:** *Wilkins v. HSBC TCPA Settlement*, No.1:14-cv-00190 (N.D. Ill.)

TCPA Compliance Tips

Develop TCPA Compliance Program

- Use manual dialing (if practical)!
- Develop legally sufficient standard notice and consent provisions to ensure compliance with FCC rules.
- Categorize messages to assess compliance risks (What types of messages are being delivered? To whom are they being delivered?).
- Train—and retrain—your employees annually.
- Check—and recheck—the National Do Not Call Registry for telemarketing calls.
- **Verify that numbers have not been reassigned** (Remember the "one free call" rule!). Note: use market solutions to identify current subscribers such as Neustar; include opt-out language in all text messages (*i.e.*, "STOP" or "REPLY WRONG" for wrong numbers)
- Scrub databases for cell phone numbers vs. home numbers
 - Cell phone numbers **always** require some type of consent (Remember that **telemarketing calls** require prior express written consent and **informational calls** require oral or written consent).



TCPA Compliance Tips *(cont'd)*

- **Record and retain all consent (consent is everything, especially for mobile phones; consent must be to specific number, "clear and conspicuous" and not condition of purchase)**
 - Develop methods for tracking receipt of consent
 - Record and retain revocation of consent
 - Immediately purge number from database when consent has been revoked or designate the number as do not call.
 - Consent can be obtained electronically (must comply with E-SIGN Act).
- **Maintain records for at least four years**
 - Paper: agreement should include date of consent; may be scanned and stored electronically
 - Online: name, telephone number, date of consent, IP address, URL of page containing consent
 - E-mail: copies of e-mails must be retained
- **Monitor vendors that provide marketing or debt collection services**
 - **Risk of joint and several liability; negotiate for maximum protection against potential vicarious liability, including** indemnification and TCPA reps and warranties
 - Perform independent review of their TCPA compliance
- **Consider arbitration clauses/class action waivers**

Defending Against TCPA Claims and Class Actions

- At inception, assess all the facts and the possible exposure (e.g., What are the number of calls at issue? What was the size of the calling/texting campaign? What type of technology was used to make the calls or send the messages?).
- Investigate insurance (notify carrier—though coverage unlikely)
- Research plaintiff and plaintiff's lawyer
- Understand current TCPA case law and regulatory landscape
- Consider early resolution/individual settlement
- Consider motions to dismiss based on:



Standing
(*Spokeo*)



ATDS



Consent



Statute of
limitations

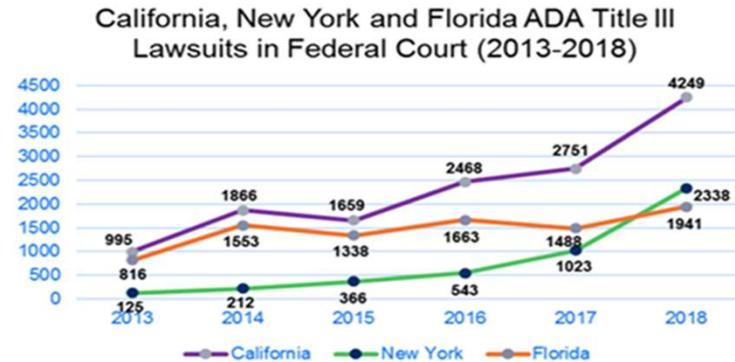
(Plaintiffs will typically just amend the complaint, mooted your motion to dismiss.)

- Summary judgment

Website Accessibility Claims

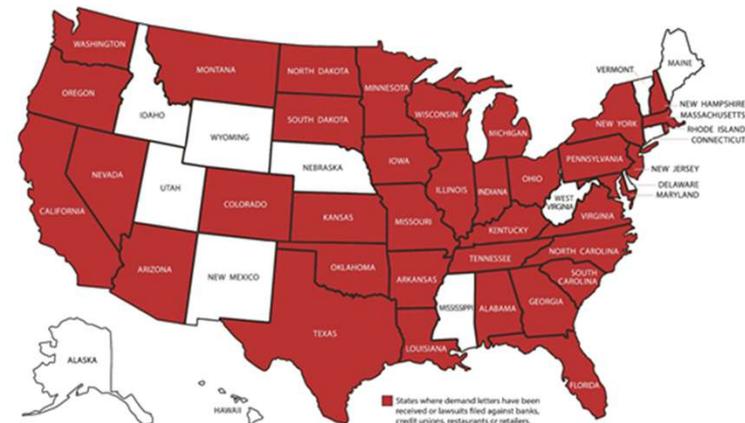
Website Accessibility Lawsuits and Demand Letters

- Plaintiffs are sending demand letters and bringing civil rights actions under the ADA against Defendants for failing to design, construct, maintain, and operate fully accessible websites (e.g., compatible with screen-reading technology, WCAG compliant, etc.) that are independently usable by blind or visually-impaired people.



[Graph: California, New York and Florida ADA Title III Lawsuits in Federal Court: 2013-2018: 2017: CA 2751, 2018: CA 4249, 2017: NY 1023, 2018: NY 2338, 2017: FL 1488, 2018: FL 1941.]

ADA Website Accessibility Demand Letters Received and/or Lawsuits Filed (by state)



Website Accessibility Claims

General Website Accessibility Considerations

Application of ADA Unclear

- “Although there have been several recent court decisions on the application of the ADA, the statutory authority for applying the ADA to websites is unclear.” (June 20, 2018 letter from 100+ U.S. House Members to AG Sessions)

Web Content Accessibility Guidelines (WCAG)

- WCAG are published by the World Wide Web Consortium, which is an international standards organization for the World Wide Web.
- WCAG 2.0 guidelines are private industry standards for website accessibility developed by technology and accessibility experts.
- WCAG 2.0 guidelines have been widely adopted, including by federal agencies, which conform their public-facing, electronic content to WCAG 2.0 level A and level AA Success Criteria.
- Although still unclear, some courts have said that WCAG 2.0 conformance is the required standard for accessibility. (See *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1350 (S.D. Fla. 2017) (pending on appeal))

Website Accessibility Claims

Settlement Value

Typical Remedies Sought by Plaintiffs

- Declaratory and Injunctive Relief Requiring Website Remediation
- Reasonable Attorneys' fees, costs, and expenses.
- Damages Under State Laws

Settlement Benefits

- Typical Settlements Range from \$5,000-\$20,000
- Settlement Agreements Provide Negotiable Website Remediation Obligations
- Avoid Uncertainty of Trial
- Avoid Excessive Litigation Costs

Demand Letters

March 22, 2019

Via Certified U.S. Mail
Return Receipt Requested

Senior Vice President and General Counsel

Re: *Class Action Notification and Pre-Lawsuit Demand Pursuant to California Civil Code Section 1782 and All Other Applicable Laws Requiring Pre-Suit Notice Concerning Your Products*

Notice of "No Artificial Colors, Flavors or Preservatives" Advertising and Label Violations

Dear _____:

I am sending this letter to you as Senior VP and General Counsel of _____ (the "Defendant"). Please let me know if I should direct future correspondence to outside counsel.

Overview of the Case

Please be advised that _____ along with co-counsel represent ("Client"), purchaser of certain varieties of _____ snack bars. Our Client seeks to represent a class of consumers ("Class") who, within the relevant time period,¹ purchased any of your products advertised as "No Artificial Colors, Flavors or Preservatives" but contained the chemical preservative citric acid (the "Products"). This letter provides Defendant with notice and demand for corrective action. All further communications intended for our Client must be directed through this office. Furthermore, this demand and notice letter is meant to comply with the requirements of *California Civil Code* §1782, and all other laws requiring a pre-suit demand and notice prior to litigation, on behalf of our Client and all others similarly situated, should this matter proceed to litigation.

During the relevant time period, Defendant has manufactured, filled, marketed, advertised, distributed, and sold the Products to consumers across the country. However, Defendant's label statement "No Artificial Colors, Flavors or Preservatives" was and continues to be

¹ From four years prior to the date of a prospective complaint filed by our Client.

Considerations for In-House Counsel

Where to allocate spending?

- Remediation
- Settlement
- Defense

Considerations for In-House Counsel *(cont'd)*

Remediation

- Relabel
- Fix Website
 - In-House
 - Third-Party Developers

Pros:

- Cut off future liability
- Create an outer boundary of a potential class

Cons:

- Admissions
- Plaintiffs' catalyst fees

Considerations for In-House Counsel *(cont'd)*

Defend or Settle?

Defend

- Discourage copy-cats
- Desire to create precedent
- Principle
- Merits/legal defenses

Settle

- Cost of defense
- Keep a customer
- Avoid adverse publicity
- Avoid discovery/additional claims
- Avoid business interruption

Considerations for In-House Counsel *(cont'd)*

Nuisance Defense Toolkit

- Arbitration provisions
- Reclassification motions
- Insurance / self-insurance

Considerations for In-House Counsel *(cont'd)*

When to engage outside counsel?

Pros:

- Work product protection
- Working relationships with plaintiffs' counsel
- Expertise
- AFAs can provide certainty

Cons:

- Cost
- Messaging

Thank you

大成 DENTONS

Dentons US LLP
601 S. Figueroa Street
Suite 2500
Los Angeles, CA 90017-5704
United States



Michael J. Duvall

Los Angeles
D: +1 213 892 2818
michael.duvall@dentons.com



Bety Javidzad

Los Angeles
D: +1 213 623 9300
bety.javidzad@dentons.com



Kelly R. Graf

Los Angeles
D: +1 213 892 2811
kelly.graf@dentons.com



Javier C. Rivera

Senior Attorney, Claims
and General Litigation
Southern California Edison Company

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