New Liability in Marketing Communications

October 6, 2022

By: Aaron C. Tifft

The Journal Record

https://journalrecord.com/2022/10/05/gavel-to-gavel-new-liability-traps-in-marketing-communications/

A new bill takes effect on November 1, 2022, that broadens the scope of potential liability for Oklahoma businesses using telephone or text message marketing. Modeled on the federal Telephone Consumer Protection Act ("TCPA"), the Oklahoma Telephone Solicitation Act ("OTSA") places significant restrictions on using calls and text messages for marketing purposes.

The OTSA prohibits using an "automated system" for a "commercial telephonic sales call" without obtaining the "prior express written consent" of the "called party." A person who believes they have received a call or message in violation of the OTSA can personally sue the caller for at least $500. The statute is unclear if this allows a plaintiff to seek $500 *per call*, but similar statutes, including the TCPA, do apply the statutory damages on a per call basis.

Unfortunately, the OTSA lacks any clear definition for an "automated system" or a "call" itself.

When referring to an "automated system," the act only defines it as one which is used for the "selection or dialing of telephone numbers or the playing of a recorded message." Because of the vague and broad nature of this definition, it could easily encompass almost any form of modern dialing through a computer platform or smart phone.

The statute similary gives businesses no clear guidance on the definition of a "commercial telephonic sales call." At many points in the OTSA, it seems to refer to a traditional audio telephone "call." However, in defining the consent requirements, the OTSA mandates the consent language include a reference to authorizing such a "call" via "text message." This strongly suggests that the OTSA includes text messages within the scope of a "commercial telephonic sales call." Accordingly, businesses should assume text messages fall within the same restrictions and consent requirements of the OTSA.

The upcoming implementation of the OTSA only furthers the need for Oklahoma businesses to seek competent legal and regulatory guidance. Businesses must ensure compliance with both existing federal restrictions and the new broader restrictions in the OTSA. Class action TCPA plaintiffs have already filed many cases in Oklahoma, seeking millions of dollars in statutory damages. To avoid potential liability and a

costly defense of these cases, businesses should anticipate future lawsuits under the OTSA and work closely with legal counsel to ensure compliance, locate potential exceptions to the OTSA, and reduce their overall liability coverage.

Attorneys

- Aaron C. Tifft