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Van Patten V. Vertical Fitness Is No TCPA Killer

Law360, New York (February 21, 2017, 9:50 AM EST) -- The rise of Telephone Consumer Protection Act litigation in the past decade has been staggering. From just 14 cases in 2007, the number of TCPA-related filings has exploded to 4,860 in 2016 — a total that is expected to exceed 5,000 in 2017. Facing this wave of litigation, counsel representing TCPA defendants have seized on language in a recent Supreme Court case — Spokeo v. Robins — to obtain the dismissal of cases before they ever reach the question of class certification. In a recent decision with important implications, the Ninth Circuit Court of Appeals questioned the viability of Spokeo arguments against TCPA actions but opened the door to defenses based on consent and waiver revocation. Van Patten v. Vertical Fitness Group LLC No. 14-55980, 2017 U.S. App. LEXIS 1591 (9th Cir. Cal. Jan. 30, 2017). Ultimately, the Spokeo defense remains an intriguing — if unsettled — means of attacking TCPA claims filed in federal court.

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The TCPA

Passed by Congress and signed into law in 1991, the TCPA was drafted to address the growing problems of junk faxes and the dinner-interrupting robocalls that were increasingly bothering both businesses and families alike. Rather than die out as facsimile machines and landlines have lost popularity, the TCPA found new life, of sorts, as it was expansively interpreted by the Federal Communications Commission and courts alike to apply to cell phones and to text messages.

Just as the rise of the cell phone culture in the United States saw marketers looking to capitalize by reaching out to individual consumers on those devices, so too did the plaintiff's bar seek to use the broadly interpreted TCPA to pursue class-based claims against companies of all stripes. The TCPA provides for statutory damages of $500 per violation, an amount that can be trebled with a showing of willfulness. Such amounts, though small in individual cases, can lead to staggering damages allegations in the aggregate and have resulted in multi-million-dollar recoveries and the corresponding boom in TCPA-related litigation.

Spokeo Inc. v. Robins

To combat the rise of TCPA cases, defendants have forwarded varying defense theories in search of a silver bullet. In the past year, a Spokeo defense has gained popularity. In Spokeo, the court determined that a plaintiff's injury must be both "particularized" and "concrete," and courts considering the issue must distinguish between those characteristics in their standing analysis. Spokeo Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016). Though not deciding the ultimate question of whether the particular plaintiff suffered the requisite injury, the court emphasized that a plaintiff "cannot allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." Id. Spokeo addressed injury allegations in a Fair Credit Reporting Act context, but defendants have employed its reasoning to strike at a plaintiff's Article III standing to bring other statutory claims — including TCPA allegations — in federal court. Such was the case in Van Patten v. Vertical Fitness, a Jan. 30, 2017, Ninth Circuit opinion that considered and rejected the defendant's Spokeo-based challenge to the plaintiff's standing while opening the door to a more fact-specific means of defeating TCPA claims.

Van Patten v. Vertical Fitness Group

The TCPA claims in Van Patten stem from a dispute over a gym membership. In 2009, plaintiff Bradley Van Patten visited a Gold's Gym franchise in Green Bay, Wisconsin, seeking information about becoming a member. During his visit, he submitted a courtesy card in which he disclosed demographic, financial and contact information — including his cell phone number — to the gym. Van Patten again gave the gym his cell phone number as part of his membership agreement, which he signed. Just three days after opening his membership, Van Patten called the gym to cancel it. Three years later, Van Patten received a series of texts from the gym's operator — Vertical Fitness — announcing a rebranding of the gym.

In June 2012, Van Patten filed a putative class action alleging that Vertical Fitness and its advertising partner, Advecor Inc., violated the TCPA and the California Business and Professions Code by "caus[ing] consumers actual harm," including "the aggravation that necessarily accompanies wireless spam" and the need to "pay their cell phone service providers for the receipt of such wireless spam." A Southern District of California court granted Van Patten's motion for class certification of a national TCPA class but later granted the defendants' motion for summary judgment on all of Van Patten's claims — a decision that Van Patten appealed to the Ninth Circuit.

Before addressing the substance of Van Patten's TCPA allegations, the panel considered the defendants' argument that Van Patten lacked Article III standing pursuant to Spokeo to bring such claims. Defendants argued that Van Patten did not establish a concrete injury-in-fact, but the panel disagreed. Citing the legislative history of the TCPA, the Ninth Circuit found that Congress deemed unrestricted telemarketing to be a nuisance that the TCPA was designed to address. With that Congressional intent in mind, the court determined that unsolicited calls and texts "by their nature, invade the privacy and disturb the solitude of their recipients," and found that a TCPA plaintiff "need not allege any additional harm beyond the one Congress has identified" in order to plead a concrete injury in fact for Article III standing purposes.

Interestingly, though refusing to dismiss on standing grounds, the Ninth Circuit ultimately affirmed the lower court's summary judgment against Van Patten. It determined that Van Patten had given his prior express consent to be contacted by disclosing his cell phone number to the gym. Further, it held that Van Patten did not revoke his consent simply by cancelling his gym membership. On the issue of prior express consent — the key question in the TCPA context when addressing whether a call or text message is allowed — the court found that the scope of Van Patten's consent was not unlimited but that the invitation to reactivate his membership fell within the purpose for which he gave his number in the first place. And, because Vertical Fitness operated the gym when he disclosed his number and still did so when Van Patten received the texts three years later, it was still the party to whom Van Patten had given his consent. As to revocation, the court found that while the TCPA allows consumers to revoke their consent, such revocation must be "clearly made and express a desire not to be called or texted" in order to be effective. It found that Van Patten had not met these requirements by merely cancelling his membership.

What's Next for TCPA Defendants

With the Van Patten decision, the Ninth Circuit questioned an increasingly popular means of challenging TCPA suits while opening the door to the defense bar on the issues of consent and effective revocation. As the first federal appellate court to weigh in on a Spokeo challenge in the TCPA context, the Ninth Circuit has drawn an early line in the sand in favor of plaintiffs and their ability to allege the requisite harm. A spate of post-Spokeo federal district court opinions that have dismissed TCPA claims based on an opposite finding suggests that other circuits will soon have the chance to consider the issue, and a circuit split may mean another opportunity for the U.S. Supreme Court to take up Article III standing in cases of a statutory-based injury. Facing this possibility, some plaintiffs are choosing to avoid the issue altogether by filing their TCPA actions in state court, highlighting an important limitation of the Spokeo approach.

For now, the Spokeo defense joins the ranks of the Campbell-Ewald defense as a potentially powerful but unresolved means of defending TCPA claims. In its January 2016 Campbell-Ewald decision, the Supreme Court held that an unaccepted Rule 68 offer of judgement does not moot a putative class action. Gomez v. Campbell-Ewald Co., 136 S. Ct. 663, 672 (2016). Such offers were popular means of resolving TCPA cases under the theory that a class representative who had been offered complete relief before moving for class certification no longer had an active case or controversy against the defendant. Though Campbell-Ewald appeared to shut down this defense approach, the court pointedly did not reach the issue of whether a defendant could moot a plaintiff's claim by making an actual payment of complete relief. In his dissent, Chief Justice Roberts even laid out a route for accomplishing such payment — depositing a certified check with the trial court for the full amount due. TCPA defendants have been testing the chief justice's strategy ever since.

While TCPA defendants wait for final clarification on Spokeo and Campbell-Ewald, the Van Patten decision does offer them a measure of relief. While Van Patten's expanded view of prior express consent and narrowing of effective revocation may not be the TCPA killer defendants have hoped for, it is a welcome refuge for companies under siege from TCPA litigation.

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