

Telemarketing

Clinton, Trump Must Heed FCC Robcall Rules As Conventions Officially Launch Candidates

Hillary Clinton and Donald Trump will want to connect with as many potential voters as they can in the weeks after their respective nominating conventions, but they should probably avoid using robots in that effort.

The presumptive Democratic and Republican nominees for president would be wise to heed the Federal Communications Commission’s enforcement advisory to all political campaigns to be wary of using an automated dialing system to send voice or text messages to the mobile phones of potential voters.



Identifying class members may prove difficult for potential plaintiffs, class action attorneys told Bloomberg BNA. But high costs in defending litigation from individuals seeking to represent classes of unhappy message recipients await campaigns and political action groups that fail to properly limit robocalls, they said.

The first law of robotics—created by science fiction master Isaac Asimov nearly 75 years ago—is that a robot shouldn’t take action to harm a human. Some may argue that making political robocalls to unconsenting individuals’ mobile phones actually does no real harm, so not only is the Asimov principle upheld but campaigns should have no liability fears. But campaigns and political action committees face the Telephone

Consumer Protection Act and its implementing rules that establish statutory damages. In many instances, courts don’t require a direct showing of concrete harm to file suit, only evidence that the message was sent to an unconsenting individual’s mobile phone(128 PRA, 7/5/16).

The presumptive nominees should learn the lessons garnered from President Barack Obama, a Chicago water commissioner and even Trump himself, who have all been subject to TCPA class claims (202 PRA 202, 10/20/15; 81 PRA, 4/27/16).

Robocall Caution Advised. During political season, voters and donors may expect countless phone calls, text messages and even faxes asking for support and monetary contribution from campaigns, political action committees and other interest and lobbying groups.

Political campaigns and companies that promote a political messages and make calls or text messages to mobile phones using an automated dialing system will need to be extra careful to obtain consent from a consumer, class action attorneys told Bloomberg BNA.

The TCPA, 47 U.S.C. § 227, prohibits the use of automated telephone dialing systems without the prior express consent of a consumer to receive unsolicited calls or text messages on a mobile phone.

Under the TCPA, there is no differentiation between marketing and informational messages sent to mobile phones, Marc Roth, a TCPA compliance and class action defense partner at Manatt, Phelps & Phillips LLP in New York, said. Although there is an exemption for political campaigns that place calls to landlines, campaigns still need to obtain prior express consent to send automated calls or texts to mobile phones, he said.

“Campaigns should be exercising best practices,” including scrubbing out mobile phone numbers “to avoid distractions from litigation” and to limit any telemarketing consent issues.

MARC ROTH, TCPA COMPLIANCE CO-CHAIRMAN,
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“Campaigns should be exercising best practices,” including scrubbing out mobile phone numbers “to avoid

distractions from litigation” and to limit any telemarketing consent issues, Roth, who is the co-chairman of the firm’s TCPA compliance and class action defense group, said. But, campaigns may be better off avoiding automated calls or texts to mobile phones all together to avoid TCPA liability, he said.

If political campaigns don’t obtain proper consent they may run into both statutory and regulatory hurdles as well as negative publicity stemming from potential TCPA class actions, the attorneys said.

Consent and Ascertainability. The central issue for any run-of-the-mill TCPA action is the ascertainability of a class of plaintiffs and more specifically, if the consumers gave consent for the calls or texts.

Ascertainability, an implied prerequisite to class certification, requires that the class be defined by objective characteristics that allow for class members to be readily identified.

Consent and ascertainability are central issues for the TCPA, Roth said. Because a political campaign may obtain consent in a multitude of different ways—signing up for a mailing list, donating to the campaign, filing a petition, among other methods—it’s “virtually impossible to certify a class of called parties.”

If plaintiffs are unable to easily ascertain which parties consented and didn’t consent to calls or texts then a case may end quickly by dismissal or settlement, Roth said.

Mark Eisen, associate at Sheppard Mullin in Chicago and member of the firm’s privacy and data security group, said that plaintiffs have such a high burden to establish ascertainability through consent. Campaigns routinely “merge existing lists of donor data they obtained” from national campaign groups or from prior candidates, he said. A reason why plaintiffs have such a hard time to certify a class is because “how do you pick apart who has consent,” he said.

“Once all lists are in use, there’s an insurmountable hurdle for the plaintiff to prove ascertainability,” Eisen said.

Roth said that even though class ascertainability may be hard to prove, campaigns should try to limit the collection of mobile numbers. “Odds are they will not have clear consent,” to contact the consumers, he said.

There’s no reason to get a “class action filed against you and have to lawyer up to defend it” when the campaign could’ve ignored mobile numbers and just stuck to landlines, Roth said.

Regulatory Oversight. The FCC’s enforcement advisory was aimed at curtailing “robocall and text abuse.”

Roth said that biannual enforcement notice is important because of the actions—including Trump and the Chicago water commissioner—“that have been brought recently.” The FCC wants to put political campaigns on notice that “they are watching and to remind the campaigns what the rules are” for political robocalls and text messages. Additionally, due to the increase in the number of pre-recorded calls the FCC wanted to inform campaigns of their responsibilities.

Even with the increased focus, what accounts for the apparent lack of FCC enforcement actions against political campaigns?

Troy K. Lieberman, class action attorney at Nixon Peabody LLP and co-leader of the firm’s TCPA team in Boston said that the lack of enforcement may be caused by the FCC’s reluctance to step in for ordinary cases

and save enforcement actions for “serious or egregious,” violations. The FCC has let private litigants attempt to curtail political robocalls, he said.

The bottom line for consumers who want to rein in political robocalls is that there isn’t a ton of FCC enforcement, so they may need to look to class action litigation.

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Lack of Lawsuits. Although there is an increase in the number of robocalls and texts sent to mobile phones, there hasn’t been many lawsuits or regulators actions against political campaigns. What explains this disparity?

According to Eisen, one of the main reasons for the lack of lawsuits or enforcement actions is the lack of complaints against the campaigns. Calls from political campaigns “have become part of our everyday life at this point,” especially if you are in early primary states—New Hampshire or Iowa—or in a swing state, he said.

Roth also agreed that lack of awareness of TCPA rules and the lack of perceived annoyance from political calls, may limit the number of cases being brought. “For such a bulk number of calls, there are only a handful that might end up suing,” he said.

Consumers may end up “supporting the entity that called and they don’t think it’s that annoying,” Roth said.

Unlike a consumer class action against a company that won’t go away easily and that will cost the defendant’s millions of dollars to defend, campaigns typically face an initial press release, he said. If a news agency picks it up, the campaign may get a “slap across the face and a black eye,” but won’t have to pay any more than a small settlement to quiet the case, Roth said.

Fleeting Cycle. Another reason for the lack of actions against political campaigns may be the fleeting nature of the political cycle.

What happens to campaign funds and donations once the candidate drops out or loses the race?

According to FactCheck.org, political funds can’t be used for personal use. Depending on the circumstances of the candidate, the funds may be used for future campaigns, donated to charity or a political party, or make contributions directly to other candidates.

Since, most of the campaign funds no longer rest with the campaign or the candidate, there may not be a deep pocket to obtain damages from a TCPA violation.

Joseph J. Siprut, consumer class action attorney and managing partner of Siprut PC in Chicago, said that although the TCPA provides for personal liability, many of the political cases so far have been brought against the campaigns and not the candidates. This may be a

real concern when a campaign drops out of the race because they may send their contributions to another political organization not related to case, he said.

Regardless, “if there is a cessation of the campaign, we would still proceed and litigate the matter,” Siprut said.

Lieberman thinks this is why companies tend to be “better targets” in TCPA actions. Since most business won’t fold within 6 months of a violation, they probably get the most attention from TCPA actions, he said.

Eisen thinks that although suing the campaign may not be the way to go, going after a PAC may be the best solution if they have violated the TCPA. As long as they sent robocalls or texts then they have potential exposure, he said. Arguably, these PACs will have “some money in the coffers that may help in a settlement or a final judgment,” he said.

Balancing Act. Regardless of whether a campaign may escape liability for a multitude of reasons, the TCPA is still very important for both free speech and consumer protection, Claire Gartland, consumer protection counsel at Electronic Privacy Information Center (EPIC), said.

“The TCPA strikes an important balance between consumer protection and free speech when it comes to political robocalls,” she said.

Although, freedom of speech is a core value, there still needs to be some protections for consumers, she said. The political robocalls to landlines exemption shows a balance between consumer and free speech rights, Gartland said.

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