



Ninth Circuit Holds That Best Buy's "Dual Purpose" Calls Regarding Its Rewards Program Violates TCPA

October was an active month in the Ninth Circuit for actions under the Telephone Consumer Protection Act (TCPA). In our [client alert](#) last week, we discussed the Ninth Circuit's October 12, 2012, decision in *Meyer v. Portfolio Recovery Associates*, in which the appeals court broadly interpreted the TCPA in examining the meaning of "prior express consent" in a debt collection matter. The Ninth Circuit made clear in *Meyer* that debt collectors and creditors must verify not only that debtors provided their cell phone numbers but that they provided them at the time of the transaction related to the debt before creditors and debt collectors can contact those debtors using an automated or predictive dialer.

In *Chesbro v. Best Buy Stores, L.P.*, the Ninth Circuit revived a consumer class action against Best Buy alleging that a series of automated phone calls the company made regarding its Reward Zone Program (RZP) violated the TCPA, reversing the district court's order granting summary judgment in favor of Best Buy. In its October 17, 2012 decision, the appeals court held that the automated calls constituted unsolicited advertisements, telephone solicitations, and telemarketing in violation of the TCPA.

Plaintiff Michael Chesbro alleged that in November 2008 he received an automated call from Best Buy to his residential phone alerting him that his RZP certificates were about to expire. In June 2009, he received another automated call to his residential phone regarding various changes to the program. Chesbro had not consented to any of the calls and had placed his number of the National Do Not Call (DNC) Registry. Best Buy argued that the calls were purely informational, did not specifically reference property, goods, or services, and therefore did not violate the TCPA.

The TCPA makes it generally unlawful to make automated calls to residential phone lines without the prior express

consent of the called party. Noncommercial calls are exempted, but "unsolicited advertisements" and "telephone solicitations" are not. "Dual purpose" calls—those that have a customer service or informational component as well as a marketing component—are prohibited, says the Federal Communications Commission (FCC).

Giving the FCC deference and using a "common sense" approach, the Ninth Circuit rejected Best Buy's argument that the calls were purely informational:

The robot-calls urged the listener to "redeem" his Reward Zone points, directed him to a website where he could further engage with the RZP, and thanked him for "shopping at Best Buy." Redeeming Reward Zone points required going to a Best Buy store and making further purchases of Best Buy's goods. There was no other use for the Reward Zone points. Thus, the calls encouraged the listener to make future purchases at Best Buy. Neither the statute nor the regulations require an explicit mention of a good, product or service where the implication is clear from the context. Any additional information provided in the calls does not inoculate them.

The court also held that the calls constituted telemarketing under the DNC regulation because the calls encouraged consumers to engage in future purchasing activity.

Interestingly, the Ninth Circuit made no distinction between the first call encouraging Chesbro to redeem his reward certificates and the second call merely informing him of various changes in the rewards program, raising the question of whether any automated calls about a rewards program can be considered "purely informational."

This publication may constitute "Attorney Advertising" under the New York Rules of Professional Conduct and under the law of other jurisdictions.

Accordingly, companies with reward or incentive programs should assume that any automated telephone call about their reward or incentive program could be construed to implicate the TCPA and require the prior express consent of each consumer for this type of communication.

Companies should consider having consumers sign up for reward or incentive programs separately from other transactions; providing clear written opt-ins notifying consumers that they agree to receive telephone calls, including SMS text messages, for informational and advertising purposes; and obtaining consumer signatures indicating enrollment and the requisite consent to be contacted. Companies should also take care to comply with consumer requests to opt out of telemarketing calls and solicitations.

For more information about the content of this alert, please contact [Michael Mallow](#), [Christine Reilly](#) or [James Taylor](#).

For more information about Loeb & Loeb's Consumer Protection Department, please contact:

ARTHUR W. ADELBERG	AADELBERG@LOEB.COM	202.618.5020
ROBERT M. ANDALMAN	RANDALMAN@LOEB.COM	312.464.3168
MARK D. CAMPBELL	MCAMPBELL@LOEB.COM	310.282.2273
CHRISTIAN D. CARBONE	CCARBONE@LOEB.COM	212.407.4852
TAMARA CARMICHAEL	TCARMICHAEL@LOEB.COM	212.407.4225
DARLENE M. CHO	DCHO@LOEB.COM	310.282.2168
AURELE A. DANOFF	ADANOFF@LOEB.COM	310.282.2398
THERESA L. DAVIS	TDAVIS@LOEB.COM	312.464.3188
PATRICK N. DOWNES	PDOWNES@LOEB.COM	310.282.2352
ERIC GUERRERO	EGUERRERO@LOEB.COM	310.282.2214
EMILY R. HAUS	EHAUS@LOEB.COM	312.464.3126
JESSICA M. HIGASHIYAMA	JHIGASHIYAMA@LOEB.COM	310.282.2072
DEREK K. ISHIKAWA	DISHIKAWA@LOEB.COM	310.282.2364
MICHAEL W. JAHNKE	MJAHNKE@LOEB.COM	212.407.4285
JENNIFER A. JASON	JJASON@LOEB.COM	310.282.2195
THOMAS P. JIRGAL	TJIRGAL@LOEB.COM	312.464.3150
IEUAN JOLLY	IJOLLY@LOEB.COM	212.407.4810
BENJAMIN KING	BKING@LOEB.COM	310.282.2279
LIVIA KISER	LKISER@LOEB.COM	312.464.3170

This alert is a publication of Loeb & Loeb and is intended to provide information on recent legal developments. This alert does not create or continue an attorney client relationship nor should it be construed as legal advice or an opinion on specific situations.

Circular 230 Disclosure: To ensure compliance with Treasury Department rules governing tax practice, we inform you that any advice contained herein (including any attachments) (1) was not written and is not intended to be used, and cannot be used, for the purpose of avoiding any federal tax penalty that may be imposed on the taxpayer; and (2) may not be used in connection with promoting, marketing or recommending to another person any transaction or matter addressed herein.

© 2012 Loeb & Loeb LLP. All rights reserved.

RICHARD M. LORENZO	RLORENZO@LOEB.COM	212.407.4288
MICHAEL MALLOW	MMALLOW@LOEB.COM	310.282.2287
DOUGLAS N. MASTERS	DMASTERS@LOEB.COM	312.464.3144
FIONA P. MCKEOWN	FMCKEOWN@LOEB.COM	310.282.2064
DANIEL G. MURPHY	DMURPHY@LOEB.COM	310.282.2215
JAY K. MUSOFF	JMUSOFF@LOEB.COM	212.407.4212
JERRY S. PHILLIPS	JPHILLIPS@LOEB.COM	310.282.2177
RACHEL RAPPAPORT	RRAPPAPORT@LOEB.COM	310.282.2367
CHRISTINE M. REILLY	CREILLY@LOEB.COM	310.282.2361
AMANDA J. SHERMAN	ASHERMAN@LOEB.COM	310.282.2261
MICHAEL B. SHORTNACY	MSHORTNACY@LOEB.COM	310.282.2315
MEREDITH J. SILLER	MSILLER@LOEB.COM	310.282.2294
DENISE A. SMITH-MARS	DMARS@LOEB.COM	310.282.2028
WALTER STEIMEL, JR.	WSTEIMEL@LOEB.COM	202.618.5015
JAMES D. TAYLOR	JTAYLOR@LOEB.COM	212.407.4895
MICHAEL A. THURMAN	MTHURMAN@LOEB.COM	310.282.2122
LAURAA. WYTSMA	LWYTSMA@LOEB.COM	310.282.2251
MICHAEL P. ZWEIG	MZWEIG@LOEB.COM	212.407.4960