Record TCPA Class Action Settlement Entered Into in Illinois

On September 8, 2016, what could end up being the largest Telephone Consumer Protection Act ("TCPA") class action settlement was announced, with payments totaling up to $76 million being paid to settle allegations of illegal robocalls to consumers. The case, *Birchmeier et al. v. Caribbean Cruise Line Inc. et al.,* 1:12-cv-04069 (ND Ill.), consisted of two nationwide classes of millions of individuals who had received robocalls offering them a free cruise in return for their participation in an opinion survey. Plaintiffs alleged that Defendants violated the TCPA because they placed pre-recorded calls for marketing purposes without the consent of the consumers they called.

Enacted in 1991, the TCPA is intended to, among other things, combat the proliferation of robocalls -- i.e., pre-recorded telemarketing calls. The TCPA also prohibits all calls (not just marketing calls) that use an automated telephone dialing system ("ATDS") or artificial or prerecorded voice to a residential landline or cellular phone without prior express consent. This prohibition includes SMS texts messages. In some cases, such as with marketing calls, prior express consent must be in writing. Penalties are $500.00 per negligent violation and $1,500.00 per knowing or willful violation -- and, as large TCPA settlements have demonstrated, those penalties represent significant exposure to defendants as call volume increases.

The *Birchmeier* class members, who received calls between August 2011 and August 2012, are expected to receive $500.00 for each call they received under the terms of the proposed settlement. The minimum amount the defendants will pay will be $56 million, and the amount paid per call may rise depending on the number of claims received from class members. The defendants will pay a maximum of $76 million, which would exceed the settlement in another Northern District of Illinois TCPA settlement from 2015, *In re Capital One TCPA Litigation*, 1:12-cv-10064. In that settlement, Capital One and three debt collection agencies agreed to pay $75.5 million after they allegedly called customers' mobile phones to collect credit card debt using an ATDS without prior express consent.

The TCPA presents many operational challenges and requires significant attention and resources to ensure compliance. PIB Law regularly advises its clients on TCPA matters, and develops and enhances policies, procedures, and controls to ensure our clients' TCPA compliance. PIB Law has also successfully defended and settled numerous TCPA cases. As *Birchmeier* and *In re Capital One* demonstrate, the TCPA applies to many types of businesses, and failure to comply can be costly. Please contact us if we can assist in reviewing your marketing and customer outreach practices, or help enhance your compliance with the TCPA.

Corporate Entity Formation: C-corporations, S-corporations, Limited Liability

Companies, and Limited Partnerships

Are you considering forming a corporation? The following highlights certain structure, liability, tax and management differences, and general advantages and disadvantages among the most common entities: C-corporations, S-corporations, limited liability companies (LLC) and limited partnerships (LP). Note that the information provided below is general and may not apply in every state. Since different states have different laws concerning these types of entities, please be sure to review the applicable state statutes prior to choosing which entity to use. Further, the below does not cover all relevant considerations for choosing an entity.

C-Corporations

Ownership requirements:

- One or more stockholders.
- No restrictions on types of owners.

Equity; Capital Raising:

- Capital stock is held by one or more stockholders. There are two basic types of capital stock: common stock and preferred stock.
- It is permissible to have multiple classes and series of stock with different rights and preferences.
- Distributions must be proportionate to stock ownership within each class of stock (preferential distributions permitted for one class over another).
- C-corporations raise capital through the issuance of equity (stock) and the incurrence of debt.
- A C-corporation is the most common entity form for a public company.

Taxation:

- C-corporations are not pass-through entities: their income is subject to tax, and any "dividend" distributions of earnings and profits to shareholders that have already been taxed at the C corporation level are also taxable to the shareholders (i.e., income is effectively taxed twice).

Liability:

- Stockholder's liability is limited to amount of capital contributed.

Management:

- A C-corporation is governed by a board of directors. The board of directors must designate officers to manage the day to day operations and may delegate certain decision making to committees. Certain major decisions need to be approved by the stockholders.

Other Advantages/Disadvantages:

- Regulators and employees are most familiar with this form.
- The well-developed body of corporate case law and statutes provides greater certainty, but less flexibility. Accordingly, recordkeeping and corporate formalities are more onerous and costly.
- Simplest and most flexible capital structure. Most common entity form for a public company and for venture capital investments.

S-Corporations

Ownership Requirements:

- One to 100 stockholders.
- With certain limited exceptions, only US citizens or residents, certain trusts and exempt organizations can be stockholders.

Equity/Capital Raising:

- Capital stock is held by one or more stockholders. There is only one type of capital stock: common stock.
- There is only one class of stock permitted, but there can be differences in voting rights among shares of common stock.
- Distributions must be proportionate to stock ownership.

- S-corporations raise capital through the issuance of equity (stock) and the incurrence of debt.
- An S-corporation must be converted to a C-corporation before an initial public offering.

Taxation:

- S-corporations are pass-through entities: their income is subject to only one level of tax at the shareholder level.
- Some states do not recognize S-corporations for state tax purposes and instead tax them as C-corporations.

Liability:

- Stockholder's liability is limited to amount of capital contributed.

Management:

- Same considerations as a C-Corporation.

Other Advantages/Disadvantages:

- S-corporations are less common than C-corporations because of the limitations regarding ownership and capital structure pointed out above.
- As with C-corporations, recordkeeping is more onerous and costly.
- It is easier for an S-corporation to convert to a C-corporation than it is for a LLC or LP to convert to a C-corporation.

Limited Liability Company

Ownership Requirements:

- One or more members. Two or more members required if LLC wants to be taxed as a partnership.
- No restrictions on types of owners.

Equity/Capital Raising:

- Percentage of membership interests are held by one or more members.
- It is permissible to classify membership interests into different classes (like common and preferred stock) with different rights and preferences.
- Distributions do not need to be proportionate to LLC ownership.
- Distribution, liquidation and voting preferences can be specified in the LLC agreement.
- LLCs raise capital through the issuance of equity (membership interests) and the incurrence of debt.
- LLCs are not typically publicly traded. Often the members convert the LLC to a corporation before an initial public offering.

Taxation:

- LLCs are pass-through entities: their income is subject to only one level of tax at the member level.
- Distributions to managing members may be subject to self-employment taxes (while distributions to shareholders of an S-corporation are generally not subject to such taxes).

Liability:

- Member's liability is limited to amount of capital contributed.

Management:

- Management is initially vested in the members, but members usually delegate management to a managing member, non-member manager or board of managers. The manager(s) may designate officers to manage day to day operations. Certain major decisions typically have to be approved by the members.

Other Advantages/Disadvantages:

- Extraordinary flexibility with respect to distributions, allocations and governance.
- LLC's are subject to less formalities than corporations, but statutory and case law is the less developed than corporation and LP law. This provides more freedom, but less certainty.
- There are more limitations on capital structure (e.g., it is more difficult to offer options to

employees and consultants) and equity financings (investors are generally more comfortable with a typical corporate structure).

Limited Partnership

Ownership Requirements:

- Two or more partners.
- No restrictions on types of owners.

Equity/Capital Raising:

- Two classes of partners: A general partner (generally responsible for management), and a limited partner (typically a silent investor). At least one general partner (who may or may not have made a contribution) is required to form a Limited Partnership.
- Distributions do not need to be proportionate to partnership ownership.
- The LP agreement can specify distribution preferences.
- LPs raise capital through the issuance of equity (partnership interests) and the incurrence of debt.
- Because limited partners are prohibited from managing the partnership, it is often used for raising capital with silent investors.
- LPs are not typically publicly traded. Often the partners convert the LP to a corporation before an initial public offering.

Taxation:

- LPs are pass-through entities: their income is subject to only one level of tax at the partner level.

Liability:

- Limited partner's liability is limited to amount of capital contributed.
- General partner has unlimited liability.

Management:

- Management is initially vested in the general partner(s). The general partner(s) may delegate management and may (but do not need to) designate officers to manage day to day operations. Certain major decisions typically have to be approved by the limited partners. If limited partners participate in management they risk losing the benefit of limited liability.

Other Advantages/Disadvantages:

- LPs (like LLCs) are subject to less formalities than corporations.
- Since general partners have unlimited liability, in most LPs general partners are corporations or LLCs in order to shield against personal liability (which creates a complex and expensive structure).
- Generally more appropriate for businesses that focus on a single or limited-term project (e.g., real estate project) or for businesses where one partner or a set of partners (general partners) do the work and the other partners (limited partners) provide the capital (e.g., hedge fund).

This article is provided for general reference. It does not constitute legal advice. Legal advice may be provided based only on specific facts. Please consult us, along with your accountant, before relying on any general information stated herein. We are happy to discuss any questions you may have regarding entity formation.
