TCPA Litigation

Key Issues and Considerations

Since the enactment of the Telephone Consumer Protection Act of 1991 (TCPA), the Federal Communications Commission (FCC) and federal courts have repeatedly clarified and reinterpreted the law. As companies increase their use of mobile marketing strategies, mobile delivery platforms, and cloud-based technologies to communicate with consumers, the business risks and potential for legal exposure under the TCPA increase in tandem. Counsel should understand the evolving legal landscape in this area and how to minimize the possibility of TCPA-related liability.

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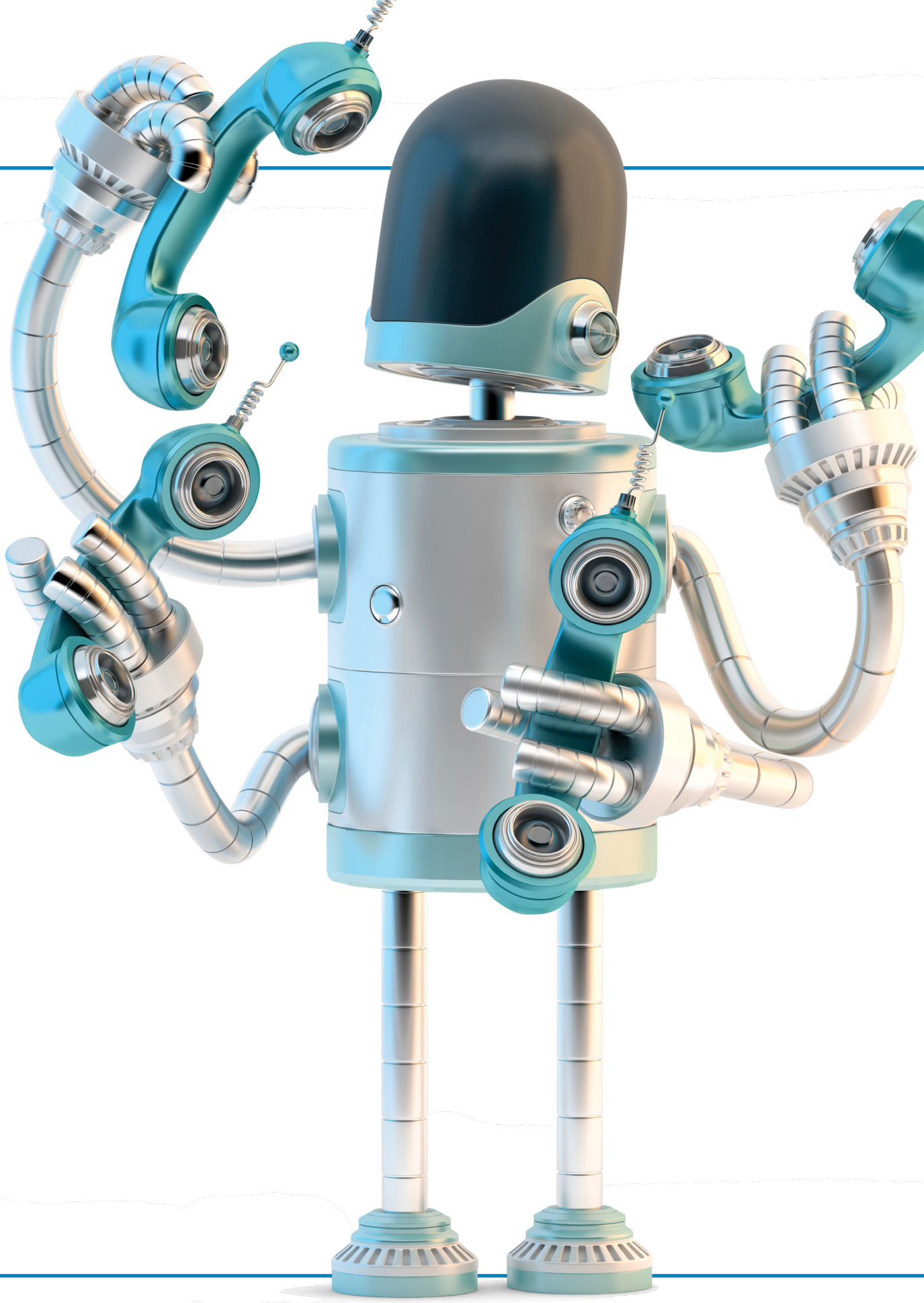

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When Congress enacted the TCPA, it was focused on balancing consumer privacy concerns against the proliferation of automatic telephone dialing systems (ATDSs) and artificial prerecorded voice technology, which broadly expanded telemarketers' ability to contact consumers on their phones and fax machines. Since then, technology has advanced in ways Congress could not have contemplated three decades ago, and private plaintiffs and regulators continue to invoke the TCPA with potentially annihilating financial exposure for defendants. Indeed, nearly every company that interacts via phone with consumers for any reason, not just for marketing purposes, faces the specter of TCPA class action litigation and government enforcement actions.

This article examines:

- Key provisions under the TCPA.
- The FCC's rulemaking authority under the TCPA, highlighting certain changes the FCC has made to its TCPA regulations.
- The areas that most commonly result in TCPA litigation or enforcement actions.
- Enforcement powers under the TCPA.
- Litigation of claims under the TCPA through class action lawsuits.
- Key TCPA-related declaratory rulings by the FCC and subsequent court rulings limiting their scope.
- The potential for third-party liability under the TCPA.
- Best practices for companies and their counsel to minimize internal and third-party TCPA-related liability risks.

KEY PROVISIONS UNDER THE TCPA

The TCPA restricts the manner by which businesses may contact consumers' telephones and fax machines and allows consumers to opt out of receiving certain types of calls and faxes. Key provisions under the TCPA that most commonly result in litigation or enforcement actions include prohibitions against:

- Making calls to cellular phone numbers using an ATDS or an artificial or prerecorded voice without prior express consent. An ATDS is defined as equipment which has the capacity to:
  - store or produce telephone numbers to be called, using a random or sequential number generator; and
  - dial those numbers.
- Making calls to residential telephone lines using an artificial or prerecorded voice to deliver a message without prior express consent (if for a commercial purpose) or appropriate disclosure language.
- Making telemarketing calls to residential consumers who have listed their numbers on the National Do-Not-Call Registry (NDNCR).
- Sending unsolicited fax advertisements without appropriate consent or opt-out disclosure. The Junk Fax Prevention Act, enacted by Congress in 2005, amended the fax provisions of the TCPA.

(47 U.S.C. § 227; 47 C.F.R. § 64.1200(a), (c)(2); see below *Commonly Litigated Provisions Under the TCPA*.)

Search Telephone Consumer Protection Act (TCPA): Overview for more on the key provisions under the TCPA.

FCC RULEMAKING AND GUIDANCE

In connection with enacting the TCPA, Congress authorized the FCC to implement rules and regulations enforcing the statute (47 U.S.C. § 227(b), (c)). Under its rulemaking authority, the FCC has set out specific compliance obligations that form the basis for most TCPA litigation (47 C.F.R. § 64.1200).

Companies may request declaratory rulings from the FCC on the meaning of the rules that it implements. In response, the FCC occasionally revises or amends its rules and also issues opinions providing interpretive guidance on its rules. The FCC's responsive decisions, however, are not necessarily binding on the courts (see *Dish Network, L.L.C. v. FCC*, 552 F. App'x 1, 1-2 (D.C. Cir. 2014)).

For example, in 2012, the FCC issued changes to its TCPA regulations, which went into effect in October 2013. These changes significantly increased litigation exposure by:

- Changing the express consent requirement to require express written consent for advertisements or telemarketing calls, including text messages, made to cellular phones using an ATDS or an artificial or prerecorded voice, as well as telemarketing calls made to residential phones using an artificial or prerecorded voice. To meet the express written consent requirement, companies must have an agreement in writing that includes all of the following:
  - the signature of the person called, which may be in electronic or digital form, provided the signature is recognized as valid under the federal E-SIGN Act or state contract law (for more on the E-SIGN Act, search Signature Requirements for an Enforceable Contract on Practical Law);
  - clear authorization for the company to deliver (or cause to be delivered) to the person telemarketing messages using an ATDS or artificial or prerecorded voice;
  - the phone number to which the signatory authorizes the telemarketing messages to be delivered; and
  - a statement that the person is not required to give consent to the telemarketing messages as a condition of purchasing any property, goods, or services.

(47 C.F.R. § 64.1200(f)(9).)

- Eliminating the established business relationship (EBR) exemption for calls and text messages made with an ATDS to residential lines, which had permitted callers to avoid the express consent requirement if they had a prior business relationship with the consumer.

(See Tel. Consumer Prot. Act of 1991, 77 Fed. Reg. 34233, 34234-38 (June 11, 2012); for more information, search New FCC Telemarketing Rule To Become Effective on Practical Law.)

On November 17, 2016, the FCC issued an advisory to clarify the rules for autodialed text messages, including outlining some key issues regarding prior express consent (FCC Enforcement Advisory, 31 F.C.C.R. 12615 (Nov. 18, 2016); for more information, search FCC Issues Advisory on Robotexts Under the TCPA on Practical Law).

COMMONLY LITIGATED PROVISIONS UNDER THE TCPA

As discussed above, TCPA provisions that commonly result in litigation or enforcement actions include restrictions related to:

- Calls to cellular phone numbers using an ATDS or an artificial or prerecorded voice.
- Calls to residential telephone lines using an artificial or prerecorded voice.
- Telemarketing calls to residential consumers who have listed their numbers on the NDNCR.

(47 U.S.C. § 227; 47 C.F.R. § 64.1200(a), (c)(2); see above *Key Provisions Under the TCPA*.)

Search TCPA Litigation: Key Issues and Considerations for the complete online version of this resource, which includes information on TCPA litigation and FCC rulings involving fax advertisements.

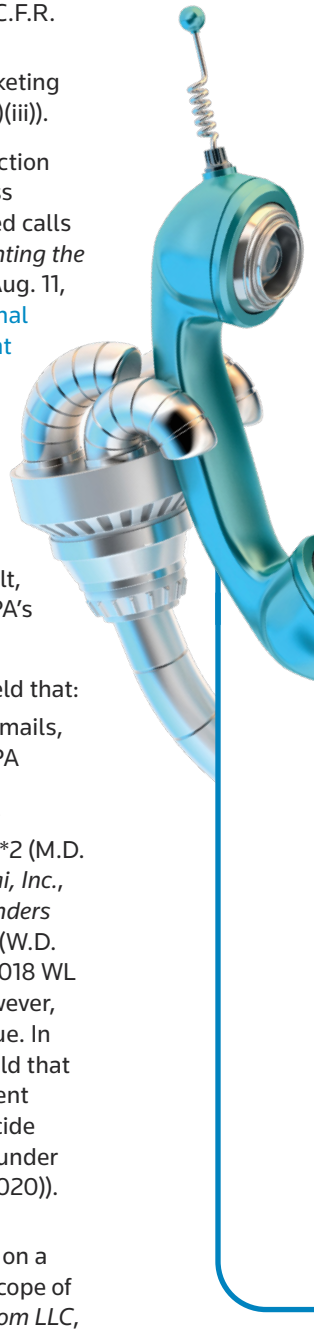
CALLS TO CELLULAR PHONES

The restrictions governing use of an ATDS or prerecorded or artificial voice to make calls to cellular phones apply not only to telemarketing calls and text messages but also to all other types of nonemergency calls, including debt collection and informational calls (47 C.F.R. § 64.1200(a)(1), (3); see, for example, *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913, 918 (9th Cir. 2012) (finding that informational calls to members of a defendant's rewards program fell within the statute where listeners were urged to "redeem" their points, directed to a website, and thanked for "shopping at Best Buy"); *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1040 (9th Cir. 2012) (affirming the grant of a preliminary injunction against the defendant debt collector), cert. denied, 569 U.S. 975 (2013); *Jordan v. Nationstar Mortg. LLC*, 2014 WL 5359000, at *12 (N.D. Cal. Oct. 20, 2014) (stating that the "law is well-settled that TCPA liability may apply to debt collection calls")).

To make these calls legally, a company must have the requisite level of prior express consent from the called party (see above *FCC Rulemaking and Guidance*), namely:

- Express written consent for calls or text messages that are made for a marketing or sales purpose (47 C.F.R. § 64.1200(a)(2)).
- Express oral or written consent for nontelemarketing calls or text messages (47 C.F.R. § 64.1200(a)(1)(iii)).

Previously, certain federal government debt collection calls were exempted from the TCPA's prior express consent requirement for autodialed or prerecorded calls (see *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 31 F.C.C.R. 9074 (Aug. 11, 2016); for more information, search FCC Issues Final Rules on TCPA Exemption for Federal Government Debt Collection Calls on Practical Law).



However, in July 2020, the US Supreme Court in *Barr v. American Ass'n of Political Consultants, Inc.* held that the TCPA's government debt collection exception is unconstitutional and severance of the improper exception was the proper remedy (140 S. Ct. 2335, 2343-44, 2356 (2020)). As a result, all debt collection calls are now subject to the TCPA's prior express consent requirement.

Additionally, some district courts have recently held that:

- Direct-to-voicemail messages, or ringless voicemails, qualify as "calls" within the meaning of the TCPA (see *Gurzi v. Penn Credit, Corp.*, 449 F. Supp. 3d 1294, 1298 (M.D. Fla. 2020); *Picton v. Greenway Chrysler-Jeep-Dodge, Inc.*, 2019 WL 2567971, at *2 (M.D. Fla. June 21, 2019); *Schaevitz v. Braman Hyundai, Inc.*, 437 F. Supp. 3d 1237, 1249 (S.D. Fla. 2019); *Saunders v. Dyck O'Neal, Inc.*, 319 F. Supp. 3d 907, 910-12 (W.D. Mich. 2018); *Silbaugh v. CenStar Energy Corp.*, 2018 WL 4558409, at *3 (N.D. Ohio Sept. 21, 2018)). However, no circuit court has squarely addressed this issue. In *Grigorian v. FCA US LLC*, the Eleventh Circuit held that receipt of a single ringless voicemail is insufficient to confer Article III standing but declined to decide whether a ringless voicemail qualifies as a call under the TCPA (838 F. App'x 390, 394 n.3 (11th Cir. 2020)).
- Although a plaintiff may receive emails on their smartphone, the mere fact that emails are read on a cellular phone does not bring them within the scope of the TCPA (see, for example, *McCarrell v. Offers.com LLC*, 2019 WL 3220009, at *3 (W.D. Tex. July 16, 2019); *Prukala v. Elle*, 11 F. Supp. 3d 443, 448-49 (M.D. Pa. 2014)).

CALLS TO RESIDENTIAL TELEPHONES

Telemarketing calls to residential telephone numbers using a prerecorded or artificial voice can be made only with the prior express written consent of the called party (47 C.F.R. § 64.1200(a)(3)). As discussed above, the FCC in 2013 heightened the level of consent required for these calls from "prior express consent" to "prior express written consent" and eliminated the EBR exemption (see above *FCC Rulemaking and Guidance*). Additionally,

as with calls to cellular phones, the prohibition against using a prerecorded or artificial voice to make calls to residential telephones without prior express written consent applies to all telemarketing and other nonemergency calls (47 C.F.R. § 64.1200(a)(1), (3); see above *Calls to Cellular Phones*).

DO-NOT-CALL REQUESTS

Under the TCPA and its regulations, telemarketers generally are prohibited from contacting consumers (even without using an ATDS or artificial or prerecorded message) who either:

- Place their phone numbers on the NDNCR.
- Make a do-not-call request directly to a company or during a telemarketing call.

National Do-Not-Call Registry

In 2003, the FCC helped establish the NDNCR in coordination with the Federal Trade Commission. If residential telephone subscribers place their phone numbers on the NDNCR (which can be done by phone or online at *donotcall.gov*), telemarketers may not call them unless either:

- There is an EBR with the consumer.
- The consumer has given express written consent.

(47 U.S.C. § 227(c); 47 C.F.R. § 64.1200(c)(2), (f).)

Telemarketers must suppress calls to numbers on the NDNCR within 31 days of the date the consumer added their number (47 C.F.R. § 64.1200(c)(2)(i)(D)). To access the NDNCR, telemarketers must pay an annual fee for each area code to which they will be placing telemarketing calls.

The NDNCR provisions of the TCPA include a safe harbor defense if a company can demonstrate both that:

- The call was made in error.
- The company meets specified routine business standards, such as having written compliance procedures, training, recordkeeping, and a process to avoid violation calls.

(47 C.F.R. § 64.1200(c)(2)(i).)

Internal Do-Not-Call Lists

Companies are required to maintain internal lists that include the phone numbers of consumers who have asked not to be called again. Companies must suppress calls to numbers on this list from calling campaigns within a reasonable timeframe, which may not exceed 30 days. (47 C.F.R. § 64.1200(d)(3), (5), and (6).)

A company-specific do-not-call request terminates an EBR for purposes of telemarketing and telephone solicitation even if the consumer continues to do business with the company (47 C.F.R. § 64.1200(f)(5)(i)).

> Whether a TCPA class action is certified or not, defendants remain under heavy pressure to settle these cases because of the potential for enormous statutory damages.

ENFORCEMENT

On the federal and state levels, the TCPA is enforced by:

- The FCC, which may take administrative action, including imposing civil forfeiture penalties (47 U.S.C. § 227(e)(5)).
- State attorneys general or other state officials or agencies, which may bring a civil lawsuit in federal court for injunctive relief or to recover the actual monetary loss or $500 for each violation, or for both injunctive relief and damages. The amount awarded may be trebled if the court finds that the defendant acted willfully or knowingly. (47 U.S.C. § 227(g)(1), (2).)

In addition to regulatory and public enforcement, the TCPA provides a private right of action. Federal and state courts share concurrent jurisdiction over claims arising under the TCPA. (47 U.S.C. § 227(b)(3); *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 384-87 (2012).)

A private litigant may seek the following under the TCPA:

- Injunctive relief.
- Actual monetary loss or $500 in statutory damages for each violation, whichever is greater.
- Up to three times the actual monetary loss or $1,500 in damages for each willful violation, whichever is greater.

(47 U.S.C. § 227(b)(3); 47 U.S.C. § 227(c)(5) (authorizing a private litigant to recover actual monetary loss or up to $500 in statutory damages for do-not-call violations).)

Notably, the liability provisions of the TCPA do not require actual injury and stretch back four years (see *Giovanniello*

v. ALM Media, LLC, 726 F.3d 106, 115 (2d Cir. 2013) (finding that the four-year federal catch-all limitations period in 28 U.S.C. § 1658(a) governs TCPA claims)).

CLASS ACTIONS

While litigation of individual claims under the TCPA does occur in small claims or state civil courts, the most common method for private enforcement of the TCPA is for a representative plaintiff who has been allegedly improperly contacted to bring a federal putative class action on behalf of unnamed individuals who have allegedly been similarly contacted. Because class actions, by definition, must be brought on behalf of sufficiently numerous class members, the potential liability that defendants face can be staggering.

Whether a TCPA class action is certified or not, defendants remain under heavy pressure to settle these cases because of the potential for enormous statutory damages. Indeed, several major companies have settled TCPA-related class action lawsuits to avoid exposure to billions of dollars in damages, including a 2014 settlement by Capital One for $75 million and a 2017 settlement by Caribbean Cruise Lines for more than $50 million with an additional $15.26 million in attorneys' fees. Another notable class action settlement involved a 2014 settlement by AT&T Mobility for $45 million, demonstrating that even a sophisticated telecommunications company is not immune to TCPA allegations. Notwithstanding these large settlement amounts, the court may reduce the amount of a statutory damages award in a class action if the magnitude of statutory damages violates the defendant's due process rights (see *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 962-63 (8th Cir. 2019) (reducing the award where $500 for each of over 3.2 million phone calls would result in a $1.6 billion statutory penalty)).

The court will closely scrutinize the settlement of a TCPA class action before granting final approval of the settlement to ensure that the settlement is fair (see, for example, *Marengo v. Miami Research Assocs., LLC*, 2018 WL 2744606, at *2-3 (S.D. Fla. June 7, 2018) (denying a motion for attorneys' fees and for final approval of a settlement); *Snyder v. Ocwen Loan Serv., LLC*, 2018 WL 4659274, at *5-6 (N.D. Ill. Sept. 28, 2018) (same)).

Search TCPA Litigation: Key Issues and Considerations for the complete online version of this resource, which includes more on TCPA class actions, such as jurisdictional issues under Article III, pre-certification offers of judgment by defendants, class certification, and venue.

Search Class Action Certification: Case Tracker for more examples of recent class actions brought under the TCPA.

FCC AND COURT RULINGS

On July 10, 2015, the FCC issued a Declaratory Ruling and Order (*In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C.R. 7961 (July 10, 2015) (July 2015 Order)), which the DC Circuit later limited in certain ways in *ACA International v. Federal Communications Commission* (885 F.3d 687 (D.C. Cir. 2018)).

FCC JULY 2015 ORDER

The FCC issued the July 2015 Order to address nearly two dozen pending petitions related to the agency's interpretation of several key TCPA provisions. Under this omnibus package of declaratory rulings, which reflected a consumer protection-oriented approach in interpreting the TCPA, the FCC provided that:

- An ATDS refers to any equipment with the future or potential capacity (rather than merely the present ability) to store or produce and dial random or sequential numbers.
- Consumers can revoke consent to receive robocalls and text messages at any time in any reasonable manner.
- Consent by the prior owner does not continue to a reassigned phone number. However, the FCC permits a safe harbor for the first call placed after reassignment.
- A consumer's wireless number included on a user's contacts list does not demonstrate consent to contact that wireless number with autodialed or prerecorded calls, including text messages.

(July 2015 Order, 30 F.C.C.R. at 7965, 7971-76, 7991-8001, 8007.)

The FCC also addressed other issues, including that:

- Calls or text messages placed by representatives in the financial and health industries under urgent circumstances are exempted from the TCPA's consumer consent requirements, provided that the calls or text messages are very limited and specific. For example, alerts related to bank account fraud and important medication refills are allowed, although consumers can revoke consent to receive such communications.
- Wireless and landline carriers may offer robocall-blocking options to customers.

(July 2015 Order, 30 F.C.C.R. at 8023-38.)

The July 2015 Order broadened the scope of TCPA litigation and increased legal and financial exposure for calling and texting practices. The expansive definition of an ATDS, in particular, dramatically increased the types of calling technology potentially subject to the TCPA. The FCC's press release noted that its action serves to "clos[e] loopholes and strength[en] consumer protections already on the books" (FCC News, FCC Strengthens Consumer Protections Against Unwanted Calls and Texts (June 18, 2015), available at *fcc.gov*).

Expanded Definition of ATDS

As noted above, the July 2015 Order provided that an ATDS refers to any equipment with the future or potential capacity to store or produce numbers to be called, using a random or sequential number generator, and to dial those numbers. The FCC reaffirmed an earlier 2003 ruling that expanded the definition of an ATDS

to include predictive dialers, which can store lists of telephone numbers and dial numbers from a given list without human intervention, even if they do not have the capacity to generate random or sequential numbers. (July 2015 Order, 30 F.C.C.R. at 7972, 7974-78; *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C.R. 14014, 14091-93 (July 3, 2003).)

The July 2015 Order potentially subjected many more types of dialing equipment and platforms to a case-by-case determination of whether they fell within the TCPA's reach. Notably, the FCC declined to specify whether "typical uses" of smartphones could fit the definition of an ATDS. Instead, the agency dismissed the idea outright, stating that there was no evidence in the record that consumers have been sued for "typical" uses of smartphones to "autodial" calls (July 2015 Order, 30 F.C.C.R. at 7976-77).

Revocation of Consent

The July 2015 Order provided that consumers can revoke consent to receive autodialed and prerecorded calls and text messages to their cellular phone in any "reasonable" way and at any time (July 2015 Order, 30 F.C.C.R. at 7993-99; see also *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1048 (9th Cir 2017) (noting that revocation of consent "must be clearly made and express a desire not to be called or texted")).

The TCPA is silent regarding revocation of consent, and the July 2015 Order attempted to provide clarity given the conflicting rulings by courts regarding whether and when consent can be revoked (compare, for example, *Kenny v. Mercantile Adjustment Bureau, LLC*, 2013 WL 1855782, at *7 (W.D.N.Y. May 1, 2013) (holding that the TCPA does not allow revocation, whether written or oral) with *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 268, 270-72 (3d Cir. 2013) (holding that the TCPA's silence permits revocation) and *Moore v. Firstsource Advantage, LLC*, 2011 WL 4345703, at *11-12 (W.D.N.Y. Sept. 15, 2011) (holding that any revocation must be in writing)).

The Second Circuit later held that the TCPA does not permit a consumer to revoke consent "when that consent forms a part of a bargained-for exchange" (*Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 53 (2d Cir. 2017), as amended (Aug. 21, 2017)). While some district courts have followed *Reyes* (see, for example, *Barton v. Credit One Fin.*, 2018 WL 2012876, at *4 (N.D. Ohio Apr. 30, 2018)), others continue to follow *Gager* (see, for example, *Patterson v. Ally Fin., Inc.*, 2018 WL 647438, at *4-5 (M.D. Fla. Jan. 31, 2018)).

Consent for Reassigned Phone Numbers

The issue of consent can be further complicated in the case of wireless phone numbers because they are periodically disconnected by one customer and reassigned to a new one. This routine business practice has led to an increasingly common fact pattern in TCPA litigation and an uproar in the regulated community.

The July 2015 Order provided that:

- **Consent by the prior owner does not continue to a reassigned phone number.** A "called party" whose consent is required under 47 U.S.C. § 227(b)(1)(A) refers to the current subscriber of the reassigned phone number.
- **Callers may incur TCPA liability when they have actual or constructive knowledge of a number reassignment.** Notably, the FCC found that "a caller receives constructive knowledge of reassignment by making or initiating a call to the reassigned number." As a solution, the July 2015 Order states that businesses should "institute new or better safeguards to avoid calling reassigned wireless numbers."
- **There is a safe harbor for the first call placed after reassignment.** The FCC explained that as long as a caller does not have actual or constructive knowledge that the number has been reassigned, it permissibly may make one call to the reassigned number. Moreover, the FCC stated that calls made by any company affiliates count for purposes of calculating this one-additional-call opportunity.

(July 2015 Order, 30 F.C.C.R. at 7999-8012 & n.261 & n.293.)

Phone Numbers on a User's Contact List

Courts generally have found text messages to fall within the scope of the TCPA (see, for example, *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952-54 (9th Cir. 2009)), and the July 2015 Order explains that internet-to-phone text messaging is the functional equivalent of phone-to-phone text messaging and therefore also is covered by the TCPA (July 2015 Order, 30 F.C.C.R. at 8016-22).

Additionally, the July 2015 Order addressed the growing line of cases questioning whether invitational text messages sent to a user's individual contacts (through a mobile application's "invite a friend" feature) are actionable under the TCPA. The Order provided that the mere inclusion of a consumer's wireless number in a contacts list on another person's wireless phone, standing alone, does not demonstrate consent to contact that wireless number with autodialed or prerecorded calls, including text messages. (July 2015 Order, 30 F.C.C.R. at 7989-92.)

COURT RULINGS

In *ACA International*, the DC Circuit vacated key parts of the July 2015 Order, including setting aside the FCC's:

- Expansive definition of an ATDS, which the court noted had the "apparent effect of embracing any and all smartphones."
- Treatment of reassigned wireless numbers, including the one-call safe harbor.

(885 F.3d at 696, 699-703, 705-09.)

In April 2021, the Supreme Court resolved a federal circuit split concerning the definition of an ATDS, holding that a technology must have the capacity to randomly or sequentially generate numbers to constitute an ATDS under the TCPA, regardless of how those numbers are dialed once they are on a stored list.

The court did not clarify what should replace these key TCPA provisions, leaving further guidance to come from the FCC. Additionally, the court affirmed the FCC's rulings on revoking prior consent and the exemption for healthcare-related calls (*ACA Int'l*, 885 F.3d at 709-14).

ATDSs and New Technology

In invalidating the FCC's interpretation of the definition of an ATDS in the July 2015 Order (see above *Expanded Definition of ATDS*), the DC Circuit in *ACA International* reasoned that the ruling:

- Impermissibly construed ATDSs to include equipment with the future or potential capacity to store or produce and dial numbers randomly or sequentially. The court expressed particular concern that the FCC's ruling had impermissibly brought smartphones, "the most ubiquitous type of phone equipment known," within the definition of an ATDS and found it "untenable" that "every uninvited communication from a smartphone infringes federal law."
- Provided a contradictory interpretation of the statutory phrase "using a random or sequential number generator" to include devices that can generate random or sequential numbers to be dialed and devices that either cannot do so or dial from a set list.
- Confirmed that the basic function of an ATDS is the ability to dial numbers without human intervention but also implied that equipment might still qualify as an ATDS even if it requires human intervention to dial numbers.

(*ACA Int'l*, 885 F.3d at 695-703.)

In April 2021, the Supreme Court resolved a federal circuit split concerning the definition of an ATDS in the wake of *ACA International*. In *Facebook, Inc. v. Duguid*, the Supreme Court adopted a narrow definition, holding that a technology must have the capacity to randomly or sequentially generate numbers to constitute an ATDS under the TCPA, regardless of how those numbers are dialed once they are on a stored list (141 S. Ct. 1163, 1167 (2021)).

Revoking Consent and the Recycled Number Phenomenon

The DC Circuit in *ACA International* set aside the FCC's interpretation of reassigned numbers as a whole (see above *Consent for Reassigned Phone Numbers*), stating that:

- The one-call safe harbor is arbitrary and capricious. The DC Circuit stated that the one-call safe harbor was "hard to square with the [FCC's] concession that the first call may give no notice of a reassignment, or with the [FCC's] disavowal of any expectation that a caller should 'divine from the called consumer's mere silence the current status of a telephone number.'"
- Although the FCC could permissibly rule that consent must come from the current subscriber as the "called party," it is untenable for callers to be held strictly liable for calling reassigned numbers.

(*ACA Int'l*, 885 F.3d at 706-08.)

The Ninth Circuit recently held that a caller's intent to call a customer who consented to its calls does not exempt the caller from TCPA liability when it calls someone else who did not consent on a reassigned number (*N.L. by Lemos v. Capital One Bank, N.A.*, 960 F.3d 1164, 1167 (9th Cir. 2020); see also *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1251-52 (11th Cir. 2014); *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637, 639-43 (7th Cir. 2012)).

To help address the issue of how to discern when a wireless phone number has been disconnected and reassigned to a new subscriber, in December 2018, the FCC issued an order seeking to establish a single database that will contain reassigned number information for each provider (*In the Matter of Advanced Methods to Target & Eliminate Unlawful Robocalls*, 33 F.C.C.R. 12024, 12025 (Dec. 13, 2018)).

The FCC's Reassigned Number Database (RND) was launched on November 1, 2021. Subscribers can query consumer numbers against the RND to verify the last date a consumer was at that telephone number. Callers that scrub against the RND can be shielded from TCPA

liability based on a reassigned number if they can demonstrate evidence of consent and a timely check against the RND that yielded an incorrect response regarding reassignment.

THIRD-PARTY LIABILITY

Third-party liability, specifically where one party makes calls that a plaintiff argues were made on behalf of another, is an increasingly significant issue in TCPA litigation. This issue arises, for example, where a company outsources its marketing activity. In 2013, the FCC issued a declaratory ruling finding that a seller could be held vicariously liable for a telemarketer's TCPA violations if the telemarketer acted as an agent of the seller under the federal common law of agency, including principles of apparent authority and ratification (*In the Matter of the Joint Pet. Filed by Dish Network LLC, the United States of Am., & the States of Cal., Ill., N. Carolina, & Ohio for Declaratory Ruling Concerning the Tel. Consumer Prot. Act Rules*, 28 F.C.C.R. 6574, 6584 (2013) (2013 Order)). Case law has provided further guidance on what circumstances may give rise to an agency relationship.

FCC 2013 ORDER

The 2013 Order provides several examples of situations in which vicarious liability may attach, such as when:

- The seller allows the telemarketer access to information and systems that normally would be within the seller's exclusive control, including:
  - the nature and pricing of the seller's products and services; or
  - the seller's customer information.
- The telemarketer has the ability to enter consumer information into the seller's sales or customer systems.
- The telemarketer has the authority to use the seller's trade name, trademark, or service mark.
- The seller approved, wrote, or reviewed the scripts used by the telemarketer.
- The seller knew or reasonably should have known that the telemarketer was violating the TCPA on the seller's behalf and the seller failed to take effective steps within its power to force the telemarketer to cease that conduct.

(2013 Order, 28 F.C.C.R. at 6592-93.)

This guidance is not binding on courts (see *Dish Network*, 552 F. App'x at 1-2), and some courts have found it unpersuasive (see, for example, *Smith v. State Farm Mut. Auto. Ins. Co.*, 30 F. Supp. 3d 765, 777-80 (N.D. Ill. 2014)).

DEVELOPING CASE LAW

Consumers claim in many cases that without vicarious liability, they are left without an effective remedy for telemarketing intrusions, particularly if the telemarketers are judgment proof, unidentifiable, or located outside the US (2013 Order, 28 F.C.C.R. at 6588; see *State Farm Mut. Auto. Ins. Co.*, 30 F. Supp. 3d at 774).

While sellers and third-party telemarketers can effectively support an independent contractor relationship with express contractual language in most cases, courts are vigilant regarding outsourcing arrangements that function as firewalls for liability. In determining whether an agency relationship exists, courts may analyze several factors, such as whether:

- The agent could enter into contracts on the principal's behalf.
- The agreement between the principal and agent contemplated telemarketing.
- The principal controlled the manner and means of the agent's telemarketing, including, for example, where the principal:
  - developed the script;
  - provided feedback on call quality; or
  - had access to records of what phone numbers were called.

(See, for example, *Lucas v. Telemarketer Calling from (407) 476-5680*, 2019 WL 3021233, at *6 (6th Cir. May 29, 2019) (affirming dismissal where the plaintiff did not allege facts indicating formal agency, apparent authority, or ratification); *Jones v. Royal Admin. Servs., Inc.*, 887 F.3d 443, 446, 450-52, (9th Cir. 2018) (affirming summary judgment where the defendant did not exercise the

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level of control necessary over the agent to be subject to vicarious liability for the telemarketers' unlawful calls); *Toney v. Quality Res., Inc.*, 75 F. Supp. 3d 727, 743-44 (N.D. Ill. 2014) (denying a motion to dismiss because the plaintiff alleged sufficient facts, including certain constraints and requirements detailed in a telemarketing agreement between the seller and third party, to make the existence of an agency relationship plausible).)

Some courts have found that simply requiring a telemarketer to comply with all applicable laws and regulations does not create an agency relationship (see, for example, *Boyle v. RJW Transp., Inc.*, 2008 WL 4877108, at *9 (N.D. Ill. June 20, 2008) (stating that contractual language that requires legal and regulatory compliance "does not render an independent contractor an agent or employee")).

MINIMIZING LITIGATION RISK

To minimize potential liability, companies should maintain written TCPA compliance policies and programs that address both internal and third-party risk. Companies and their counsel should develop these TCPA compliance programs in light of, or in conjunction with, their overall direct marketing programs and should designate a team (or an individual) responsible for overseeing and updating the programs.

Companies and their counsel should take the following key steps to develop an effective TCPA compliance program:

- **Review and categorize messages.** The first step in creating a strong TCPA compliance program is to understand the messages the company is sending, as well as how and to whom they are being delivered. Without this basic information, a company cannot accurately assess its compliance risks and obligations.
- **Develop a standard TCPA notice and consent form.** As a practical matter, notice and consent are often provided in the same document. The notice language should follow the legal requirements, and any notice should also provide for a legally sufficient method of consent (see above *FCC Rulemaking and Guidance*; for a sample form that organizations can use to comply with the TCPA's prior express written consent requirement, with explanatory notes and drafting tips, search Telephone Consumer Protection Act Prior Express Written Consent Form on Practical Law).
- **Create a contact and tracking database.** It is critical that the company have a reliable and documented method for tracking:
  - the provision of notice, including the exact text of the notice and the receipt of consumer consent or opt outs;
  - withdrawals of consent; and
  - when contact information becomes stale, for example, when a phone number no longer dials the person that provided consent for that number (see above *Revoking Consent and the Recycled Number Phenomenon*).
- **Develop a training program.** A compliance program is effective only if the company ensures that its personnel are aware of their compliance obligations.
- **Review existing consents.** A company cannot rely on consents that violate the current FCC rules, even if the consents were obtained before the 2013 amendments (see above *FCC Rulemaking and Guidance*). To avoid liability, the company should review its pre-2013 consents to assess whether they comply with the current rules.
- **Develop an audit and review program.** Compliance is an ongoing effort. The company should periodically assess whether its programs are working as intended and whether the programs must be revised or updated.
- **Institute appropriate policies for monitoring vendors.** Vendors are a key risk area. In outsourcing its marketing efforts, a company should:
  - perform a due diligence review of the proposed vendor's TCPA compliance policies and procedures;
  - clearly and explicitly state the vendor's TCPA compliance obligations in the parties' contracts;
  - include risk allocation provisions in the parties' contracts, which although not dispositive, may be helpful in the event of litigation; and
  - consider contractually requiring vendors to maintain appropriate insurance, while understanding that TCPA litigation has been an area rife with exclusions and coverage disputes (see, for example, *Emasco Ins. Co. v. CE Design, Ltd.*, 784 F.3d 1371, 1383-86 (10th Cir. 2015)).
- **Institute distributor accountability programs.** When dealing with distributors of its products, a manufacturer should ensure that its contracts include appropriate marketing limitations, obligations, and risk allocation provisions as they relate to the TCPA. Additionally, manufacturers should track which distributors are subject to particular permissions, requirements, or restrictions, and develop procedures for discipline should distributors breach their obligations.
- **Implement appropriate recordkeeping policies.** State and federal telemarketing regulations include requirements that callers maintain certain records, data, and documents for specific periods of time following calls. Companies should ensure compliance with those requirements in maintaining their own information as well as relevant information collected or stored by third-party vendors.

Search Advertising and Marketing Toolkit for a collection of resources to help counsel structure a company's advertising and marketing campaigns to comply with applicable laws, minimize the risk of legal challenges, and overcome potential regulatory obstacles.