TCPA Litigation: Key Issues and Considerations

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This Practice Note examines the key issues that counsel involved in litigation under the Telephone Consumer Protection Act of 1991 (TCPA) should consider, including rulemaking authority under the TCPA and the TCPA's scope, enforcement powers under the TCPA, class action lawsuits, emerging TCPA-related issues, the potential for third-party liability, and best practices to minimize TCPA-related liability risks.

When Congress enacted the TCPA in 1991, 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 two 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 Note examines:

- Rulemaking authority under the TCPA and the scope of the TCPA, highlighting the most commonly litigated areas (see Rulemaking and Scope).
- Enforcement powers under the TCPA (see Enforcement).
- Key issues in class action lawsuits brought under the TCPA (see Class Actions).
- Recent Federal Communications Commission (FCC) TCPA rulings, which may expand and modify compliance obligations (see Recent FCC TCPA Rulings and Court Limitation).
- The potential for third-party liability under the TCPA (see Third-Party Liability).
- Best practices for companies and their counsel to minimize internal and third-party TCPA-related liability risks (see Minimizing Litigation Risk).

RULEMAKING AND SCOPE

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 forth specific compliance obligations that form the basis for most TCPA litigation (47 C.F.R. § 64.1200).

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

- Making calls to cellular phone numbers using an ATDS or an artificial or prerecorded voice without appropriate consent (see Calls to Cellular Phones).
- Initiating 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 (see Calls to Residential Telephones).
- Sending unsolicited fax advertisements without appropriate consent or opt-out disclosure (see Fax Advertisements).
- Making telemarketing calls to residential consumers who list their numbers on the National Do-Not-Call Registry (NDNCR) (see Do-Not-Call Requests).

For more information on the TCPA and related regulations, see Practice Note, Direct Marketing (5-500-4203).

CALLS TO CELLULAR PHONES

The restrictions governing ATDSs and prerecorded or artificial voice 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 when the listener was urged to "redeem" his 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 preliminary injunction against defendant debt collector), cert. denied, 133 S. Ct. 2361 (2013); *Jordan v. Nationstar Mortg. LLC*, 2014 WL 5359000, at *12 (N.D. Cal. Oct. 20, 2014) ("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, namely:

- Express written consent for calls or texts 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)).

Although 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) and Legal Update, FCC Issues Final Rules on TCPA Exemption for Federal Government Debt-Collection Calls (W-004-5885)), the Fourth and Ninth Circuits recently held that the federal debt collection exception is an unconstitutional restriction on speech and severed the exception from the automated call ban (see *American Ass'n of Political Consultants, Inc. v. FCC*, 923 F.3d 159, 172 (4th Cir. 2019); *Duguid v. Facebook*, 926 F.3d 1146, 1153 (9th Cir. 2019); see also *Katz v. Liberty Power Corp., LLC*, 2019 WL 4645524, at *6 (D. Mass. Sept. 24, 2019) (collecting cases)). The Supreme Court recently granted certiorari to review the Fourth Circuit's decision, including whether the proper remedy for any constitutional violation is to sever the exception from the remainder of the statute (see *Barr v. American Ass'n of Political Consultants, Inc.*, 2020 WL 113070 (U.S. Jan. 10, 2020)).

Recently, at least four district courts held direct-to-voicemail messages, or ringless voicemails, qualify as "calls" within the meaning of the TCPA (see *Picton v. Greenway Chrysler-Jeep-Dodge, Inc.*, 2019 WL 2567971, at *2 (M.D. Fla. June 21, 2019); *Schaevitz v. Braman Hyundai, Inc.*, 1:17-cv-23890-KMM, Order on Motion to Dismiss, at 7-12 (S.D. Fla. Mar. 25, 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)). The issue has not yet been addressed by a circuit court.

Although a plaintiff may receive emails on his 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, 449 (M.D. Pa. 2014)).

CALLS TO RESIDENTIAL TELEPHONES

Telemarketing calls to residential telephone numbers using prerecorded or artificial voices can be made only with the prior express written consent of the called party (47 C.F.R. § 64.1200(a)(3)).

In 2013, the FCC heightened the level of consent required for these calls (from "prior express consent" to "prior express written consent") and also eliminated the established business relationship (EBR) exemption (see TCPA Rule Amendments and Guidance).

FAX ADVERTISEMENTS

In 2005, Congress enacted the Junk Fax Prevention Act, which amended the fax provisions of the TCPA. Generally, the Junk Fax Prevention Act:

- Codifies an EBR exemption to the prohibition on sending unsolicited fax advertisements and provides a definition of an EBR to be used in this context (47 U.S.C. § 227(a)(2), (b)(1)(C), and (b)(2)(G)).
- Requires the sender to mark all fax advertisements in a margin at the top or bottom of the fax with:
  - the date and time the fax was sent;
  - an identification of the business sending the message; and
  - the telephone number of the sending machine.
- (47 U.S.C. § 227 (d)(1)(B), (d)(2).)
- Requires the sender of an unsolicited fax advertisement to provide specified notice and contact information on the fax allowing recipients to opt out of any future fax transmissions from the sender, including specifying the circumstances under which a request to opt out complies with the Junk Fax Prevention Act (47 U.S.C. § 227(b)(2)(D)).

Notably, the Junk Fax Protection Act's requirement that the sender notify recipients that they may opt out of future receipt of faxes is very detailed, requiring an opt-out notice to:

- Be "clear and conspicuous" and placed on the first page of the advertisement.
- State that the recipient may opt out of future unsolicited advertisements.
- Note that a failure by the sender to comply with an opt-out request is unlawful.
- Include a domestic contact number and fax number for the recipient to send an opt-out request.
- Include a cost-free mechanism to send an opt-out request.
- Instruct the recipient that a request not to send future unsolicited advertisements is valid only if the recipient:
  - sends the request to the number of the sender identified in the notice;
  - identifies the fax number to which the opt-out request relates; and
  - does not expressly invite fax advertisements thereafter.

(47 C.F.R. § 64.1200(a)(4)(iii), (iv).)

Despite advances in telecommunications, companies continue to regularly use fax machines to advertise their products or hire a third-party entity to do so. Without attention to the requirements of the TCPA, statutory damages can grow quite high for this type of marketing campaign (see, for example, *City Select Auto Sales, Inc. v. David/Randall Assocs., Inc.*, 96 F. Supp. 3d 403, 422, 428 (D.N.J. 2015) (granting class-wide summary judgment to the plaintiffs in the amount of $22.4 million); see also *Imhoff Inv. LLC v. Alfoccino, Inc.*, 792 F.3d 627, 634-35 (6th Cir. 2015) (reversing

summary judgment to the defendant and finding that the party whose goods or services are advertised, and not the fax broadcaster, is subject to direct liability for unsolicited fax advertisements)). In December 2019, the FCC issued a Declaratory Ruling finding that online fax services that receive faxes solely as emails fall outside the scope of the TCPA's definition of a "telephone facsimile machine" (*In the Matter of Amerifactors Fin. Group, LLC*, 2019 WL 6712128 (F.C.C. Dec. 9, 2019)).

DO-NOT-CALL REQUESTS

Under the TCPA and its regulations, telemarketers generally are prohibited from contacting consumers who place their phone numbers on the NDNCR (even without using an ATDS or prerecorded messages), or who 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) and 64.1200(c)(2), (f)(14).)

Telemarketers must suppress calls to numbers on the NDNCR within 31 days of the date the consumer added her 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, record keeping, 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); but see Revoking Consent and the Recycled Number Phenomenon).

TCPA RULE AMENDMENTS AND GUIDANCE

Companies may request declaratory rulings from the FCC on the meaning of the rules. 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); see also Recent FCC TCPA Rulings and Court Limitation; FCC Guidance).

For example, the FCC made changes to its TCPA regulations, which went into effect in October 2013, that significantly increased litigation exposure by:

- Changing the express consent requirement to require express written consent for telemarketing calls, including text messages, made to cellular phones using an ATDS. To meet the TCPA's 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 information on the E-SIGN Act, see Practice Note, Signature Requirements for an Enforceable Contract (6-518-3096));
  - 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 advertisements or telemarketing messages to be delivered; and
  - a statement that the person is not required to give consent as a condition of purchasing any property, goods, or services.
- (47 C.F.R. § 64.1200(f)(8).)
- Eliminating the EBR exemption for calls and text messages made with an ATDS to cellular phones, 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).)

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. For more information, see Legal Update, FCC Issues Advisory on Robotexts Under the TCPA (W-004-6240) and *FCC Enf't Advisory*, 31 F.C.C.R. 12615 (Nov. 18, 2016).

For more information on the 2013 changes to the FCC regulations, see Legal Update, New FCC Telemarketing Rule to Become Effective (2-544-1945).

ENFORCEMENT

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

- The FCC, which may take administrative action, including imposing civil forfeiture penalties (see 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 and damages in the amount of $500 for each violation, which 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, and 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*, 132 S. Ct. 740, 752-53 (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); see also 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 (see Jurisdictional Issues Under Article III) and stretch back four years (see *Giovanniello v. ALM Media, LLC*, 726 F.3d 106, 115 (2d Cir. 2013) (finding the four-year federal catch-all limitations period in 28 U.S.C. § 1658(a) governs TCPA claims)). As discussed in more detail below, TCPA claims are often brought in the class action context.

CLASS ACTIONS

While litigation of individual claims under the TCPA does occur, 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 class action on behalf of unnamed individuals who have 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 recently have settled TCPA-related class action lawsuits to avoid exposure to billions of dollars in damages, including a settlement by Capital One for $75 million and by Caribbean Cruise lines for more than $50 million with an additional $15.26 million in attorneys' fees. Another notable class action settlement involved AT&T Mobility settling 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 (8th Cir. 2019) (reducing 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 to 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 motion); *Snyder v. Ocwen Loan Serv., LLC*, 2018 WL 4659274, at *5-6 (N.D. Ill. Sept. 28, 2018) (denying motion)). For recent examples of class actions brought under the TCPA, see Class Action Certification: Case Tracker (3-551-6186).

JURISDICTIONAL ISSUES UNDER ARTICLE III

Most courts permit a subscriber or a regular user of a telephone number to recover under the TCPA (see, for example, *Abante Rooter & Plumbing, Inc. v. Birch Commc'ns, Inc.*, 2016 WL 269315, at *3 (N.D. Ga. Jan. 7, 2016); *Olney v. Progressive Cas. Ins. Co.*, 993 F. Supp. 2d 1220, 1226 (S.D. Cal. 2014) (holding that "the regular user of a cellular telephone has standing to bring a claim under the TCPA, regardless of whether he is responsible for paying the bill"); *Soulliere v. Cent. Fla. Invs., Inc.*, 2015 WL 1311046, at *3-5 (M.D. Fla. Mar. 24, 2015) ("Regardless of whether Plaintiff's employer ... is the subscriber in that it owns Plaintiff's cell phone number and pays the bill, Plaintiff is not precluded from having standing as it is not disputed that he was the primary or regular user of his cell phone and received the calls at issue.")).

The U.S. Supreme Court recently addressed whether:

- A plaintiff must demonstrate an actual injury to satisfy Article III.
- An offer of judgment can moot a TCPA claim.

Actual Injury and Constitutional Standing

On May 16, 2016, the Supreme Court vacated and remanded *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), a case questioning whether a statutory violation under the Fair Credit Reporting Act gave the plaintiff Article III standing even when he could not demonstrate a concrete injury as the result of that violation. In doing so, the Court held that for a plaintiff to establish Article III standing, he must allege an injury-in-fact that is both concrete and particularized. A plaintiff cannot automatically satisfy the injury-in-fact requirement "whenever a statute grants a person a right and purports to authorize that person to sue to vindicate that right." Rather, "Article III standing requires a concrete injury even in the context of a statutory violation." (*Spokeo*, 136 S. Ct. at 1549.) Further, the Court clarified that even in the context of a class action, named plaintiffs who represent a class "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong." (*Spokeo*, 136 S. Ct. at 1547 n.6 (citation omitted).) The Supreme Court remanded the case to the US Court of Appeals for the Ninth Circuit to determine whether the particular procedural violations at issue entailed a degree of risk sufficient to meet Article III's concreteness requirement. On remand, the Ninth Circuit subsequently held that the plaintiff's alleged injuries were in fact sufficiently concrete, and since it previously determined that the alleged injuries were sufficiently particularized, it held that the plaintiff had Article III standing. (See *Robins v. Spokeo, Inc.*, 867 F.3d 1108 (2017) (reversing the dismissal of the complaint and remanding to the district court).)

Many claims brought under the TCPA assert purely procedural statutory violations raising questions as to whether TCPA claims could satisfy the standing requirements of *Spokeo*. There is a circuit split regarding whether receipt of a text message is sufficient to confer Article III standing to bring a TCPA claim (compare *Melito v. Experian Marketing Solutions, Inc.*, 923 F.3d 85, 92-95 (2d Cir. 2019) and *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1042-43 (9th Cir. 2017) (finding standing) with *Salcedo v. Hanna*, 2019 WL 4050424 (11th Cir. Aug. 28, 2019) (finding no standing)).

Other federal circuits have held that the receipt of calls confers standing to bring a TCPA claim in federal court (see *Krakauer v. Dish*

Network, L.L.C., 925 F.3d 643, 653 (4th Cir. 2019) (receipt of two calls to a phone number on the NDNCR); *Golan*, 930 F.3d at 958) (receipt of two answering machine messages); (*Susinno v. Work Out World, Inc.*, 862 F.3d 346, 351-52 (3d Cir. 2017) (receipt of one prerecorded call)).

TCPA class actions may be brought in federal court, and those brought in state court may be removed to federal court (*see Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745 (2012)). But because *Spokeo* addresses only requirements for standing in federal cases, and because state courts have concurrent jurisdiction over TCPA actions, TCPA cases that are removed from state courts to federal courts may later be remanded back to state courts if it is determined that plaintiffs lack Article III standing under *Spokeo*.

For more information on class action standing challenges, see Practice Note, Non-Statutory Grounds for Challenging Class Actions: Standing and Ascertainability (5-606-5912).

Offers of Judgment and Mootness

Under Federal Rule of Civil Procedure (FRCP) 68, a defendant may make an offer to the plaintiff allowing for judgment on specified terms. In the context of class actions, defendants rely on this rule to make pre-certification offers of judgment to representative plaintiffs in an effort to end the litigation before a class is certified. FRCP 68 often is invoked in the context of TCPA litigation because the statutory damage provisions permit a defendant to offer complete monetary relief to the plaintiff and thereby terminate the potential exposure resulting from a class action. Moreover, making this type of offer early in a litigation enables a defendant to avoid some of the difficult statutory construction issues associated with the TCPA and its related regulations.

The Supreme Court resolved a circuit court split as to whether an unaccepted offer that fully satisfies the representative plaintiff's claim also can serve to moot the class claims (see *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016)). In *Campbell-Ewald*, the defendant advertising and marketing agency sent the plaintiff an unwanted text message on behalf of the US Navy recruiting office. The plaintiff filed a class action complaint alleging violations of the TCPA on behalf of a nationwide class of individuals who had received, but had not consented to receipt of, the text messages. Before the deadline to file for class certification, the defendant made an offer of judgment under FRCP 68 for full relief of the plaintiff's individual claim. The plaintiff did not accept the offer, allowing it to lapse. In response, the defendant moved to dismiss, arguing there was no longer a live case or controversy because its offer of complete relief mooted the individual claim and, because the plaintiff had not made a motion for class certification, the putative class claims became moot as well. (136 S. Ct. at 667-68.)

The Supreme Court rejected the defendant's position and held that the FRCP 68 unaccepted offer of judgment did not moot the representative plaintiff's claim. In addition, because "a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted," the class claims remained live as well. (*Campbell-Ewald Co.*, 136 S. Ct. at 670-72.) As a result, a defendant can no longer moot a putative class action simply by offering complete relief to the named plaintiff.

Notably, the Supreme Court left open the issue of "whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount" (*Campbell-Ewald Co.*, 136 S. Ct. at 672). In his dissent, Justice Alito stated that the decision "does not prevent a defendant who actually pays complete relief – either directly to the plaintiff or to a trusted intermediary – from seeking dismissal on mootness grounds" (*Campbell-Ewald Co.*, 136 S. Ct. at 685 (Alito, J., dissenting)). Under this potential exception, the method of payment and the identity of the persons or entities who would qualify as a "trusted intermediary" have not yet been determined. If the defendant is unwilling to tender the funds directly to the plaintiff (using cash, check, MoneyGram, PayPal, and so on.), or to the plaintiff's counsel (or plaintiff's counsel refuses attempts at payment), then the defendant could deposit the funds with the court, or create a bank or trust account for the sole benefit of the plaintiff.

District courts are likely to see an increase in FRCP 68 offers with corresponding efforts at payment and entry of judgment from defendants who want to establish the boundaries of this potential exception to the Court's ruling. In fact, in a recent case involving unsolicited fax advertisements for dental products, prior to the plaintiff filing for class certification, defendant Bisco, Inc. moved for leave to deposit funds (representing what it believed could be the maximum possible damages, as well as fees and costs) with the district court under FRCP 67, arguing that the deposit and the acquiescence to the injunctive terms rendered the claim moot. The district court agreed, granting the defendant's motion, but the Seventh Circuit reversed, concluding that "an unaccepted offer to settle a case, accompanied by a payment intended to provide full compensation ... under Rule 67, is no different in principle from an offer of settlement made under Rule 68" (see *Fulton Dental, LLC v. Bisco, Inc.*, 860 F.3d 541, 547 (7th Cir. 2017); see also *Radha Geismann, M.D., P.C. v. ZocDoc, Inc.*, 909 F.3d 534, 541 (2d Cir. 2018)).

Of course, the *Campbell-Ewald* decision does not affect accepted FRCP 68 offers of judgment, which remain an effective strategy to eliminate a representative plaintiff prior to class certification, particularly if the underlying claims are weak.

Finally, when making an offer of judgment, defendants should be cognizant of any injunctive or equitable relief requested in the complaint. An offer of judgment must offer complete relief if it has any hope of mooting the plaintiff's claims. Thus, in the TCPA context, a proposed injunction that the defendant will not call, text, or fax in violation of the statute remains an important element of any FRCP 68 offer of judgment.

For more information on FRCP 68 offers of judgment, see Practice Note, FRCP 68 Offers of Judgment (W-000-3769).

CLASS CERTIFICATION

As in any other class action, to obtain class certification in a TCPA action, the named plaintiff must establish that:

- The class is so numerous that joining each individual plaintiff to the lawsuit is not practical (numerosity).
- There are common questions of law or fact (commonality).
- The named plaintiff's claims are typical of those of the class (typicality).

- The named plaintiff's interests are aligned with those of the class (adequacy of representation).

(FRCP 23(a).)

Because of the potential for high statutory damages, TCPA class actions are often brought under FRCP 23(b)(3) for monetary damages. In these types of class actions, the named plaintiff must also establish that:

- Common questions of law and fact predominate over individual questions particular to each plaintiff (predominance).
- The class action procedure is superior to other methods of resolving the dispute (superiority).

(See FRCP 23(b)(3).)

Additionally, although not a statutory prerequisite, an FRCP 23(b)(3) class must be sufficiently definite or ascertainable. To meet this requirement, the court must be able to determine membership in the class by objective, as opposed to subjective, criteria. (See *City Select Auto Sales, Inc. v. BMW Bank of N. Am., Inc.*, 867 F.3d 434, 439 (3d Cir. 2017); *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 997-98 (8th Cir. 2016).)

For more information on the requirements for class certification, see Practice Note, Class Actions: Certification (2-542-7567).

Courts have reached varying results on class certification in TCPA cases. Arguments that have supported denial of class certification include:

- Lack of ascertainability (see Lack of Ascertainability).
- Lack of predominance (see Lack of Predominance).
- Lack of superiority (see Lack of Superiority).

Lack of Ascertainability

Some courts have found that when dealing with a list of cellular phone numbers (particularly given number portability and the fact that numbers are frequently disconnected and reassigned), there is no accurate way to identify to whom a wireless number belonged when the challenged call was made. This fact raises an ascertainability issue because any class definition could be both over- and under-inclusive. (See, for example, *Smith v. Microsoft Corp.*, 297 F.R.D. 464, 473 (S.D. Cal. 2014); but see *Sandusky Wellness Ctr., LLC*, 821 F.3d at 997 (finding the person who subscribes to the fax number is the best objective indicator of the "recipient" of a fax and, under this definition, the class was ascertainable).) For more information on the implicit ascertainability requirement, see Practice Note, Non-Statutory Grounds for Challenging Class Actions: Standing and Ascertainability (5-606-5912).

Lack of Predominance

One common reason courts deny class certification in TCPA cases is because the factual issue of consent presents an individualized issue that defeats FRCP 23(b)(3)'s predominance requirement (see, for example, *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1273-77 (11th Cir. 2019); *Brodsky v. HumanaDental Ins. Co.*, 910 F.3d 285, 291 (7th Cir. 2018); *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 326-29 (5th Cir. 2008); *O'Connor v. Diversified Consultants, Inc.*, 2013 WL 2319342, at *5 (E.D. Mo. May 28, 2013); *but see True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 931 (9th Cir. 2018) (finding affirmative defenses of express consent and defendant's supporting evidence of the defenses were sufficiently similar to satisfy the predominance requirement for the putative class members subject to those defenses); *Chapman v. First Index, Inc.*, 2014 WL 840565, at *2 (N.D. Ill. Mar. 4, 2014), aff'd in part, vacated in part, remanded, 796 F.3d 783 (7th Cir. 2015) (noting that courts are split over whether the issue of individualized consent renders a TCPA class action uncertifiable on predominance grounds)).

Other than consent, individualized issues that have defeated a finding of predominance include whether:

- A consumer heard a prerecorded message (see, for example, *Fitzhenry v. ADT Corp.*, 2014 WL 6663379, at *6 (S.D. Fla. Nov. 3, 2014)).
- A call was made to a residential versus a business number (see, for example, *Vigus v. S. Ill. Riverboat/Casino Cruises, Inc.*, 274 F.R.D. 229, 237 (S.D. Ill. 2011)).

Lack of Superiority

In some TCPA cases, the plaintiff cannot establish that a class action is superior to other methods of adjudication. Superiority is difficult to establish because the TCPA was designed to provide adequate statutory damages to incentivize plaintiffs to bring individual claims, and is especially hard to prove given:

- Potential plaintiffs, witnesses, and evidence may be geographically widespread, making it undesirable to concentrate the litigation in one action in a particular forum.
- The likely difficulties in managing the class action.

(See, for example, *Microsoft Corp.*, 297 F.R.D. at 468-73.)

VENUE

Class action defendants should consider moving to transfer venue to the district in which they are headquartered when an individual plaintiff brings a putative class action seeking to represent a nationwide class in the district in which he resides (see, for example, *Geraci v. Red Robin Int'l, Inc.*, 2019 WL 2574976 (D.N.J. June 24, 2019)). Counsel should argue that the operative facts, such as the marketing decisions to send alleged automated messages and the location of the technology used to send the messages, arose in the district where the defendant's headquarters is located (see, for example, *Geraci*, 2019 WL 2574976, at *6; *Simms v. Simply Fashion Stores Ltd.*, 2014 WL 12461321, at *1-3 (S.D. Cal. May 9, 2014)).

RECENT FCC TCPA RULINGS AND COURT LIMITATION

On July 10, 2015, the FCC issued a Declaratory Ruling and Order (July 2015 Order) that the D.C. Circuit later limited in certain ways in *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). 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. This omnibus package of declaratory rulings reflected a consumer-protection oriented approach by the agency in interpreting the TCPA, including finding that:

- An ATDS can be **any** technology with the present or **potential future** capacity to store or produce and dial random or sequential numbers.

- Consumers can revoke consent to receive robocalls and texts at any time in any reasonable manner.
- Consent by the prior owner does not continue to a reassigned phone number, but 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.

The FCC also addressed other issues, including:

- Exceptions for the financial and health industries when representatives place calls or texts to wireless numbers under urgent circumstances, provided the calls and texts are "very limited and specific." For example, alerts related to bank account fraud and important medication refills will be allowed, although consumers can revoke consent to receive such communications.
- Wireless and landline carriers may offer robocall-blocking options to customers.
- (See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C.R. 7961 (rel. July 10, 2015).)

These rulings increased the range of TCPA litigation and 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."

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

- Expansive definition of ATDSs, 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, which the court stated "is hard to square with the Commission's concession that the first call may give no notice of a reassignment, or with the Commission's disavowal of any expectation that a caller should 'divine from the called consumer's mere silence the current status of a telephone number.'"
- (885 F.3d at 699-703, 705-09.)

The court did not clarify what should replace these key TCPA provisions, leaving further guidance to come from the FCC. 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

The TCPA was meant to prohibit the use of automated equipment that has the capacity to store or produce numbers to be called, using a random or sequential number generator, and to dial those numbers (47 U.S.C. § 227(a)(1)). In an earlier agency ruling, the FCC expanded the definition of an ATDS to include predictive dialers, because these dialers use lists of telephone numbers and dial without human intervention (*In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C.R. 14014, 14091-94 (July 3, 2003)).

The July 2015 Order expanded the definition of an ATDS, potentially subjecting many more types of dialing equipment and platforms to a case-by-case determination of their inclusion within the reach of the TCPA (30 F.C.C.R. 7961, 7974-78). The FCC interpreted the definition of an ATDS to include all equipment with the future potential capacity to become an ATDS. With respect to smartphones, 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. (30 F.C.C.R. 7961, 7976-77.)

However, the DC Circuit court in *ACA International* invalidated the FCC's interpretation of the definition of an ATDS because the July 2015 Order:

- Impermissibly construed ATDSs to include equipment with the future potential capacity to dial numbers randomly or sequentially (*ACA Int'l*, 885 F.3d at 695-700).
- 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 700-03.)

In rejecting the FCC's interpretation, the court in *ACA International* 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 (*ACA Int'l*, 885 F.3d at 698). Finding it "untenable" that "every uninvited communication from a smartphone infringes federal law," the DC Circuit court set aside the FCC's interpretation (*ACA Int'l*, 885 F. 3d at 698).

Since the DC Circuit's decision in *ACA International*, the Second, Third, Seventh, Ninth, and Eleventh Circuit courts have recognized that *ACA International* invalidated the FCC's interpretation of the definition of an ATDS as provided in its 2015 Order (*King v. Time Warner Cable, Inc.*, 894 F.3d 473, 476-477 (2d Cir. 2018); *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 120-21 (3d Cir. 2018); *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458, 463 (7th Cir. 2020); *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1049 (9th Cir. 2018); *Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301, 1309 (11th Cir. 2020)).

There is now a federal circuit split concerning the definition of an ATDS in the wake of *ACA International*. The Second and Ninth Circuit's analysis has diverged from that of the Third, Seventh, and Eleventh Circuit. The Second and Ninth Circuit define an ATDS more broadly, holding that an ATDS includes any technology that permits the random or sequential dialing of telephone numbers from a stored list regardless of how those numbers were generated. This broad definition includes predictive dialers. (See *Marks*, 904 F.3d at 1051; *Duran v. La Boom Disco, Inc.*, 2020 WL 1682773, at *13, 24 (2d Cir. April 7, 2020).)

The Third, Seventh and Eleventh Circuits have taken a narrower view, requiring that the technology must have the capacity to randomly or sequentially generate numbers to be an ATDS that the TCPA

covers, regardless of how those numbers are dialed once they are on a stored list (see *Dominguez*, 894 F.3d at 121; *Gadelhak*, 950 F.3d at 464; *Glasser*, 948 F.3d at 1311).

The Ninth Circuit, in *Marks*, also held that *ACA International* invalidated not only the July 2015 Order, but also the FCC's prior rulings determining whether predictive dialers and other technology qualified as an ATDS (*Marks*, 904 F.3d at 1047, 1049). That conclusion is shared by the Third, Seventh, and Eleventh Circuits; however, the Second Circuit found that the pre-2015 FCC Orders remain valid guidance (see *Duran*, 2020 WL 1682773 at *15-16.)

District courts have taken varying and sometimes inconsistent approaches, even within the same Circuit, on the definition of an ATDS under the TCPA as well as the continued impact of the pre-2015 FCC Order (for example, compare *Fleming v. Associated Credit Servs., Inc.*, 342 F. Supp. 3d 563, 574 (D.N.J. 2018) with *Somogyi v. Freedom Mortg. Corp.*, 2018 WL 3656158, at *6 (D.N.J. Aug. 2, 2018)).

Absent additional clarification from the FCC or the US Supreme Court, the definition of an ATDS under the TCPA is thus likely to vary by the circuit and, potentially, the district court, in which a case is brought.

REVOKING CONSENT AND THE RECYCLED NUMBER PHENOMENON

The TCPA is silent regarding revocation of consent. The July 2015 Order, however, states that consumers can revoke consent to receive autodialed and pre-recorded calls and texts to their cellular phone in any "reasonable" way and at any time (see 2015 WL 4387780, at *21-25; see also *Van Patten v. Vertical Fitness Grp.*, 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")).

This interpretation attempted to provide clarity given the conflicting rulings by courts (see, for example, courts holding that the TCPA does not allow revocation, whether written or oral, *Kenny v. Mercantile Adjustment Bureau, LLC,* 2013 WL 1855782, at *7 (W.D.N.Y. May 1, 2013); *Reyes v. Lincoln Auto. Fin. Servs.*, 2016 WL 3453651, at *3 (E.D.N.Y. June 20, 2016), while other courts have held that the TCPA's silence permits revocation, *Gager v. Dell Fin. Servs.*, 727 F.3d 265, 268, 270-72 (3d Cir. 2013), and some have found that any revocation must be in writing, *Moore v. Firstsource Advantage, LLC*, 2011 WL 4345703, at *12 (W.D.N.Y. Sept. 15, 2011)). Recently, the Second Circuit affirmed a district court decision, ruling that the TCPA "does not permit a consumer to revoke consent ... when that consent forms a part of a bargained-for exchange" (see *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)), other continue to follow *Gager* (see, for example, *Patterson v. Ally Fin., Inc.*, 2018 WL 647438, at *4-5 (M.D. Fla. Jan. 31, 2018)).

The issue of consent is particularly difficult in the case of wireless phone numbers because these numbers 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. In its July 2015 Order, the FCC ruled that callers may incur TCPA liability when they have actual or constructive knowledge of 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 Order states that businesses should "institute new or better safeguards to avoid calling reassigned wireless numbers." (30 F.C.C.R. 7961, 7999-8012.)

However, the July 2015 Order provided that, so long as a caller does not have actual or constructive knowledge that the number has been reassigned, it permissibly may make one call to a reassigned number. Moreover, the FCC stated that calls made by all of a company's affiliates count for purposes of calculating this one-additional-call opportunity. (30 F.C.C.R. 7961, 8000 n.261.)

The DC Circuit set aside the FCC's interpretation of reassigned numbers as a whole, stating that:

- The one-call safe harbor is arbitrary and capricious (*ACA Int'l*, 885 F.3d at 706-08).
- 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, 708).

To help address the issue of how to discern when a wireless phone number has disconnected and been 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)). It is not clear yet when the database will be implemented and available.

INVITATIONAL TEXT MESSAGING

While courts generally have found text messages to fall within the scope of the TCPA (see *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952-54 (9th Cir. 2009)), 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 (see 2015 WL 4387780, at *37-41).

In addition, the July 2015 Order addressed the growing line of cases questioning whether invitational text messages sent to a user's individual contacts (through an application's (app's) "invite a friend" feature) are actionable under the TCPA. The July 2015 Order concludes that the mere inclusion of a consumer's wireless number in a contact list on another person's wireless phone, standing alone, does not demonstrate consent to autodialed or prerecorded calls, including texts. (2015 WL 4387780, at *18-20.)

THIRD-PARTY LIABILITY

Third-party liability, specifically where one party makes calls that the 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 (2013 Order)*, 28 F.C.C.R. 6574, 6584 (2013)).

FCC GUIDANCE

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.

(28 F.C.C.R. at 6592-93.)

This "guidance" is not necessarily 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 (28 F.C.C.R. at 6588; *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, whether the principal:
  - developed the script;
  - provided feedback on call quality; or
  - had access to records of what phone numbers were called.

(See, for example, *Jones v. Royal Admin. Servs., Inc.*, 887 F.3d 443, 450-52, (9th Cir. 2018) (affirming summary judgment where the defendant did not exercise the level of control necessary over the agent to be subject to vicarious liability for telemarketers' unlawful calls); *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); *Toney v. Quality Res., Inc.*, 75 F. Supp. 3d 727, 743-44 (N.D. Ill. 2014) (denying 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 *Boyle v. RJW Transp., Inc.*, 2008 WL 4877108, at *9 (N.D. Ill. June 20, 2008) (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.

For a collection of resources designed 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, see Advertising and Marketing Toolkit (2-503-9096).

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.** 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 TCPA Rule Amendments and Guidance).
- **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. Additionally, the company should develop a method to track withdrawals of consent and identify when contact information becomes stale, for example, when a phone number no longer dials the person that provided consent for that number (see 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 TCPA Rule Amendments 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.

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