

## Some TCPA Class Action Defense Strategies

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Enacted in 1991 to protect consumers from receiving unsolicited telemarketing calls and faxes, the Telephone Consumer Protection Act regulates and restricts the manner in which a business may advertise its products and services to consumers, including via cellphones and fax machines. Among other things, the TCPA prohibits the use of an “automatic telephone dialing system” or an “artificial or prerecorded voice” to call or send text messages to cell phones without the prior express consent of the called party. This rule applies to both telemarketing and nontelemarketing calls, including debt collection or informational calls. The TCPA is a strict liability statute that awards \$500 per violation and up to \$1,500 per willful violation, penalties that were designed to empower individual consumers to seek redress in small claims court. The [Federal Communications Commission](#) is charged with rulemaking authority by the statute and has the discretionary authority to reinterpret those rules as technology evolves.

At the time of its enactment, proponents were aiming to curb annoying telemarketer calls at dinnertime, and cellphone use was in its infancy. Moreover, most wireless subscribers had to pay for whatever calls they received and widespread texting was still several years away. The economics, demographics and usage around cellphones are fundamentally and materially different than they were nearly 25 years ago. But the statute hasn’t changed to keep up with technology or current usage trends.

That dynamic, along with the uncapped strict liability, has spawned a class action cottage industry. The number of lawsuits filed under the TCPA has grown exponentially in recent years. Coupled with staggering settlement amounts, the trend toward increased litigation is likely to continue in 2016: TCPA class actions increased by 400 percent from 2010 to 2013; over 2,100 actions were filed in 2014. TCPA suits continue on a significant uptick; the 2015 total of 3,710 suits represents a 45 percent increase over 2014.

Unfortunately, if you regularly contact customers via telephone, text or fax, there is a high likelihood that at some point you will be named as a party to a lawsuit alleging violations of the TCPA. While litigation of individual claims under the TCPA does occur, it is far more typical for a representative plaintiff to bring a federal class action on behalf of unnamed individuals. Successfully resolving TCPA class actions requires a proactive, methodical approach and a specialized skill set.

We foremost recommend engaging in an early and robust case evaluation process as a predicate to any successful defense strategy. It is absolutely critical to get a fulsome and quick understanding of the facts and the viable defenses, if any, because the TCPA is a strict liability statute that provides limited options for defending a claim.

### Key Preliminary Issues



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## ***Consent***

Consent is often a dispositive issue in TCPA litigation. Prior express consent is one of the few defenses to a TCPA claim, and the FCC has made clear that the burden of demonstrating consent lies with the party placing the call. The ability to document accurately, maintain, and recall documentation evidencing consent is critical. And determining whether the calling party can document consent for any calls or texts to the named plaintiff is the first step in developing strategy. The best defense to a TCPA claim is demonstrating express written consent. If possible, a successful defendant should accomplish this quickly to gain the most traction and drive the most cost-effective resolution of the matter.

## ***Size of the Potential Class and Scope of Potential Damages***

The statute of limitations under the TCPA is four years. Depending on the size of the call or text campaign, the potential class could range from several hundred to several million recipients. The frequency of the calls or text will also impact statutory damages, as could the possibility of willful statutory damages, particularly if prior revocation of consent is at issue. This data is almost always in the control of the calling party and creates an asymmetry of understanding between the parties. That asymmetry, however, won't last long if the parties get into discovery. Knowing the scope of the potential financial problem from inception should always inform defensive strategy.

## ***Automatic Telephone Dialing System***

The FCC has expanded the definition of ATDS: "equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers." As a result, there are fewer opportunities to assert that the technology at issue doesn't constitute an ATDS under the TCPA. But, counsel should still gain expertise on the technology, the process and data associated with any automated call or text programs. If there are any arguments that the calls were not made using an ATDS or were made via manual dial, they need to be developed and documented early in the case to have a meaningful impact on a resolution strategy.

## ***Insurance***

It's also worth noting that the recipient of any demand or lawsuit alleging TCPA violations should notify its carrier. While policyholders have had limited success absent specific TCPA provisions securing coverage under these policies, coverage can be waived if the claim isn't reported promptly.

## ***Homework on Your Adversary and Plaintiff***

Understanding your adversaries is also an instrumental part of developing a successful defense strategy. TCPA claims have become extremely popular with the plaintiffs' bar. Drawn by the large reported settlements and the strict liability, more plaintiffs' lawyers have partnered with consumer protection advocates to help develop their TCPA claims. There are lawyers in the space with varying skills and approaches. Research the reported cases, analyze the website and any press reports, and ask your network to gain insights into your adversary's skill sets and approach.

### ***Is a Motion to Dismiss Viable?***

Unfortunately, it is not difficult to plead effectively a TCPA claim. Indeed, any [Google](#) search will provide several examples to cut and paste from. Moreover, many of the most viable defenses hinged on factual matters that will be disputed at the pleading stage. As such, Rule 12 motions are typically not effective in getting the case dismissed. And even when they are, because pleading a claim is so easy, fixing technical deficiencies through amendment can often undo the benefits of any viable motion to dismiss. In our experience, the most effective Rule 12 motions have been to assert statute of limitations issues (i.e., certain of the class claims are barred) or to show that the claims are precluded by a prior settlement covering that plaintiff.

### ***Set Up and Argue Mootness?***

A defendant can attempt to moot the class plaintiffs' claim. This approach had become increasingly popular with the defense bar. But weeks ago the [U.S. Supreme Court](#) ruled in the Campbell-Ewald matter that defendants cannot end class action cases by offering to pay damages to make the class representatives whole before they move for class certification. The court did not opine on whether a defendant might moot statutory class claims by actually tendering a payment to plaintiffs, rather than making a statutory offer, to satisfy their claims fully.

### ***Argue Lack of Standing? (Spokeo v. Robbins)***

In order to have standing to sue in federal court, a plaintiff must have a particularized "injury in fact." In the Spokeo case, the Supreme Court will determine whether a plaintiff who had suffered no actual injury but who alleges a violation of a federal statute has standing. But even if a "noninjury" plaintiff lacks standing in federal court, it's not clear how valuable that may be to a defendant in a TCPA matter. One likely result is that plaintiffs will just file in the state courts. And one unintended consequence could be that without Article III standing, defendants could lose the ability to remove TCPA class actions to federal court.

### **Opposing Class Certification**

If the complaint survives the pleading stage, then the next opportunity to derail the case is through summary judgment or class certification. As an initial matter, there is a strategy call to be made about whether to file any motion for summary judgment pre or post the class certification briefing. In any event, and as discussed, there are very few viable defenses to assert on summary judgment and they are typically focused on consent or manual dialing. When the defendant can demonstrate express written consent or when the defendant can present call logs and testimony from company personnel demonstrating that the calls at issue have in fact been manually dialed, defendants have succeeded on summary judgment. But, often the last line of defense is opposing class certification. And while the unique facts and circumstances will dictate and shape the arguments in opposition to class certification, we believe the following arguments should be considered (and developed as part of any early case evaluation):

#### ***Individual Issues Predominate***

Typically, individual issues regarding class members' consent to receive calls preclude a finding of predominance. This argument is particularly viable when the methods for obtaining or revoking consent are not uniform. Individualized issues of consent can also predominate when the evidence shows that a significant percentage of the putative class consented to receiving

calls or texts on their cellphone.

### ***Ascertainability***

An essential requirement for certifying a class under Rule 23 is a means for presently ascertaining who is or is not a member of the proposed class. Courts are invoking the lack of ascertainability with increasing frequency as a basis for denying class certification motions. This is particularly so where the class definition is demonstrably overbroad and where ascertaining the class members would not be administratively feasible because there is inadequate or insufficient documentation that could be used to identify them.

### ***Superiority***

In some TCPA cases, the plaintiff cannot establish that a class action is superior to other methods of adjudication. Superiority can be difficult to establish because the TCPA is a strict liability statute designed to provide damages that incentivize plaintiffs to bring individual claims. This argument is most viable when there are a small number of class members or where the class representative received a multitude of calls such that the representative's individual recovery would likely be greater than any class recovery or incentive fee.

### ***Fail-Safe Class***

Fail-safe classes are defined in a way where membership in the class is dependent on the same criteria as the merits of plaintiffs' legal claims. The problem with fail-safe classes is that they impose liability on the defendant in the event the claims prevail, but impose no risk on the absent class members in the event of a judgment adverse to the class. This issue occurs frequently in TCPA class litigation because plaintiffs often define the class, in part, as recipients of calls or texts who did not provide prior express consent. Inclusion of this type of consent language can give rise to an argument that the proposed class consisted solely of persons who could establish that the defendant violated the TCPA and therefore is a "fail safe" class.

### **Administrative Solution at the FCC**

In light of the difficulty that exists in defending TCPA claims, we would recommend that in addition to a traditional litigation strategy, companies consider pursuing an administrative solution at the FCC. The FCC has the authority, from Congress, to exclude from the TCPA's prohibitions calls and texts that are not charged to the called party, with conditions to minimize any harm to consumer privacy. The FCC exercises this authority through the formal processes of issuing declaratory rulings and engaging in rulemaking. Generally speaking, the FCC uses its power to issue declaratory rulings for the purpose of terminating a controversy or removing uncertainty. Petitions for declaratory rulings dealing with the TCPA are docketed under CG 02-278, the FCC's existing proceeding for rules and regulations implementing the TCPA. After petitions are docketed, there is a 30-day period for responses and a 15-day period after that for replies.

The commission has already exhibited a willingness to entertain petitions in this area and act to provide limited relief. Engaging the FCC could be a cost-effective and protective measure that limits liability down the road.

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