

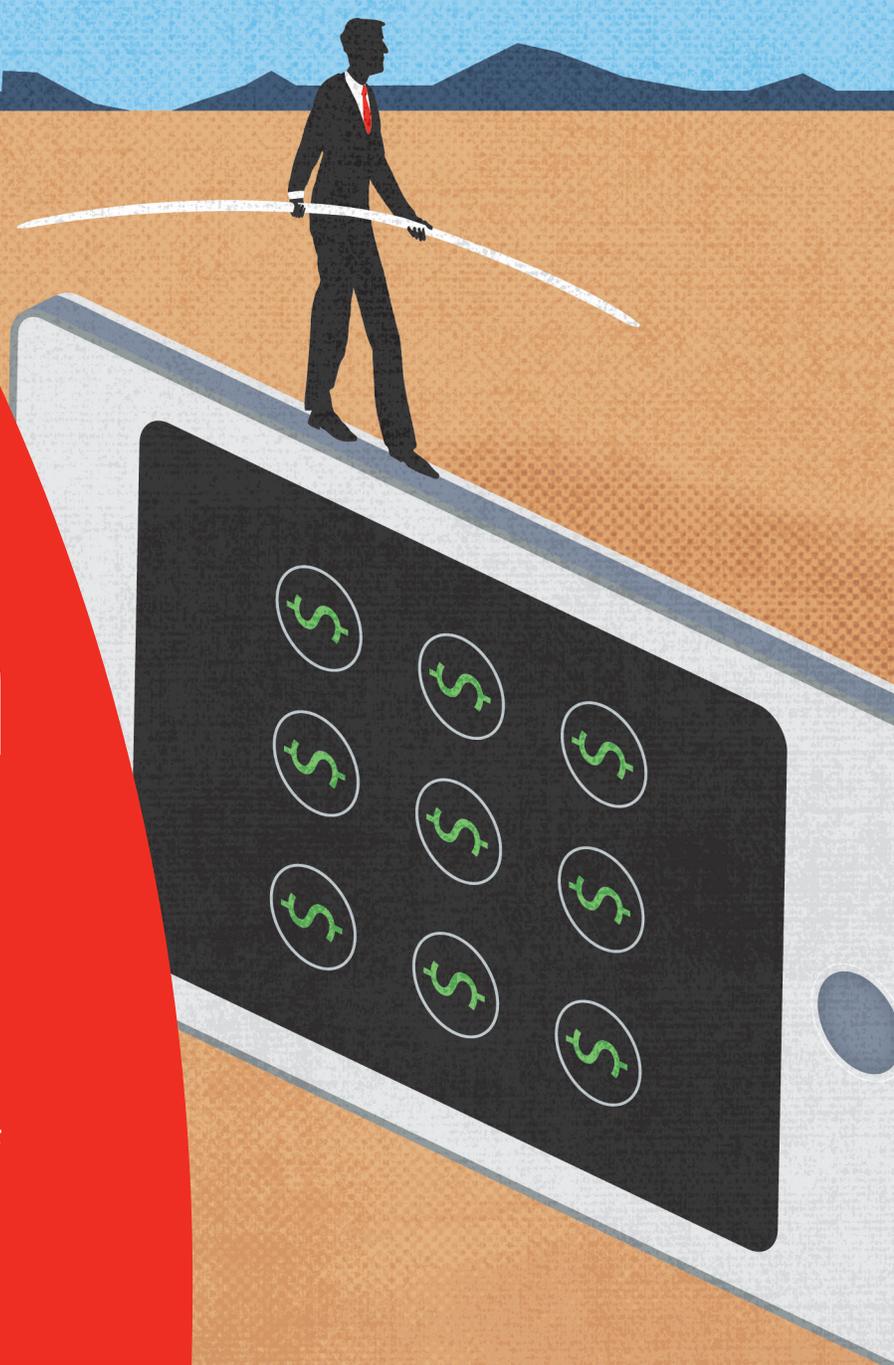


U.S. CHAMBER  
Institute for Legal Reform

# TCPA Litigation Sprawl

*A Study of the Sources and  
Targets of Recent TCPA Lawsuits*

.....  
AUGUST 2017





**U.S. CHAMBER**  
**Institute for Legal Reform**

An Affiliate of the U.S. Chamber of Commerce

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# Executive Summary and Key Findings

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In October 2013, the U.S. Chamber Institute for Legal Reform released a paper entitled *The Juggernaut of TCPA Litigation: The Problems With Uncapped Statutory Damages*.<sup>1</sup> That paper warned American businesses about the increasing amount of litigation brought under the Telephone Consumer Protection Act (TCPA), highlighted the emerging trends towards litigation abuse, and called for recommended reforms.<sup>2</sup> Unfortunately, since that publication, the problems with TCPA litigation abuse have only worsened. Now TCPA cases—many of which are brought as nationwide class actions—sprawl across the country, targeting companies in virtually every industry.

In recent years American businesses have been besieged by litigation under the TCPA.<sup>3</sup> A central theme with the unchecked expansion of the TCPA's prohibitions is that it is not the unscrupulous scam telemarketers that are targeted by TCPA litigation, but rather legitimate domestic businesses.<sup>4</sup> Many lawsuits involve technologies that were not and could not have been part of Congress' discussions when it crafted the TCPA. Indeed, well-intentioned companies and small businesses have increasingly been

pulled into lawsuits claiming staggering, and potentially annihilating, amounts of statutory damages tied to new technologies (such as text messaging) that could have existed only in the realms of science fiction when the TCPA was enacted in 1991.<sup>5</sup>

Further, businesses are facing confusing and conflicting case law on the TCPA. With so much litigation, decisions are constantly emerging from courts spanning the country that are trying to interpret the statute's

*“ With so much litigation, decisions are constantly emerging from courts spanning the country that are trying to interpret the statute’s intent and meaning in the absence of any revisions from Congress to this twenty-six year old statute. ”*

intent and meaning in the absence of any revisions from Congress to this twenty-six year old statute. A circuit court of appeals may issue a ruling on a new question (e.g. the Third Circuit’s 2013 decision that prior express consent may be revoked orally at any time<sup>6</sup>), and suddenly new lawsuits based on that court’s interpretation follow. A court might also issue a ruling helpful to businesses, such as the Second Circuit’s recent opinion that when prior consent was provided by a customer as part of his or her contractual bargain with a company, that customer cannot “revoke” that consent so as to sue under the TCPA.<sup>7</sup> However, whenever there has been a “pro-defense” ruling, new litigation that would be impacted by that ruling simply tends to be filed in district courts in circuits where it can be argued that the prior ruling need not be followed. Thus, thousands of businesses facing TCPA lawsuits remain unclear as to what defenses might prevail and what conduct would even be found to be actionable under the TCPA.

Indeed, the only clarity to be found is in the certainty that federal court dockets are overburdened with TCPA litigation. On July 15, 2015, a divided Federal Communications Commission (FCC) issued an Omnibus TCPA Declaratory Ruling,<sup>8</sup> which invited additional TCPA litigation and triggered a significant uptick in TCPA cases, as further detailed below. These lawsuits—which are not required to be based on any actual harm to the plaintiff—imperil American businesses, both big and small, that were often simply attempting to reach out to their own customers using numbers provided by those customers.

To better understand the increasing reach of TCPA litigation, both across industries and geographically, this paper began as a database of TCPA cases filed in the

“ [A]fter the FCC’s July 2015 Order, TCPA litigation boomed—increasing by 46%. ”

17-month period after the FCC’s July 2015 Order, concluding at the end of 2016. The database was populated with information from federal court dockets, with additional review of some state court filings in courts with online docketing. To examine trends and understand the sources and targets of TCPA litigation, this paper indexes 3,121 cases filed between August 1, 2015 and December 31, 2016, in which a TCPA claim was identified during the electronic docketing process.

We also confirmed through the docket searches that began our database project that after the FCC’s July 2015 Order, TCPA litigation boomed—increasing by 46%. The same search of electronic dockets from the 17-month period before the FCC’s Order showed 2,127 cases listing the Telephone Consumer Protection Act as a claim in the docketing summary, so the increasing pace of TCPA case filings after the FCC’s July 2015 Order is clear.

### TCPA LITIGATION BEFORE & AFTER JULY 2015 FCC ORDER

17-Month Period Before FCC Order  
2,127 TCPA Lawsuits Filed

17-Month Period After FCC Order  
3,121 TCPA Lawsuits Filed

An initial review of the post-Order database reveals important information about the wide reach of TCPA litigation across industries, who is bringing these claims, and the pervasive presence of TCPA litigation throughout the country. The data shows that these lawsuits rarely involve claims brought against spam telemarketers/texters or blast faxes that reach out to millions of unknown persons in an attempt to get someone to engage with them.<sup>9</sup> Rather, the lawsuits examined here, for the most part, seek aggregated statutory damages from legitimate American companies not engaged in the kinds of cold-call telemarketing the TCPA was designed to limit.

The sprawl of TCPA litigation illustrates the serious problem that occurs when uncapped statutory damages and a technologically-outdated statute work together to overincentivize litigation. The actual number of disputes under the TCPA brought against companies in this 17-month timeframe is certainly much higher than the 3,121 electronically

*“ [T]he lawsuits examined here... seek aggregated statutory damages from legitimate American companies not engaged in the kinds of cold-call telemarketing the TCPA was designed to limit. ”*

*“ The sprawl of TCPA litigation illustrates the serious problem when uncapped statutory damages and a technologically-outdated statute work together to overincentivize litigation. ”*

searchable cases tracked in this paper for a trend analysis.<sup>10</sup>

Significant settlements and verdicts continue to drive TCPA litigation. Unfortunately, as detailed in the sections that follow, every indication is that with the promise of uncapped statutory damages that can be sought through TCPA litigation (despite any actual damages), and absent significant action from legislators or regulators, as well as conflicting court interpretations, there is little that can stop the spread of TCPA litigation abuse.

## Findings

As detailed in Section 2, TCPA lawsuits have been filed against companies in approximately 40 different industries. While the financial industry was the hardest hit by far (with 36% of the 3,121 examined cases brought against banks and other financial entities), seemingly no industry was safe from litigation. Further, over 1,000 of the cases examined—more than one-third of the total lawsuits reviewed—were brought as nationwide class actions.

The filing of these suits is likely driven by the promise of lucrative settlements or verdicts. A sampling of some recent settlements of TCPA class actions in the past three years—entered into by a wide range of companies in different industries—is detailed in Section 3.

Encouraged by these settlements, and by the also-lucrative practice of pursuing individual claims in litigation or arbitration,<sup>11</sup> more and more attorneys have joined the cottage industry of TCPA litigation. Thus, hundreds of law firms are involved in a significant way in pursuing TCPA actions. But as discussed in Section 4, around 60% of the TCPA lawsuits examined in the study’s 17-month period were brought by only 44 law firms/lawyers, with two firms filing well over 200 TCPA litigations each in the 17-month sample.

Moreover, as also discussed in Section 4, a review of the 3,121 cases confirmed that repeat TCPA plaintiffs are also responsible for the increase in litigation, with “professional plaintiffs” attempting to make a living by receiving phone calls/texts/faxes, allowing those communications to accumulate, and then filing TCPA lawsuits seeking statutory damages going back four years.

TCPA litigation is not limited in geographic scope, as was once the case. Instead, as discussed in Section 5, litigation has now

spread throughout the country. Examining the 3,121 lawsuits, which were primarily those filed in federal courts between August 1, 2015 and December 31, 2016, we found that TCPA litigation activity that was once focused almost exclusively in California, Illinois, and Florida has spread throughout the country, with 40% of the TCPA litigation in our survey brought outside of those three states.

As shown in Section 6, a review of reporting in just one daily legal newsletter (*Law360*) on various TCPA actions over a four-and-a-half-month period between February 7, 2017 and June 21, 2017, shows that TCPA litigation is continuing to hoard the spotlight when it comes to big-ticket cases. The varied TCPA cases making the news confirm how many different kinds of companies are battling TCPA class action litigation throughout the country for a variety of communications, from flu shot reminders to happy birthday

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“ Further, over 1,000 of the cases examined—more than one-third of the total lawsuits reviewed—were brought as nationwide class actions. ”

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text messages; from customer satisfaction surveys to food delivery order alerts; and from transactional calls to targeted text messages sent during a college football game to fans in attendance. These lawsuits claim that such communications are placed without required consent, and often presume significant facts, such as that a call/text was placed with an autodialer. Despite these

assumptions, many courts find the pleading sufficient to move the parties into discovery.

Finally, Section 7 attempts to address and predict the near and distant futures of TCPA litigation absent any revision or updating of this statute by Congress, in light of the trends we found in our litigation review.

# The Widespread Reach of TCPA Litigation Across Industries

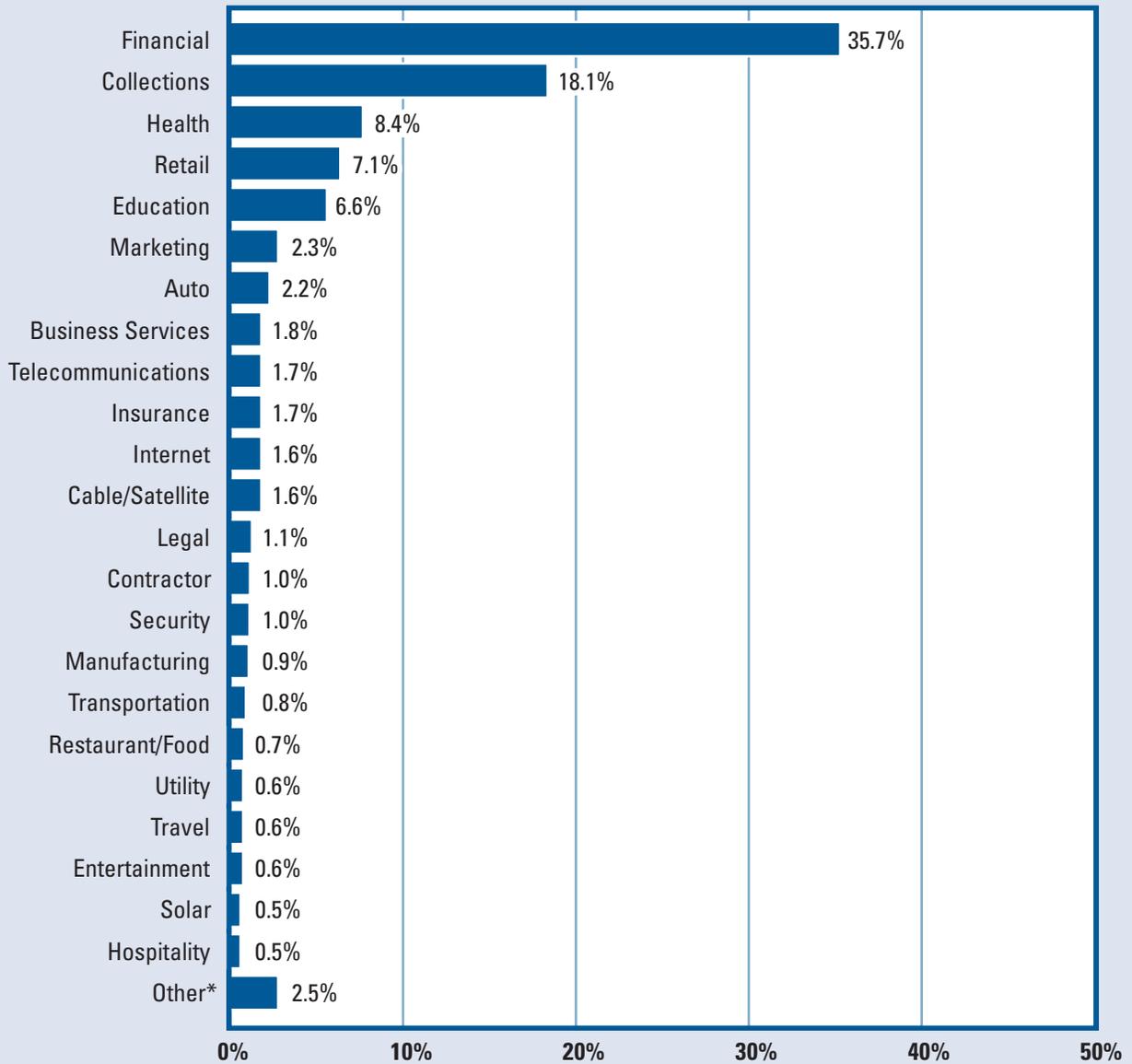
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Initial findings from the litigation database about the reach of TCPA litigation across industries are further described below. But first, it is important to note that the 3,121 cases we examined do not by themselves capture all the activity generated by the TCPA. To understand the enormous impact of the TCPA on businesses, one must keep in mind that there are also small claims cases, limited jurisdiction state court cases, and arbitration demands involving the TCPA filed in the timeframe examined,<sup>12</sup> as well as demand letters sent to companies requesting significant amounts of statutory damages at the outset to prevent the filing of TCPA litigation.

Further, many thousands of federal and state court cases brought before August 1, 2015 and after December 31, 2016, are still working their way through the judicial system and would not be captured in our database, which tracked new filings. In other words, the 3,121 cases captured in the litigation database and examined herein are inherently under-reporting the full universe of TCPA-related litigation and demand letters.

Turning to the 3,121 cases analyzed that were filed in the 17-month study window, the largest number of cases were brought against companies in the financial industry, which faced more than 1,000 new TCPA cases, or 36% of all those examined.

## INDUSTRIES TARGETED BY RECENT TCPA LITIGATION



\*Media, Software, Real Estate, Medical, Wholesale, Religious, Political, Analytics, Newspapers/Magazines, Housing, Construction, Gaming, Charity, Employment

The businesses/entities within these categories that find themselves targeted by TCPA lawsuits are varied: for example, the education industry's largest target by far for TCPA litigation was an education loan servicer, but lawsuits were also filed against universities and colleges, education companies, and school boards, including the following:

- Colorado Technical University
- Community College District No. 608 (Illinois)
- Drexler University
- American Intercontinental University
- Bridgepoint Education, Inc.
- Duval County School Board (Florida)
- Palm Beach County School Board (Florida)

Within the retail industry, TCPA defendants in the sample group reflect a wide swath of businesses. And while not many companies in the restaurant/food industries faced TCPA lawsuits brought in federal courts during the 17-month window, every TCPA action tracked against them was brought as a nationwide class action.

As already noted, the top twenty companies sued most often under the TCPA after August 1, 2015, in the 3,121 tracked cases,

are primarily in the financial services or collections industries. Each of the top twenty defendants has been named in at least 17 TCPA cases in the sample group of tracked cases, and together they face 601 class action and individual TCPA lawsuits filed in the examined timeframe.

Significantly, while certain individual companies were most frequently named in the 3,121 TCPA lawsuits examined, companies often face lawsuits brought against various affiliated companies as well—for example, Citibank NA is named as the defendant in 48 cases, but there are other lawsuits against related entities such as Citibank Inc., Citigroup, or Citimortgage, bringing the total “Citi” TCPA lawsuits to 77 filed in the 17-month sample time period. Likewise, Navient Solutions Inc.’s lawsuits double when alternative names for that company are considered.

Over 1,000 of the 3,121 cases tracked were brought as putative class actions seeking statutory damages ranging from tens of millions to billions of dollars. Such far-reaching class actions strong-arm companies into significant settlements that, in turn, fuel more litigation. The pressure on companies caused by ever-increasing settlements in TCPA cases is detailed in the next section.

*“Over 1,000 of the 3,121 cases tracked were brought as putative class actions seeking statutory damages ranging from tens of millions to billions of dollars.”*

# Recent TCPA Settlements (and Verdicts) Raising the Stakes

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This section considers some of the significant TCPA settlements entered into in the past three years by a range of businesses for a variety of communications. These settlements provide class counsel the incentive to bring more and more TCPA litigation, with millions of dollars in attorneys' fees being carved out of significant class awards.<sup>13</sup>

Settlement is where almost all TCPA cases end up if a class is certified, or if certification seems at all likely, because of the *in terrorem* value of classwide claims. In TCPA litigation, every 2,000 calls can equate to \$1 million in potential statutory damages, even before potential "willfulness" damages are considered.

However, one defendant recently did go to trial after a class had been certified, rather than settle. After a five-day jury trial in North Carolina, on January 20, 2017, DISH Network was hit with a jury verdict of \$20.5 million (\$400 per call) for 51,000 calls that had been placed not by the company itself, but by a now-defunct retailer of DISH services.<sup>14</sup> The jury found that DISH was vicariously liable for these calls. On June 6, 2017, the judge then issued a ruling that trebled "willfulness" damages should apply, increasing the damages to over \$61 million for 51,000 calls.<sup>15</sup>

DISH's experience (now subject to varied appeals) will likely persuade companies to continue the long-standing trend of settling TCPA class action lawsuits early on, particularly when any significant number of calls is placed at issue by a plaintiff, rather than face even a small risk of losing on the merits at trial.

Some of the other most widely reported settlements in TCPA class actions entered into between 2014 and 2017 by various businesses are listed on the next page. Many of these cases were pending for several years before settlement was reached. For each settlement, the year in which the case was filed is listed along with the court in which the action was filed.

| <b>DEFENDANT</b>                           | <b>SETTLEMENT AMOUNT<br/>(\$ Million)</b> | <b>YEAR<br/>FILED</b> | <b>CASE<br/>NUMBER</b> | <b>COURT</b> |
|--|---|-----------------------|------------------------|--------------|
| Caribbean Cruise Line, Inc.                | 76  | 2012                  | 1:12-cv-04069          | N.D. Ill.    |
| Capital One Bank (USA), N.A.               | 75  | 2012                  | 1:12-cv-10064          | N.D. Ill.    |
| US Coachways, Inc.                         | 49.9                                      | 2014                  | 1:14-cv-05789          | N.D. Ill.    |
| AT&T Mobility, LLC                         | 45  | 2013                  | 1:13-cv-00050          | D. Mont.     |
| HSBC Bank Nevada, N.A.                     | 40  | 2014                  | 1:14-cv-00190          | N.D. Ill.    |
| Interline Brands, Inc.                     | 40  | 2011                  | 1:11-cv-04462          | N.D. Ill.    |
| Sirius XM Radio, Inc.                      | 35  | 2013                  | 4:13-cv-00003          | E.D. Va.     |
| Bank of America Corp.                      | 32  | 2011                  | 5:11-cv-02390          | N.D. Cal.    |
| Wells Fargo Bank, N.A.                     | 30.4                                      | 2015                  | 1:15-cv-01270          | N.D. Ga.     |
| Metropolitan Life Insurance Co.            | 23  | 2013                  | 9:13-cv-80561          | S.D. Fla.    |
| Buccaneers Limited Partnership             | 19.5                                      | 2016                  | 8:16-cv-01622          | M.D. Fla.    |
| Portfolio Recovery Assoc., LLC             | 18  | 2011                  | 3:11-md-02295          | S.D. Cal.    |
| Papa John's International, Inc.            | 16.5                                      | 2010                  | 2:10-cv-01139          | W.D. Wash.   |
| Wells Fargo Bank, N.A.                     | 16.3                                      | 2015                  | 1:15-cv-01156          | N.D. Ga.     |
| Life Time Fitness, Inc.                    | 15  | 2014                  | 0:14-md-02564          | D. Minn.     |
| PharMerica Corp.                           | 15  | 2013                  | 1:13-cv-23924          | S.D. Fla.    |
| American Eagle Outfitters, Inc.            | 14.5                                      | 2014                  | 1:14-cv-02440          | S.D. N.Y.    |
| Walgreen Co.                               | 11  | 2013                  | 1:13-cv-04806          | N.D. Ill.    |
| Frontier Communications Corp.              | 11  | 2013                  | 3:13-cv-01191          | D. Conn.     |
| JPMorgan Chase Bank, N.A.                  | 10.2                                      | 2013                  | 1:13-cv-08285          | N.D. Ill.    |
| Hollister Co., Abercrombie & Fitch, Co.    | 10  | 2014                  | 1:14-cv-23120          | S.D. Fla.    |
| Ace American Insurance Co.                 | 9.76                                      | 2015                  | 1:15-cv-21264          | S.D. Fla.    |
| American Express Co.                       | 9.25                                      | 2013                  | 1:13-cv-04836          | N.D. Ill.    |
| The Western Union Co.                      | 8.5                                       | 2014                  | 1:14-cv-01741          | N.D. Ill.    |
| Burger King Corp.                          | 8.5                                       | 2013                  | 8:13-cv-00662          | D. Md.       |
| Comenity Bank                              | 8.5                                       | 2012                  | 3:12-cv-02484          | S.D. Cal.    |
| Clark County Collection Service, LLC       | 8   | 2013                  | 2:13-cv-01731          | D. Nev.      |
| State Farm Mutual Automobile Insurance Co. | 7   | 2013                  | 1:13-cv-02018          | N.D. Ill.    |
| Stryker Sales Corp.                        | 6.85                                      | 2012                  | 1:12-cv-00729          | W.D. Mich.   |
| Anthem Insurance Companies, Inc.           | 6.25                                      | 2013                  | 4:13-cv-01411          | E.D. Mo.     |
| Vivint, Inc.                               | 6   | 2012                  | 0:12-cv-61826          | S.D. Fla.    |
| Trueblue, Inc.                             | 5   | 2014                  | 3:14-cv-05963          | W.D. Wash.   |
| Kaiser Foundation Health Plan, Inc.        | 5.4                                       | 2013                  | 3:13-cv-00981          | S.D. Cal.    |
| Power Home Remodeling Group, LLC           | 5.2                                       | 2015                  | 2:15-cv-04623          | E.D. Pa.     |
| TruGreen, Inc.                             | 4.45                                      | 2013                  | 1:13-cv-03957          | N.D. Ill.    |
| Senco Brands, Inc.                         | 3   | 2014                  | 1:14-cv-06866          | N.D. Ill.    |
| Rita's Water Ice Franchise Company, LLC    | 3   | 2015                  | 2:15-cv-03509          | E.D. Pa.     |
| Guess?, Inc.                               | 3   | 2014                  | 3:14-cv-00020          | S.D. Cal.    |
| Navy Federal Credit Union                  | 2.75                                      | 2015                  | 8:15-cv-01629          | C.D. Cal.    |

# The TCPA Lawyers and Plaintiffs at the Wheel

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It is settlements and verdicts such as those noted previously that continue to encourage new TCPA lawsuits, which are often brought by plaintiffs and attorneys specializing in TCPA litigation. In fact, the 3,121 TCPA actions examined over a 17-month period illustrate how a relatively small number of attorneys, law firms, and repeat TCPA plaintiffs brought a significant portion of TCPA litigation.

Forty-four law firms are the primary filers of over eighteen hundred (1,826) of all the TCPA cases examined (approximately 60%). The most frequent filers—those attorneys listed as primary counsel on at least 14 cases in the database—are listed in the table on page 12.<sup>16</sup>

Some of these lawyers specialize in filing nationwide class actions (*i.e.*, Anderson & Wanca), while others bring primarily or exclusively individual lawsuits (*i.e.*, Kimmel & Silverman). The most prolific filer of TCPA lawsuits between August 2015 and December 2016 was the Law Offices of Todd M. Friedman, which filed 263 lawsuits against hundreds of different companies in that time frame—and 215 of those cases (approximately 80%) were filed as nationwide class actions.

Many of these firms are very aggressive about finding new TCPA plaintiffs—advertising online, via social media, and through networks of friends and associates. One Connecticut-based firm, Lemberg Law, LLC (with 107 of the cases in the sample group) even came out with a smartphone application, “Block Calls, Get Cash,” that potential clients can download so that call data is available directly to the

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“ *Forty-four law firms are the primary filers of over eighteen hundred (1,826) of all the TCPA cases examined (approximately 60%).* ”

## FREQUENT TCPA FILERS\*

| ATTORNEY/FIRM                    | CASES FILED |
|----------------------------------|-------------|
| Law Offices of Todd M. Friedman  | 263         |
| Morgan & Morgan                  | 235         |
| Lemberg Law/Serge Lemberg        | 107         |
| Kimmel & Silverman               | 106         |
| Berry & Associates/Matthew Berry | 87          |
| Edelman Combs                    | 77          |
| Anderson & Wanca                 | 74          |
| Bursor & Fisher                  | 51          |
| Bock Hatch                       | 51          |
| Price Law Group                  | 46          |
| Christopher Boss                 | 38          |
| Hyde & Swigart/Joshua Swigart    | 38          |
| Hormozdi Law/Shireen Hormozdi    | 35          |
| Krohn & Moss                     | 34          |
| Skaar & Feagle                   | 30          |
| Trinette Kent                    | 27          |
| Edward Geller                    | 25          |
| Westgate Law                     | 25          |
| Kazerouni Law Group              | 25          |
| Centrone & Shrader               | 24          |
| Prato & Reichman                 | 24          |
| The Consumer Protection Firm     | 22          |
| Hughes Ellzey                    | 21          |
| Loan Lawyers                     | 21          |
| Leavengood Dauval                | 21          |
| Benjamin Kelsen                  | 20          |
| Michael Siddons                  | 20          |
| Hyslip Taylor                    | 19          |
| Michael Agruss                   | 19          |
| Edelson PC                       | 18          |
| Law Offices of Kenneth Hiller    | 18          |
| Max G. Margulis                  | 18          |
| Maney Gordon                     | 17          |
| Sagaria Law                      | 17          |
| Schultz Associates               | 17          |
| Sulaiman Law/Ahmad Sulaiman      | 17          |
| Kristensen Weisberg              | 16          |
| Christopher Legg                 | 15          |
| Donald Yarbrough                 | 15          |
| Martin & Bontrager               | 15          |
| Mark Ankcorn                     | 15          |
| Ronald Marron                    | 14          |
| Farmer Jaffe                     | 14          |

\*Names of firms and attorneys reflect how they were listed in the court dockets examined.

law firm, which can review inbound calls to look for potential litigation targets.<sup>17</sup> The app’s website states that “with no out-of-pocket cost for the app or legal fees, its users will laugh all the way to the bank.”<sup>18</sup> Interestingly, a former associate of this firm has claimed in her own lawsuit against Lemberg Law that the first time some “clients” of Lemberg who used this or other similar apps (such as Privacy Star) found out about their own lawsuit was after a company decided to settle. The associate claimed that many consumers were unaware of their own TCPA demands until their “attorney” contacted them about their portion of the settlement (after carving out Lemberg’s own fees and costs, including a \$595 “Privacy Star” cost).<sup>19</sup>

As for the most frequent filer—the Law Offices of Todd M. Friedman, located in Southern California—over 200 different companies found themselves facing federal court actions filed by this single firm during the 17-month timeframe. The Friedman firm brought nationwide class actions against the following disparate companies that have little in common, other than reaching out in some way to a customer.

- Adobe Systems Inc.
- AFNI, Inc.
- Allstate Building & Office Maintenance Inc.
- Barclays Bank PLC
- Casa Linda Furniture, Inc.
- Century 21 Real Estate LLC
- Citigroup Inc.
- Coldwell Banker Real Estate LLC
- Comenity LLC

- Efinancial, LLC
- Fantech Software, Inc.
- Green Air Solutions
- Hair Club For Men, Ltd., Inc.
- Riverside Harley-Davidson
- HVAC Services, Inc.
- Kaiser Foundation Health Plan, Inc.
- loanDepot.com, LLC
- Magazine Club LLC
- North Central University
- Scott Industries, LLC
- Sears Brands, LLC
- Sterling Jewelers, Inc.
- Target Brands, Inc.
- Time Warner Cable Inc.
- Uber Technologies Inc.
- University of Phoenix
- Verizon Wireless

Another trend worth noting is that many firms specializing in TCPA actions bring multiple lawsuits anchored to one plaintiff, likely because when a plaintiff turns over all phone records to his or her counsel, multiple targets can be identified. As just one example, a California-based plaintiff named Melissa Meyer filed 11 lawsuits through the Friedman firm asserting TCPA violations against various companies. Of these, ten were filed as class actions between September 2015 and September 2016, brought in the Southern and Central District of California against the following defendants:

- Global Credit & Collection Inc.
- National Service Bureau Inc.
- Oliphant Financial, LLC
- Exeter Finance Corp.
- Experian Information Solutions, Inc.
- Ideal Tax Solution
- M Pierpont Financial
- NTC Financial, Inc.
- Convergence Research, Inc.
- Tax Law Advocates

*“ Another trend worth noting is that many firms specializing in TCPA actions bring multiple lawsuits anchored to one plaintiff, likely because when a plaintiff turns over all phone records to his or her counsel, multiple targets can be located. ”*

Similarly, another California plaintiff observed in the TCPA database, Paul Sapan, paired up with his attorneys, Prato & Reichman, to file 20 TCPA cases in California federal court against defendants in the financial services, health, security, travel, energy/solar, and legal industries.

Unfortunately for companies that communicate with dentists and doctors, several small medical offices have also teamed up with TCPA lawyers to bring litigation. For example, Dr. Charles Shulruff

DDS of Illinois filed nationwide class actions in the examined timeframe with the Edelman, Combs law firm in the Northern District of Illinois, suing the following defendants:

- BIOLASE, Inc.
- InterMed, Inc.
- Total Merchant Services, Inc.
- Doreen Mayhew & Co., P.C.
- KaVo Kerr Group, LLC/Sybron Dental Specialties Inc.
- Futuredontics, Inc.

This same Illinois law firm (Edelman, Combs) also represented a local pharmacy in bringing four class action lawsuits.<sup>20</sup>

Finally, as just one more example of a frequent filer in TCPA litigation, Anderson & Wanca is a Midwest-based firm whose business model includes bringing facsimile actions after getting a roster of potential clients from a fax-blaster named B2B. In a 2016 decision, the Seventh Circuit upheld \$16,000 worth of statutory damages against a small digital hearing aid company located in Terra Haute, Indiana, for 32 facsimile ads, but noted its distaste in doing so:

Fax paper and ink were once expensive, and this may be why Congress enacted the TCPA, but they are not costly today. As a result, what motivates TCPA suits is

not simply the fact that an unrequested ad arrived on a fax machine. Instead, there is evidence that the pervasive nature of junk-fax litigation is best explained this way: it has blossomed into a national cash cow for plaintiffs' attorneys specializing in TCPA disputes. We doubt that Congress intended the TCPA, which it crafted as a consumer-protection law, to become the means of targeting small businesses. Yet in practice, the TCPA is nailing the little guy, while plaintiffs' attorneys take a big cut. Plaintiffs' counsel in this case admitted, at oral argument, that they obtained B2B's hard drive and used information on it to find plaintiffs. They currently have about 100 TCPA suits pending.<sup>21</sup>

Yet despite its acknowledgment of the growing abuse of TCPA litigation (and the fact that the plaintiffs' law firm went searching for persons to bring TCPA lawsuits), the Seventh Circuit upheld the \$16,000 verdict that resulted from just the 32 faxes the small company had authorized.

Finally, it is not just the TCPA-focused attorneys that drive this litigation. As the database shows, there are also individual plaintiffs who file multiple *pro se* actions (without legal representation). Consider Craig Cunningham of Texas, who is responsible for over 60 of the lawsuits

*“ Instead, there is evidence that the pervasive nature of junk-fax litigation is best explained this way: it has blossomed into a national cash cow for plaintiffs' attorneys specializing in TCPA disputes.”*

“ [C]ourts throughout the country are forced to devote significant resources to the ‘business venture’ of TCPA litigation.”

in the 3,121 case sample. In fact, when Mr. Cunningham faced arguments by one defendant in a Virginia action that he provided his prior express consent for the alleged autodialed/prerecorded calls, he filed a petition with the FCC asking that it re-interpret the TCPA so as to eliminate any such consent defenses.<sup>22</sup>

Some of the behaviors of these serial TCPA plaintiffs have made the news. One New Jersey TCPA plaintiff, Jan Konopca, was highlighted in a *Forbes* article: he filed 31 TCPA lawsuits in New Jersey federal court and has made enough money as a professional TCPA litigant so that he no longer qualifies for social security disability benefits.<sup>23</sup> Suggesting that this plaintiff may have made as much as \$800,000 with his personal TCPA business, the *Forbes* article also notes that he keeps his wife’s cellular number (still in her name) despite having been divorced for ten years, and does not appear to use the phone for outgoing calls—only for collecting inbound calls on which he can bring suit.<sup>24</sup>

Also reported on by *Forbes* is another repeat TCPA plaintiff, Jason Alan, who has registered more than 20 telephone numbers belonging to him as business numbers for plumbing services, listing them in the white pages to encourage calls on which he can base his more than 30 federal TCPA lawsuits.<sup>25</sup>

Companies are in constant jeopardy that any communication might end up reaching a professional TCPA plaintiff waiting hopefully by the phone for that very call. As more and more attorneys and TCPA plaintiffs latch onto this business model, litigation will continue to accelerate.

Indeed, as noted above, the database sample group of 3,121 cases after August 1, 2015 showed a significant increase from the previous 17-month period, when 2,127 such TCPA cases were filed. And as detailed in the next section, this increased traffic means that courts throughout the country are forced to devote significant resources to the “business venture” of TCPA litigation.

# The Growing Geographic Sprawl of TCPA Litigation

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The expense and burden of TCPA litigation is often compounded by the fact that lawsuits can be brought essentially anywhere in the country, and companies can thus find themselves defending TCPA lawsuits in a variety of venues. For example, the 77 federal court actions filed with a TCPA designation against Citibank entities mentioned previously were brought in a range of federal courts within 13 different states: California, Florida, Illinois, New Jersey, Maryland, North Carolina, Georgia, Tennessee, New York, Missouri, Pennsylvania, Texas, and New Mexico.

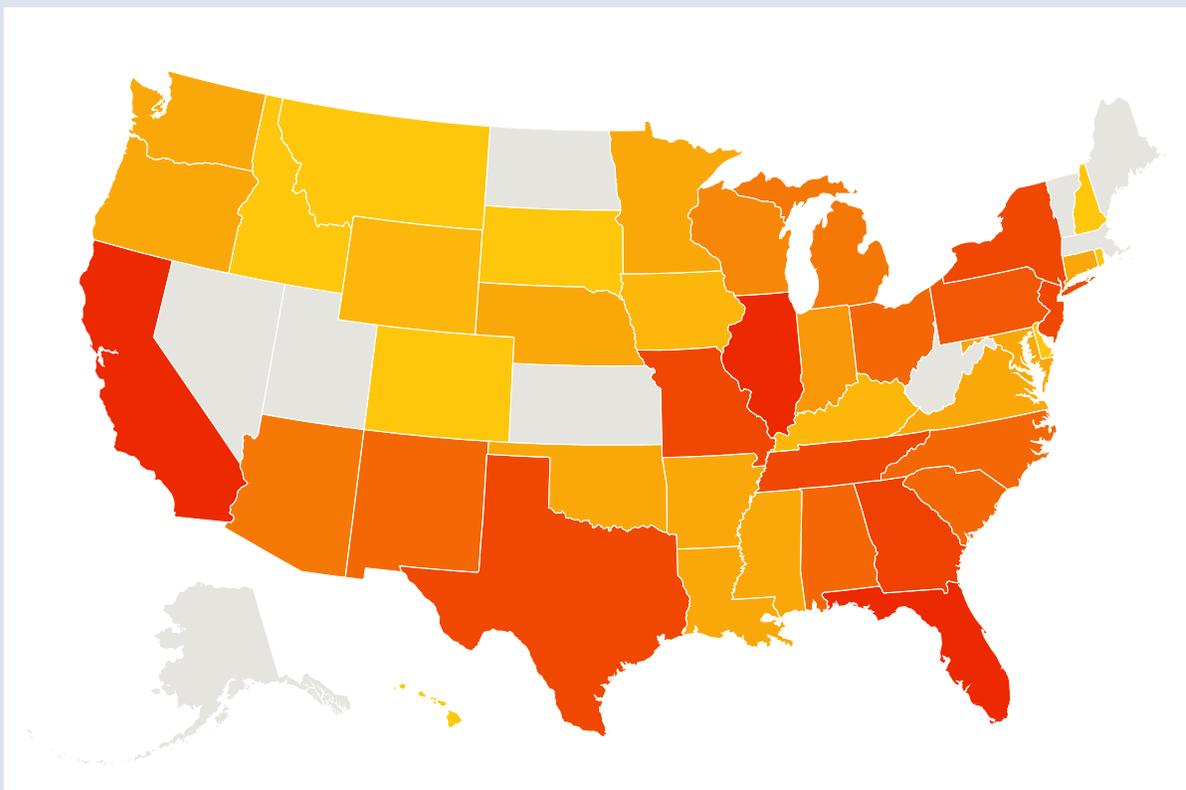
The 3,121 cases reviewed in the database were brought in 42 states, showing a greatly expanded scope for TCPA litigation, which years ago was almost exclusively found in California, Illinois, and Florida federal courts. In reviewing the sample cases filed between August 2015 and December 2016, a significant numbers of TCPA actions were filed in other states as well, such as New York (111), Texas (109), New Jersey (144), Pennsylvania (87), Tennessee (72), and Georgia (234).

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*“ The 3,121 cases reviewed in the database were brought in 42 states, showing a greatly expanded scope for TCPA litigation, which years ago was almost exclusively found in California, Illinois, and Florida federal courts. ”*

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## LOCATION OF TCPA CASES



### NUMBER OF CASES BY STATE

|      |     |     |     |     |     |     |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |   |   |   |
|------|-----|-----|-----|-----|-----|-----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|---|---|---|
| CA   | FL  | IL  | GA  | NJ  | NY  | TX  | PA | TN | MO | OH | MI | AL | IN | NC | NM | SC | WI | AZ | CT | AR | MD | MS | LA | MN | OR | WA | NE | VA | OK | KY | DE | CO | DC | IA | HI | ID | MT | NH | RI | SD | WY |   |   |   |
| 1005 | 620 | 262 | 234 | 144 | 111 | 107 | 87 | 72 | 66 | 66 | 37 | 34 | 28 | 28 | 28 | 25 | 25 | 22 | 19 | 18 | 12 | 11 | 9  | 8  | 8  | 8  | 6  | 6  | 6  | 3  | 3  | 2  | 2  | 2  | 1  | 1  | 1  | 1  | 1  | 1  | 1  | 1 | 1 | 1 |

Thus, while California courts—and the central and southern federal districts in particular—continue to bear the most significant burdens in dealing with TCPA class actions, judges throughout the country are finding TCPA cases on their dockets. Of the Georgia cases examined, for example, almost two hundred (199) were filed in the Northern District of Georgia, which according to its website (at the time of this paper) has only 15 judges, five of whom are on senior status.<sup>26</sup>

Clearly, it is not just businesses that are caught up in the swell of TCPA litigation; the courts are also inundated with these cases seeking the hefty statutory damages made available by the TCPA. And TCPA plaintiffs and the law firms that bring these actions are now “spreading the risk” of their arguments by filing actions in multiple districts to see how those cases develop under the different caselaw in play in various circuits. For example, our database showed how one serial TCPA plaintiff, in

just 2016 alone, filed TCPA-based lawsuits against various businesses in federal courts across the country, including in Tennessee, Texas, Virginia, Florida, and California.<sup>27</sup>

Furthermore, a district with very little TCPA litigation historically can find itself suddenly barraged with TCPA cases, as was recently the case for federal judges in Connecticut. In the surveyed time period, our database shows only 19 TCPA cases brought in Connecticut in a 17-month timeframe. But now, just one plaintiff—Gorss Motels, a company owning a Super-8 motel—has brought a flurry of litigation for

alleged unsolicited facsimiles it received over the past four years. As of the date of this paper, almost every judge in the district has at least one Gorss TCPA class action lawsuit on his or her docket.<sup>28</sup> Gorss Motels also filed TCPA class actions in Indiana and Illinois during the period of this survey,<sup>29</sup> based on similar faxes that it apparently collected in the four years before it began filing its TCPA lawsuits.<sup>30</sup>

The wide geographic reach of TCPA litigation is also evident by the cases recently addressed in the news, discussed in the next section.

# The Latest News Reports on TCPA Litigation

The trends tracked and discussed previously from the TCPA database are continuing into 2017. Businesses across industries are facing aggressive TCPA litigation for a variety of communications, and *Law360's* daily reports on significant litigation decisions are filled with TCPA case developments seeking staggering statutory damages against a wide array of companies.

During just a four-month period between February 2017 and June 2017, both new and long-pending TCPA class action cases filed around the country made the news, demonstrating the reach of the TCPA in various lawsuits against companies that would apparently have little in common,

such as Home Depot, Coca-Cola, Kohl's, Avis Rent A Car, CVS Pharmacy, Edible Arrangements, Marriott, Rady Children's Hospital-San Diego, Volkswagen, AT&T, Facebook, GoDaddy, GrubHub, Sears Holding Co., Twilio, Honda, and so on.

## RECENTLY-FILED TCPA CASES

| Defendant Company | Case Name  | Filing Date Case No.      | Forum      | Allegations  |
|-------------------|--|---------------------------|------------|--|
| Able Home Health  | Able Home Health, LLC v. Onsite Healthcare, Inc., S.C., et al.     | 8-19-16<br>1:16-cv-08219  | N. D. Ill. | Alleges defendant sent unsolicited marketing faxes to class plaintiffs.  |
| Alarm.com         | Abante Rooter and Plumbing, Inc., et al. v. Alarm.com Inc., et al. | 12-30-15<br>4:15-cv-06314 | N.D. Cal.  | Alleges Alarm.com sells its software via authorized security system dealers that use autodialers and prerecorded messages to call consumers on the Do Not Call (DNC) registry. |

| <b>Defendant Company</b> | <b>Case Name</b>                                     | <b>Filing Date Case No.</b> | <b>Forum</b> | <b>Allegations</b>  |
|--------------------------|--|-----------------------------|--------------|---|
| Ally Financial           | Tillman v. Ally Financial, Inc.                      | 4-28-16<br>2:16-cv-00313    | M.D. Fla.    | Alleges Ally Financial continued to make unwanted phone calls in an attempt to reach an unknown person despite plaintiff informing Ally that the gentleman was not reachable at his number. |
| AT&T                     | Gadelhak v. AT&T Services, Inc.                      | 2-28-17<br>1:17-cv-01559    | N.D. Ill.    | Alleges plaintiff received an unsolicited customer satisfaction survey despite not being an AT&T customer.  |
| Avis Rent A Car          | Sauberman v. Avis Rent A Car System, LLC             | 2-3-17<br>2:17-cv-00756     | D.N.J.       | Alleges Avis sent customers unauthorized text messages through an automatic dialing system without obtaining prior permission.  |
| Business Texter          | McWilliams v. Business Texter, Inc.                  | 6-8-17<br>0:17-cv-61158     | S. D. Fla.   | Alleges BizTexter found contact information on real-estate website and sent unsolicited marketing text messages using an automated AI SMS Bot that simulates human conversation.            |
| Cayan                    | Heather N. McCombs, D.P.M., LLC v. Cayan LLC, et al. | 12-2-15<br>1:15-cv-10843    | N.D. Ill.    | Alleges plaintiff received an unsolicited 4-page fax from Capital Bankcard on behalf of Wells Fargo advertising payment-processing services.  |
| Coca-Cola                | Phillips v. Mozes Inc., et al.                       | 12-5-12<br>2:12-cv-04033    | N.D. Ala.    | Alleges plaintiff received text messages containing a Coke Zero advertisement in response to text he sent supporting his football team.   |
| Costco                   | The Backer Law Firm v. Costco Wholesale Corp.        | 5-1-15<br>4:15-cv-00327     | W.D. Mo.     | Alleges Costco sent unsolicited junk faxes that did not contain the "opt-out" language required by TCPA.  |

| <b>Defendant Company</b>             | <b>Case Name</b>  | <b>Filing Date<br/>Case No.</b> | <b>Forum</b> | <b>Allegations</b>  |
|--------------------------------------|---|---------------------------------|--------------|---|
| CVS Pharmacy                         | Lowe, et al. v. CVS Pharmacy, Inc., et al.                | 5-20-14<br>1:14-cv-03687        | N.D. Ill.    | Alleges CVS made hundreds of thousands of improper reminder phone calls to previous patients reminding them to get their flu shots, and offering them gift cards. |
| Edible Arrangements                  | Rando v. Edible Arrangements International, LLC           | 2-1-17<br>1:17-cv-00701         | D.N.J.       | Alleges receiving marketing texts that were sent after she asked for them to stop not by replying "STOP," but with lengthy messages.                              |
| Everalbum                            | Aloise v. Everalbum, Inc.                                 | 5-11-17<br>6:17-cv-00837        | M.D. Fla.    | Alleges "Everalbum" app tricks users into sharing their contacts and then sends those contacts telemarketing texts.   |
| FRS Caribbean and Miami Never Sleeps | Tamaddon-Dallal v. FRS-Fast Reliable Seaways, LLC, et al. | 3-16-17<br>1:17-cv-20979        | S.D. Fla.    | Alleges ferry operator FRS Caribbean & Miami Never Sleeps sent telemarketing text messages without consent.   |
| Facebook                             | Brickman v. Facebook                                      | 2-12-16<br>3:16-cv-00751        | N.D. Cal.    | Alleges Facebook sent unauthorized reminder texts to consumers reminding them of their friends' birthdays.  |
| First Community Bancshares           | LaVigne v. First Community Bancshares, Inc., et al.       | 10-19-15<br>1:15-cv-00934       | D.N.M.       | Alleges bank, through its vendor, made automated calls without prior express consent and after being informed they were calling the wrong person.                 |
| Flagship Credit Acceptance           | Ward v. Flagship Credit Acceptance LLC                    | 5-5-17<br>2:17-cv-02069         | E.D. Pa.     | Alleges loan financier, Flagship, sent unwanted robocalls and prerecorded messages to consumers that did not have a relationship with the company.                |
| Gallup                               | Hartley v. Gallup, Inc.                                   | 4-17-17<br>3:17-cv-00768        | S.D. Cal.    | Alleges company made automated phone calls to consumers on the DNC registry.  |

| <b>Defendant Company</b> | <b>Case Name</b>  | <b>Filing Date Case No.</b> | <b>Forum</b>                 | <b>Allegations</b>   |
|--------------------------|---|-----------------------------|------------------------------|--|
| GatherApp                | Paul Ruppe v. GatherApp, Inc.                                       | 5-18-17<br>2017-CH-07052    | Ill. Cir. Ct.,<br>Cook Cnty. | Alleges "Gather" app tricked customers into giving it access to their contacts and then sending unsolicited robotexts.   |
| GoDaddy.com              | Herrick v. GoDaddy.com LLC  | 1-28-16<br>2:16-cv-00254    | D. Ariz.                     | Alleges GoDaddy.com sent unauthorized marketing text messages.   |
| Grubhub                  | Amodeo v. Grubhub, Inc.   | 2-17-17<br>1:17-cv-01284    | N.D. Ill.                    | Alleges receiving texts from GrubHub that started with a message alert that his food order was nearly ready (but he did not order food).   |
| Home Depot               | Charvat v. The Home Depot, U.S.A., Inc., et al.                     | 4-24-17<br>1:17-cv-01446    | N.D. Ga.                     | Alleges Home Depot affiliate placed two telemarketing calls to plaintiff, despite plaintiff's inclusion on the national DNC registry.  |
| Honda                    | Samuel Katz v. American Honda Motor Co., Inc.                       | 6-10-15<br>2:15-cv-04410    | C.D. Cal.                    | Alleges Honda made unwanted advertisement calls through an automated dialing system to customers, who only gave permission to receive calls regarding maintenance of their cars. |
| Instant Car Offer        | Mohamed v. American Motor Co., LLC, et al.                          | 9-4-15<br>1:15-cv-23352     | S.D. Fla.                    | Alleges used car dealer sent unsolicited marketing texts in response to a Craigslist advertisement plaintiff posted about selling his car.                                       |
| iRemedy Healthcare       | Kenneth A. Thomas MD, LLC v. The iRemedy Healthcare Companies, Inc. | 4-10-17<br>2:17-cv-14120    | S.D. Fla.                    | Alleges medical device e-commerce company sent unsolicited fax advertisements.   |
| Kohl's                   | Viggiano v. Kohl's Dept. Stores, Inc.                               | 1-12-17<br>3:17-cv-00243    | D.N.J.                       | Alleges Kohl's sent customers sales messages, which customers signed up for. All that was needed to opt-out was to reply "STOP."   |

| <b>Defendant Company</b>   | <b>Case Name</b>   | <b>Filing Date Case No.</b> | <b>Forum</b> | <b>Allegations</b>   |
|----------------------------|--|-----------------------------|--------------|--|
| Law Offices of Joel Cardis | Germond v. Law Offices of Joel Cardis, LLC, et al.             | 5-8-17<br>2:17-cv-14152     | S.D. Fla     | Alleges debt collector sent hundreds of calls from company trying to collect a debt, even though she was not a customer and had asked the calls to cease.          |
| Macy's                     | Clark v. Macy's Credit and Customer Services, Inc.             | 4-17-17<br>6:17-cv-00692    | M.D. Fla.    | Alleges Macy's used an automatic dialing system to place calls in an attempt to collect credit card debt that plaintiff did not owe.                               |
| Marriott                   | Hartley v. Marriott Int'l, Inc.                                | 4-17-17<br>3:17-cv-00770    | S.D. Cal.    | Alleges Marriott made unwanted automatic phone calls using a prerecorded marketing message.  |
| Medtox Scientific          | Sandusky Wellness Center LLC v. Medtox Scientific, Inc. et al. | 8-23-12<br>0:12-cv-02066    | D. Minn.     | Alleges that Medtox sent unsolicited marketing faxes to consumers.   |
| National Grid              | Burdier v. National Grid USA Service Company, Inc.             | 5-2-17<br>1:17-cv-03217     | S.D.N.Y.     | Alleges that National Grid placed unsolicited automated calls to individuals despite consumers' requests to stop.  |
| Ocwen Loan Servicing       | Snyder v. Ocwen Loan Servicing LLC                             | 10-27-14<br>1:14-cv-08461   | N.D. Ill.    | Alleges Ocwen Loan Servicing placed more than 100 million unauthorized calls to roughly 1.2 million borrowers.   |
| The Plain Dealer           | VanDrunen v. The Pisa Group, Inc., et al.                      | 4-3-17<br>4:17-cv-01238     | E.D. Mo.     | Alleges that the newspaper, The Plain Dealer, sent unsolicited, automatic telemarketing calls to potential subscribers.  |
| Quality Resources          | Toney v. Quality Resources, Inc., et al.                       | 1-3-13<br>1:13-cv-00042     | N.D. Ill.    | Alleges company placed unsolicited calls through an automated dialing system to consumers who supplied numbers while ordering children's slippers on Stompeez.com. |

| <b>Defendant Company</b>           | <b>Case Name</b>  | <b>Filing Date Case No.</b> | <b>Forum</b> | <b>Allegations</b>  |
|------------------------------------|---|-----------------------------|--------------|---|
| Rady Children's Hospital—San Diego | Crooks, et al. v. Rady Children's Hospital—San Diego        | 2-8-17<br>3:17-cv-00246     | S.D. Cal.    | Alleges consumers received automated debt-collection calls.   |
| Rexall Sundown                     | Lary, Jr. v. Rexall Sundown Inc.                            | 10-22-13<br>2:13-cv-05769   | E.D.N.Y.     | Alleges nutritional supplement company sent unsolicited faxes.  |
| Sears                              | Hoover v. Sears Holding Co.                                 | 7-26-16<br>3:16-cv-04520    | D.N.J.       | Alleges Sears sent unsolicited marketing text messages despite express agreement to the contrary.   |
| Sprint                             | Gorss Motels Inc. v. Sprint Communications Co. L.P., et al. | 4-3-27<br>3:17-cv-00546     | D. Conn.     | Alleges Sprint repeatedly faxed unsolicited marketing ads to consumers without opt-out notices.   |
| Twilio                             | Wick v. Twilio, Inc.  | 6-15-16<br>2:16-cv-00914    | W.D. Wa.     | Alleges that Twilio sent plaintiff a text message encouraging him to purchase products, after plaintiff provided the website with his phone number. |
| Volkswagen                         | Brian Trenz v. On-Line Administrators, Inc. et al.          | 10-26-15                    | C.D. Cal.    | Alleges Volkswagen did not obtain consent for over one million telemarketing phone calls it made since 2011.  |

The list above of just some of the TCPA lawsuits recently in the news confirms the findings from our exploration of the 3,121 cases brought between August 1, 2015 and December 31, 2016. Companies across all industries are finding themselves

in courts throughout the country, facing TCPA claims brought for a wide range of communications, where \$500 per-communication damages are sought for thousands, tens of thousands, and even millions of calls, with no signs of slowing.

# Conclusion

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Many companies have been waiting since July 2015 for the Circuit Court of the District of Columbia to rule on the consolidated appeals of the FCC's July 2015 Order.<sup>70</sup> As of the date of this paper, that hotly-anticipated decision has yet to be issued.

The D.C. Circuit Court might well find (as it should) that the FCC 3-2 majority overstepped its authority in interpreting the TCPA as it did in July 2015. The hope is that some rationality is brought back into the discussion of TCPA claims and defenses. However, the reality is that TCPA plaintiffs are not eager to let go of the golden goose, even if the D.C. Circuit Court rules that the FCC went too far in its interpretation of the statute.

One indicator of how the D.C. Circuit opinion might be pushed aside by TCPA plaintiffs eager to proceed with their claims came earlier this year, in the context of a ruling on fax advertisements and TCPA liability. In March 2017, the D.C. Circuit weighed in on another TCPA-based petition challenging a 2006 order by the FCC, which held that even facsimiles solicited by the recipient must have, on their face, the opt-out language required by the TCPA for unsolicited facsimiles. Eleven years later, the D.C. Circuit found that the FCC's ruling on this point was unlawful.<sup>71</sup> Defendants in cases throughout the country rejoiced, believing that the TCPA

cases pending against them that involved solicited facsimiles would be dropped by the parties pursuing those claims. However, in the months since that decision, it has become clear in many of the cases relying on the very same FCC ruling—now found unlawful by the D.C. Circuit—that the plaintiffs have decided to press onwards by arguing that the D.C. Circuit Court's ruling is not binding on trial courts outside of Washington D.C., or by arguing that the facsimiles at issue were not, in fact, solicited.

Similarly, when the D.C. Circuit does finally issue its order (an order likely to be appealed by whichever side does not prevail), one cannot expect a quick cessation of TCPA litigation, even if the order resolves every issue in favor of the petitioners. There is simply too much money made available by the uncapped statutory damages for litigation—and litigation abuse—to stop on its own. TCPA defense lawyers long ago learned that one good ruling from a circuit court of appeals does little to stop TCPA cases in other circuits; for years, whenever one circuit

becomes unfriendly to a certain line of TCPA argument, new cases are then brought using that same disfavored argument in jurisdictions without any such binding precedent.

Thus, what is needed is Congressional action. The legislature needs to take a fresh look at this 1991 statute and to update the statute to account for new technologies and current means of communications. Specifically, Congress should consider making the following revisions to the TCPA, among others:

### **STATUTE OF LIMITATIONS**

The allowable time to bring suit under the TCPA should be reasonably limited to one year, as is the case with other federal statutes providing private rights of action for statutory damages.<sup>72</sup>

### **AFFIRMATIVE DEFENSES**

The affirmative defenses available in Section 227(c)<sup>73</sup> should also be imported into Section 227(b) to provide protection to businesses working in good faith to comply with the TCPA.

### **CAPACITY**

The “capacity” of an autodialer should be interpreted for past calls as written in the text of the statute, meaning only those devices that have the actual ability to randomly/sequentially dial telephone calls would be actionable.

### **NEW TECHNOLOGIES**

If Congress wishes to limit other types of calling technologies not addressed in the TCPA (*i.e.*, text messages), new and more precise language should be drafted, vetted,

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“ *The legislature needs to take a fresh look at this 1991 statute and to update the statute to account for new technologies and current means of communications.* ”

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and implemented after a notice period to companies so that they can comply with statutory requirements.

### **REASSIGNED OR WRONGLY PROVIDED NUMBERS**

Businesses should not be faced with TCPA lawsuits when they, in good faith, call a customer-provided phone number that now belongs to a new party. (If, after notice and reasonable time to remove the outdated number the company continues to call, then lack of prior consent would be established for future calls.)

### **VICARIOUS LIABILITY**

The TCPA should be revised to define “vicarious liability” so that it would exist only against the appropriate entities—the entity that places the calls, retains someone to place the calls, or authorizes an agent to place calls on its behalf.

### **MITIGATION**

Anyone seeking to assert claims pursuant to the private right of action should not be permitted to simply sit back and allow calls to accumulate without informing the caller of any perceived problems, and then recover for all call attempts.

## **DAMAGES**

Congress should consider revising the uncapped statutory damages currently available under the TCPA and include limiting language, such as that in other statutes offering a private right of action untethered to any actual harm.

## **BAD ACTORS**

The TCPA should be reformed to focus on the actual bad actors engaged in cold-call telemarketing (*i.e.* fraudulent calls from “Rachel from Cardmember Services,” with spoofed numbers in caller ID fields to hide the identity of the caller), rather than companies trying to contact their consumers for a legitimate business purposes.

## **FICALA**

In addition to modernizing the TCPA, Congress should pass the Fairness in Class Action Litigation Act of 2017 (FICALA). FICALA would begin to address broader problems with class actions by ensuring that plaintiffs' lawyers prove up front that they will be able to readily identify class members and deliver them the proceeds of any settlement before a class can be certified.

With such updates to the TCPA, much of the abusive litigation now pending against companies facing tens or hundreds of millions of dollars in statutory damages would be curtailed. Further, revisions to the TCPA could refocus the energies of plaintiffs and regulators onto the entities that are clogging consumers' phone and fax lines with spam marketing. Congress must take action so that companies working in good faith to comply with the law and attempting to contact their own customers at customer-provided numbers would not find themselves staring down the barrel of a multi-million or multi-billion dollar statutory damages lawsuit that they cannot risk defending.

Absent action from Congress, the patchwork decisions from various courts of appeal and the aggressive creativity of the TCPA plaintiffs' bar will ensure that the TCPA juggernaut rolls on.

# Endnotes

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- 1 See The Juggernaut of TCPA Litigation: The Problems With Uncapped Statutory Damages, authored for the U.S. Chamber Institute for Legal Reform (by Becca Wahlquist), located at <http://www.instituteforlegalreform.com/research/the-juggernaut-of-tcpa-litigation--the-problems-with-uncapped-statutory-damages>.
- 2 See, generally, *id.*
- 3 See, e.g., U.S. Chamber Comments on United Healthcare’s Petition for Expedited Declaratory Ruling (filed Mar. 10, 2014 in CG Docket No. 02-278); U.S. Chamber Comments on ACA International’s Petition for Rulemaking (filed Mar. 27, 2014 in CG Docket No. 02-278); U.S. Chamber and Institute of Legal Reform Comments on American Association for Justice’s Petition for Waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules (filed Feb. 18, 2015 in CG Docket No. 02-278, CG Docket No. 05-338); U.S. Chamber Comments on Petition for Rulemaking and Declaratory Ruling filed by Craig Cunningham and Craig Moskowitz (filed March 10, 2017, in CG Docket No. 02-278, CG Docket No. 05-338).
- 4 See *In re Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C.Rcd. 7961, 8072-73(2015) (Pai Dissent) (“The TCPA’s private right of action and \$500 statutory penalty could incentivize plaintiffs to go after the illegal telemarketers, the over-the-phone scam artists, and the foreign fraudsters. But trial lawyers have found legitimate, domestic businesses a much more profitable target.”).
- 5 See *id.*, 30 F.C.C. Rcd. at 8087 (O’Reilly Dissent) (“The TCPA was enacted in 1991—before the first text message was ever sent. The Commission should have had gone back to Congress for clear guidance on the issue rather than shoehorn a broken regime on a completely different technology.”).
- 6 See *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 271 (3d Cir. 2013) (finding a common law right to later revoke prior consent to receive calls, and holding, “the TCPA’s silence as to revocation should not be seen as limiting a consumer’s right to revoke prior express consent. Instead, we view the silence in the statute as evidence that the right to revoke exists.”).
- 7 See *Reyes v. Lincoln Automotive Financial Services*, --- F.3d ---, 2017 WL 2675363 (2nd Cir. June 22, 2017).
- 8 See *In re Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C.Rcd. 7961 (2015) (July 2015 FCC Order).
- 9 Most businesses focused on spam marketing efforts are located overseas and do not have the kinds of deep pockets that interest the TCPA plaintiffs’ bar.
- 10 For example, one business that reviews complaints to look for TCPA claims embedded in the complaint that are not recorded in the dockets has reported locating 4,800 TCPA-related litigations in 2016 alone. See, e.g. <https://webrecon.com/2016-year-in-review-fdcpa-down-fcra-tcpa-up/>.
- 11 For example, one New Jersey woman was granted a \$229,500 verdict against her cable provider in July 2015 (*King v. Time Warner Cable*, 113 F. Supp. 3d 718 (S.D.N.Y. 2015)), and another received a \$571,000 verdict in 2013 against the finance company calling her husband’s phone after she defaulted on car payments. See *Nelson v. Santander Consumer USA, Inc.*, 2013 WL 1141009 (W.D. Wisc., March 8, 2013), a decision later vacated by agreement of the parties as part of a confidential settlement.

- 12 For example, a single bank has over 100 pending TCPA-focused individual arbitrations before JAMS and other arbitration providers, and expects to soon have over 200 arbitrations brought by certain plaintiffs' counsel who have accumulated large groups of customers for whom they will bring individual arbitrations, generally seeking in excess of \$50,000 each.
- 13 While the TCPA itself does not provide for attorneys' fees, attorneys have found courts amenable to allowing a 25%-30% portion of any settlement fund to go to counsel, and individual plaintiffs often agree to that same percentage of their statutory damages will go to their attorneys.
- 14 See, e.g., <https://www.law360.com/articles/882907/jury-awards-20m-in-dish-telemarketing-class-action-trial>. The court then denied DISH Network's motion for a new trial on May 16, 2017. See <https://www.law360.com/articles/924657>.
- 15 See *Krakauer v. Dish Network L.L.C.*, No. 1:14-CV-333, May 22, 2017 Order, which can be found at <https://dlbjbjzgnk95t.cloudfront.net/0927000/927109/https-ecf-ncmd-uscourts-gov-doc1-13312652264.pdf>.
- 16 In TCPA litigation, it is common for plaintiffs' attorneys to join together in filing complaints in order to share the costs of bringing and pursuing class actions. It is typical for a class action complaint to have two, three, or four firms as counsel. For purposes of analysis here, only the first-listed law firm was tracked; however, many of the attorneys listed above would also appear as counsel in other pending matters.
- 17 See Reply Comments of the U.S. Chamber of Commerce, CG Docket 02-278, at 4 (filed Dec. 1, 2014) (*citing* *Lawsuit Abuse? There's an App for That*, U.S. Chamber Institute for Legal Reform (Oct. 29, 2014), <http://www.instituteforlegalreform.com/resource/lawsuit-abuse-theres-an-app-for-that/>).
- 18 *Id.*
- 19 In recent litigation with an associate who withdrew to start up her own lucrative TCPA practice, the former associate claims that demands are being sent by Lemberg Law and litigation filed for consumers who have no idea that they have "retained" a law firm to represent them and who were not even consulted about complaints filed on their behalf. See, e.g., Amended Answer, Affirmative Defenses, and Counterclaim, Dkt. No. 32, Filed 11/12/15, in *Lemberg Law, LLC v. Tammy Hussin and the Hussin Law Offices, P.C.*, Case No. 3:15-cv-00737-MPS (D. Conn), 1.f, 1.g, 1.k; see also 1.s ("Lemberg insisted on taking a 40% referral fee for new 'clients' without even having discussed legal representation with them and without having obtained a signed fee agreement. Upon reaching the new 'clients' when Hussin transferred the cases to her firm, most of them had no knowledge of Lemberg's firm and were unaware of legal representation, yet Lemberg insisted on taking a 40% referral fee on said cases.").
- 20 See *Glen Ellyn Pharmacy Inc. v. FDS Inc.* (Case No. 1:15-cv-8927 N.D. Ill.), *Glen Ellyn Pharmacy Inc. v. Immunization Access Providers Inc.* (Case No. 1:15-cv-8645 N.D. Ill.), *Glen Ellyn Pharmacy Inc. v. Mayne Pharma, Inc.* (Case No. 1:16-cv-6654 N.D. Ill.), and *Glen Ellyn Pharmacy Inc. v. Paragon Enterprises, Inc.* (Case No. 1:15-cv-11368 N.D. Ill.).
- 21 *Bridgeview Health Care Center, Ltd. v. Jerry Clark*, 2016 WL 10852333, \*5 (7<sup>th</sup> Cir. Mar. 21, 2016) (emphasis added; internal citations and quotations omitted).
- 22 See *In the Matter of Petition for Rulemaking and Declaratory Ruling filed by Craig Cunningham and Craig Moskowitz*, CG Docket No. 02-278, CG Docket No. 05-338 (filed January 22, 2017).
- 23 See <https://www.forbes.com/sites/legalnewsline/2017/05/31/phoney-lawsuits-comcast-fighting-for-access-to-professional-plaintiffs-prior-testimony/#5a9353b5727c>.
- 24 See *id.*, noting that Konopca only used the cellphone in question for an outgoing call in only 10 of 34 months between May 2011 and March 2014—there were 24,949 incoming calls and 142 outgoing during that time.

- 25 See <https://www.forbes.com/sites/legalnewsline/2017/04/25/phoney-lawsuits-settlement-cancels-fight-against-frequent-tcpa-lawyerplaintiff-combo/#3d041d214fb8>.
- 26 See <http://www.gand.uscourts.gov/directory-district-judges-and-staff>, visited 8/3/17.
- 27 See, e.g., *Cunningham v. The Vanderbilt University; Vanderbilt University Medical Center* (Case No. 3:16cv223), filed 2/16/2016 in Tennessee Federal Court (M.D. Tenn.); *Cunningham v. Tranzvia LLC* (Case No. 4:16-cv-905), filed 11/26/2016 in Texas Federal Court (E.D. Tex.); *Cunningham v. Nationwide Security Solutions Inc.; Nortek Security & Control LLC; HomePro Inc.; Techforce National LLC* (Case No. 4:16cv889), filed 11/18/2016 in Texas Federal Court (E.D. Tex.); *Cunningham v. Sunshine Consulting Group LLC; Sunshine Consultation Services LLC dba Specialized Consumer Strategies; Donna Cologna; Cologna Building and Ground Services LLC* (Case No. 3:16cv2921), filed 11/17/2016 in Tennessee Federal Court (M.D. Tenn.); *Cunningham v. Robert Jacovetti; Law Office of Robert Jacovetti PC; Pre-Paid Legal Services Inc. dba LegalShield; Pre-Paid Legal Casualty Inc.* (Case No. 3:16cv2922), filed 11/16/2016 in Tennessee Federal Court (M.D. Tenn.); *Cunningham v. Gregory Charles Mitchell; Eastern Legal Services; Paul Hank aka Poul Hank; Karl Kepper* (Case No. 1:16cv1109), filed 8/30/2016 in Virginia Federal Court (E.D. Va.); *Cunningham v. Rapid Capital Funding LLC/RCF; Craig Hecker; GRS Telecom Inc. fka CallerID4U Inc.; Paul Maduno; GIP Technology Inc.; Ada Manduno; Luis Martinez; Merchant Worthy Inc.; Robert Bernstein; Bari Bernstein; Mace Horowitz; Spectrum Health Solutions Inc. dba Spectrum Lead Generation* (Case No. 3:16cv2629), filed 10/5/2016 in Tennessee Federal Court (M.D. Tenn.); *Cunningham v. Focus Receivables Management LLC* (Case No. 3:16cv1677), filed 7/7/2016 in Tennessee Federal Court (M.D. Tenn.); *Cunningham v. Yellowstone Capital LLC; Integrity Capital Solutions Inc.* (Case No. 0:16cv62029), filed 8/23/2016 in Florida Federal Court (S.D. Fl.); *Cunningham v. Nationwide Business Resources Inc.* (Case No. 2:16cv4542), filed 6/22/2016 in California Federal Court (C.D. Cal.).
- 28 Some of these Gorss Motels cases filed in Connecticut include *Gorss Motels v. Land's End, Inc.*, D. Ct. (J. Eginton), filed 1/4/17; *Gorss Motels v. Sysco Guest Supply*, D. Ct. (J. Bryant), filed 11/18/16; *Gorss Motels v. Schneider Publishing*, D. Ct. (J. Arterton), filed 11/7/16; *Gorss Motels v. Magnuson Hotels*, D. Ct. (J. Meyer), filed 11/7/16; *Gorss Motels v. Otis Elevator Co.*, D. Ct. (J. Bolden), filed 10/27/16; *Gorss Motels v. Sboca LLC*, D. Ct. (J. Shea), filed 9/28/16; *Gorss Motels v. Cetis Inc.*, D. Ct. (J. Chatigny), filed 8/11/16; *Gorss Motels v. Commercial Lighting Ind.*, D. Ct. (J. Shea), filed 8/11/16; *Gorss Motels v. G.S. Wilcox*, D. Ct. (J. Underhill), filed 3/1/16.
- 29 See *Gorss Motels Inc. v. Brigadoon Fitness Inc.*, Case No. 1:16cv330, N.D. Ind. (filed 9/13/2016); *Gorss Motels Inc. v. Renue Systems Development Corp. Inc.*, Case No. 1:16cv10975, N.D. IL (filed 11/30/2016).
- 30 One Gorss Motels lawsuit in particular hinges its allegations on a fax received three years and eleven months before that plaintiff filed suit. See *Gorss Motels, Inc. v. Eric Ryan Co*, D. Ct. (J. Bolden), Case No. 3:17-cv-00126-VAB, filed 1/27/17 (alleging TCPA violations from three faxes received in 2013, including one received March 1, 2013).
- 31 See <https://www.law360.com/articles/919588/alarm-com-faces-likely-class-cert-in-sales-call-tcpa-row> (5/2/17 article).
- 32 See <https://www.law360.com/articles/919409/ally-financial-says-lies-warrant-sanctions-in-tcpa-spat> (5/2/17 article).
- 33 See <https://www.law360.com/articles/896697> (2/28/17 article).
- 34 See <https://www.law360.com/articles/889006/avis-car-rental-text-messages-flout-tcpa-suit-says> (2/7/17 article).
- 35 See <https://www.law360.com/articles/932939/text-marketing-co-slapped-with-tcpa-class-action> (6/9/17 article).

- 36 See <https://www.law360.com/articles/902886/wells-fargo-can-t-beat-pay-processing-junk-fax-suit> (3/20/17 article).
- 37 See <https://www.law360.com/articles/935652/univ-of-alabama-fan-agrees-to-end-coca-cola-tcpa-suit> (6/16/17 article).
- 38 See <https://www.law360.com/articles/918255/-costco-fax-recipients-get-class-cert-in-tcpa-suit> (4/28/17 article).
- 39 See <https://www.law360.com/articles/922434/cvs-says-tcpa-claims-too-individualized-for-class-cert> and <https://www.law360.com/articles/911588/class-status-sought-in-cvs-robocall-dispute> (4/10/17 article).
- 40 See <https://www.law360.com/articles/936358/edible-arrangements-seeks-to-toss-text-ad-suit> (6/20/17 article).
- 41 See <https://www.law360.com/articles/923105/app-maker-faces-suit-over-texts-to-users-contacts> (5/15/17 article).
- 42 See <https://www.law360.com/articles/902706/ferry-operator-nightlife-promoter-slapped-with-tcpa-suit> (3/16/17 article).
- 43 See <https://www.law360.com/articles/918378/facebook-can-take-birthday-text-class-action-to-9th-circ> (4/28/17 article).
- 44 See <https://www.law360.com/articles/903616/class-seeks-certification-in-bank-autodialing-suit> (3/22/17 article).
- 45 See <https://www.law360.com/articles/921610> (5/18/17 article).
- 46 See <https://www.law360.com/articles/914322/gallup-faces-tcpa-suit-over-purported-automated-call> (4/18/17 article).
- 47 See <https://www.law360.com/articles/925869/smartphone-app-slapped-with-tcpa-class-action-over-texts> (5/18/17 article).
- 48 See <https://www.law360.com/articles/909141/godaddy-says-tcpa-suit-must-involve-automated-dialer> (4/3/17 article).
- 49 See <https://www.law360.com/articles/936644/grubhub-users-say-dc-circ-case-irrelevant-to-tcpa-row> (6/20/17 article).
- 50 See <https://www.law360.com/articles/933374/home-depot-contractor-seeks-end-to-tcpa-suit> (6/13/17 article).
- 51 See <https://www.law360.com/articles/923859/honda-can-t-get-quick-win-in-tcpa-unwanted-call-suit> (5/15/17 article).
- 52 See <https://www.law360.com/articles/932830/car-dealer-gets-class-pared-in-tcpa-suit-over-junk-texts> (6/8/17 article).
- 53 See <https://www.law360.com/articles/912274/medical-device-e-commerce-co-faces-tcpa-suit-over-faxes> (4/12/17 article).
- 54 See <https://www.law360.com/articles/907987/consumer-only-had-to-text-stop-kohl-s-says-in-tcpa-row> (3/20/17 article).
- 55 See <https://www.law360.com/articles/921609/debt-collector-faces-class-action-over-autodialed-calls> (5/8/17 article).
- 56 See <https://www.law360.com/articles/914534/macy-s-accused-of-harassing-consumers-with-robocalls> (4/18/17 article).
- 57 See <https://www.law360.com/articles/914319/marriott-hit-with-tcpa-suit-for-unsolicited-marketing-calls> (4/18/17 article).
- 58 See <https://www.law360.com/articles/917246/medtox-fax-recipients-certified-in-revived-tcpa-suit> (4/25/17 article).
- 59 See <https://www.law360.com/articles/919608/national-grid-continued-autodialing-practice-class-says> (5/3/17 article).
- 60 See <https://www.law360.com/articles/929227/borrowers-seek-class-cert-in-tcpa-suit-against-ocwen> (5/30/17 article).
- 61 See <https://www.law360.com/articles/925536/health-care-co-can-t-shake-tcpa-claims-in-fax-suit> (5/18/17 article).

- 62 See <https://www.law360.com/articles/909668/ohio-paper-telemarketer-face-tcpa-suit-over-cold-calls> (4/4/17 article).
- 63 See <https://www.law360.com/articles/921428/telemarketing-co-says-proposed-call-class-is-too-broad> (5/8/17 article).
- 64 See <https://www.law360.com/articles/890270/california-children-s-hospital-hit-with-tcpa-action> (2/9/17 article).
- 65 See <https://www.law360.com/articles/912041/2nd-circ-revives-tcpa-claims-against-supplement-co> (4/11/17 article).
- 66 See <https://www.law360.com/articles/893184/sears-denied-dismissal-of-suit-over-text-bombardment> & <https://www.law360.com/articles/934630> (6/14/17 article).
- 67 See <https://www.law360.com/articles/909220/sprint-hit-with-junk-fax-suit-over-unwanted-ads> (4/5/17 article).
- 68 See <https://www.law360.com/articles/904402/consumer-slams-twilio-s-bid-to-exit-tcpa-lawsuit> (3/21/17 article).
- 69 See <https://www.law360.com/articles/901484/volkswagen-marketing-co-fight-class-cert-in-tcpa-spat> (3/14/17 article).
- 70 The Chamber filed one of the Petitions for Review that is pending in the District of Columbia Circuit, arguing that in the July 2015 Order, the Commission vastly and impermissibly expanded the scope of the TCPA in several ways, including by (1) expanding the definition of “autodialer”; (2) improperly defining “called party” and creating an ill-devised safe harbor; and (3) interpreting the TCPA to allow “revocation” of prior consent by any “reasonable” means.
- 71 See *Bais Yaakov v. Fed. Commc’ns Comm’n*, 852 F.3d 1078, 1079 (D.C. Cir. 2017) (“We hold that the FCC’s 2006 Solicited Fax Rule is therefore unlawful to the extent that it requires opt-out notices on solicited faxes.”).
- 72 See, e.g., Electronic Funds Transfer Act (15 U.S.C. § 1693), Section 1693(m) (statute of limitations—1 year); Fair Debt Collection Practices Act (15 U.S.C. §1692), Section 1692(k) (statute of limitations—1 year).
- 73 See 47 U.S.C. § 227(c)(5)(C) (“It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection.”).











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