Expanding Litigation Pathways

TCPA Lawsuit Abuse Continues in the Wake of *Duguid*

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For years, the Telephone Consumer Protection Act (TCPA) has generated staggering liability exposure and risks to organizations that use modern-day calling and texting technologies for outreach—earning the TCPA the characterization by a former Federal Communications Commission (FCC) Chairman as "the poster child for lawsuit abuse."[1]

This is due to the ongoing, arguably predatory use by the plaintiffs' bar of the TCPA's private rights of action (PRAs)[2] and statutory damages of up to $1,500 per violation, with violations assessed for each call or text.[3] For cases taken through trial, verdicts have exceeded $200 million,[4] and TCPA settlements often exceed seven figures.[5] In short, the TCPA has been a cash cow for persistent plaintiffs' lawyers.

Previous research from the U.S. Chamber of Commerce Institute for Legal Reform (ILR) has illustrated plaintiffs' lawyer exploitation of the TCPA,[6] shining a spotlight on how it generates enormous paydays for a few while failing to measurably protect consumers from the scammers and bad actors that abuse communications networks. And as detailed in ILR's *Turning the TCPA Tide: The Effects of Duguid*,[7] the predatory use of the TCPA was meaningfully reduced in the wake of the U.S. Supreme Court's 2021 decision in *Facebook v. Duguid*.[8] There, in a crisp, unanimous decision, the Court curbed overly broad interpretations of what constitutes an "autodialer." In this important decision, the Supreme Court confirmed that the scope of a key threshold trigger for TCPA liability—the definition of automatic telephone dialing system (ATDS) or autodialer—did not include "virtually all modern cell phones,"[9] as plaintiffs' attorneys had long argued. Because autodialer-based TCPA claims were the subject of so much litigation abuse prior to this decision, the impact of the Supreme Court's narrow definition was significant. Indeed, immediately after *Duguid*, the number of TCPA-based complaints filed in federal court decreased,[10] such that the total number of federal TCPA filings in 2021 was just over 1,600—far fewer than the over 2,400 filings in 2020, as detailed in Chapter 3 of this report.

But now, examining the litigation landscape three years after the landmark decision in *Duguid*, the pace and nature of TCPA filings show some interesting and troubling trends. Our latest research shows that while *Duguid* meaningfully reduced federal TCPA filings, there are still large quantities of abusive TCPA lawsuits. And just as concerning, plaintiffs' lawyers are building pathways around *Duguid,* including looking to state laws ("mini-TCPAs") that

establish PRAs and provide high monetary damages per violation.

So, despite *Duguid*, the TCPA and similar state laws continue to fuel massive litigation abuse from plaintiffs' lawyers. They are: (1) pushing the bounds of TCPA autodialer liability by trying to evade the *Duguid* decision, litigating novel theories about the "capacity" of a device to function as a random or sequential number generator, and suing over text messages; (2) relying on other provisions of the TCPA that do not hinge on whether or not a company uses an autodialer; and (3) bringing more cases in state and federal court using states' mini-TCPA statutes.

Through these suits, the plaintiffs' bar continues to look for creative ways to use the TCPA to seek major settlements and judgments. This stream of lawsuits hurts legitimate U.S. businesses and nonprofits trying to communicate with customers, clients, donors, patients, and others. At the same time, data indicates that this abusive litigation does nothing to help consumers. For example, our findings also show that state TCPA-equivalent statutes have not led to a decrease in robocall volume. In the example we focus on, Florida even saw a year-over-year increase in robocalls since passing its mini-TCPA law.

This research provides an update to ILR's prior examination of the TCPA landscape and explores the myriad ways that the plaintiffs' bar is attempting to circumnavigate *Duguid*—including through state mini-TCPA laws like Florida's. This research also shows that the landscape remains perilous for legitimate U.S. businesses that seek to communicate with their customers, even after the Supreme Court's unanimous decision in *Duguid* narrowed the path to the courthouse for a subset of abusive TCPA lawsuits. Finally, the paper shows the continually high rate of class action lawsuits and highlights the prevalence of "serial" TCPA plaintiffs (those who file large numbers of TCPA suits) and a core group of law firms continuing to pursue high-volume litigation.

Ultimately, while *Duguid* helped legitimate callers fight back against meritless and overbroad claims about autodialer-based liability, the plaintiffs' bar continues to exploit the TCPA and its state equivalents to seek out large paydays from legitimate businesses—without corresponding or meaningful benefits for consumers.

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Plaintiffs Conjure Up New Pathways to Litigation Abuse in the Post-*Duguid* World

Chapter

02

While *Duguid* brought a much-needed resolution to the debate over the definition of autodialer, the data show that the plaintiffs' bar remains undeterred and continues to try to profit off the TCPA's (and mini-TCPAs') PRAs and windfall statutory damages.

Two notable trends have since developed. First, plaintiffs are resisting the Supreme Court's guidance by pursuing new and evolving legal theories to undercut the *Duguid* decision. Second, plaintiffs are turning to the TCPA's other provisions—including its restrictions on the use of artificial or prerecorded voice messages and its do-not-call rules—as well as the states' mini-TCPAs, as ways to completely evade *Duguid*.

Pushing the Boundaries on Autodialer Claims

Plaintiffs' firms have presented creative arguments to get around the clear ruling in *Duguid* and conjure up theories of expanded liability since the decision was first published. While many of these new arguments seem meritless, especially with respect to the not-so-contentious Footnote 7 issues detailed below, plaintiffs have succeeded in prolonging litigation, taking cases to expensive discovery phases and even summary judgement, which creates risks for legitimate callers attempting to reach their customers with important information.

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Foreclosing the "Human Intervention" Analysis

Prior to the Supreme Court's decision in *Duguid*, both the human intervention and capacity analyses were critical factors in determining whether calling equipment met the expansively-interpreted autodialer definition. The *Duguid* decision rejected human intervention as a relevant factor in analyzing whether a device constitutes an ATDS, explaining that practically speaking, "all devices require some human intervention," and therefore the Court declined to "interpret the TCPA as requiring such a difficult line-drawing exercise around how much automation is too much." *Facebook, Inc. v. Duguid,* 592 U.S. 395, 406 n.6 (2021). While the Supreme Court rightfully rejected plaintiffs' arguments, it also effectively foreclosed further use of this important defense for companies defending against TCPA claims, despite this factor previously being widely recognized by courts.

The "Infamous" Footnote 7

In the *Duguid* decision, the Supreme Court clarified that to be an ATDS, a device must have the capacity to use a random or sequential number generator to either (1) store numbers to be called; or (2) produce numbers to be called.[11] To clarify the scope of what it means to "store" numbers, the Court also included Footnote 7; however, rather than providing clarity, the footnote initially had the opposite effect, creating confusion that plaintiffs' attorneys seized on. As such, the now infamous Footnote 7 became a significant source of litigation in the years immediately following *Duguid*.

Specifically, plaintiffs' attorneys attempted to cherry-pick one sentence from Footnote 7 that strips it of its context, asserting that devices may constitute autodialers if they "use a random generator to determine the order in which to pick phone numbers from a preproduced list."[12] But courts have largely not been fooled,[13] and 2022 decisions from first the Ninth Circuit and then the Eighth Circuit hopefully put the matter to rest.[14] These cases were a major step towards dispelling plaintiffs' frivolous narrative that any random number generation—even selecting the order in which to call customers who had provided their phone numbers to a company[15]—converts equipment into an ATDS.[16] As the Ninth Circuit put it: "an autodialer must randomly or sequentially generate telephone numbers, not just any number," and the contrary "myopic focus on a single sentence in a footnote—hardly a holding—ignores the broader context discussed by the Court, including how the Court itself characterized the issue as 'whether an autodialer must have the capacity to generate random or sequential phone numbers.'"[17] Although the Ninth and Eighth Circuits' decisions will hopefully limit plaintiffs' baseless theory going forward, there remains the possibility that other courts could still adopt the plaintiffs' bar's unsupported interpretation of Footnote 7.

The Issue of Capacity

One issue that plaintiffs claim *Duguid* left open is what it means to have the "capacity" to constitute an ATDS under the TCPA.[18] Prior to *Duguid*, the D.C. Circuit addressed the capacity question, holding that capacity does not include all equipment that could be theoretically modified in the future because "[i]t cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact."[19] The D.C.

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Text of *Duguid* Footnote 7

Duguid argues that such a device would necessarily "produce" numbers using the same generator technology, meaning "store or" in § 227(a)(1)(A) is superfluous. "It is no superfluity," however, for Congress to include both functions in the autodialer definition so as to clarify the domain of prohibited devices. *BFP v. Resolution Trust Corp.,* 511 U.S. 531, 544 n. 7 (1994). For instance, an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list. It would then store those numbers to be dialed at a later time. *See* Brief for Professional Association for Customer Engagement et al. as *Amici Curiae* 19. In any event, even if the storing and producing functions often merge, Congress may have "employed a belt and suspenders approach" in writing the statute. *Atlantic Rich ield Co. v. Christian*, 590 U. S. _, n. 5, 140 S.Ct. 1335, 1350, n. 5, 206 L.Ed.2d 516 (2020). *Facebook, Inc. v. Duguid*, 592 U.S. 395, n.7 (2021).

Circuit did not, however, address whether there are additional limits on the definition of "capacity," and the Supreme Court did not directly address the issue. But in June 2022, the Third Circuit clarified how a device's "capacity" to use a random or sequential number generator should factor into ATDS litigation,[20] holding that for a device to be considered an ATDS, it must have the present capacity—not a hypothetical future capacity—to either "use a random or sequential number generator to produce telephone numbers to be dialed" or "use a random or sequential number generator to store telephone numbers to be dialed."[21] And even if a device does have the present capacity to function as an ATDS, the Third Circuit explained that to have a cognizable ATDS claim, a plaintiff must allege and ultimately show that the calling or texting party actually used random or sequential number generation capabilities to place the call or text.[22]

The Fourth Circuit further cemented this holding in 2023 when it upheld a district court's dismissal of an ATDS claim because the plaintiff in that case failed to allege that the defendant actually used ATDS capabilities to call the plaintiff.[23] While district courts outside of the Third and Fourth Circuits considering capacity questions have largely (and rightly) followed these decisions,[24] that is not likely to dissuade persistent professional plaintiffs, so we would expect broad capacity arguments to continue to arise.

Litigation Over Text Messaging

Despite the fact that short message service (SMS) texting technology did not even exist when Congress passed the TCPA in 1991,[25] the FCC and some courts have found that the TCPA's requirements apply to text messages and calls alike.[26] In *Duguid,* even though the case involved texting, the Supreme Court did not address this threshold

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question of scope, and the Court assumed that texts are "calls" under the TCPA, at least in part because the litigants agreed that the statute regulates text messaging.[27] The Court's silence has given the plaintiffs' bar a stronger basis to challenge text messaging post-*Duguid*, which plaintiffs continue to take advantage of.[28]

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is sufficient to confer standing under the TCPA.[29] And several texting cases turn on the specifics of the text at issue, as well as the configuration of the system used to send the texts. In one case, for example, the plaintiff alleged that the defendant used an ATDS to text him because the messages were not sent by a live agent, and according to the plaintiff, created a "one-sided conversation" in which the plaintiff could not receive a response to his questions or concerns.[30] The case ultimately settled for a substantial sum of $400,000.[31]

While courts have rightly dismissed some frivolous texting claims outright, the plaintiffs' bar is continuing to test the bounds of liability under the TCPA. In one case, a plaintiff provided her cell phone number to the defendant hotel and then sued.[32] The court rightly dismissed the plaintiff's ATDS claim, finding that because the plaintiff first provided her number to the defendant, the defendant did not randomly or sequentially store or produce the number.[33] Ultimately, given that the Supreme Court did not address the TCPA's jurisdiction over text messages in *Duguid*, litigation over texting claims is expected to continue for the foreseeable future.

Looking Beyond Autodialer Claims to Circumnavigate *Duguid*

Autodialer-based claims are just one pathway to make a TCPA claim and seek enormous damages or a settlement. Although the Supreme Court's *Duguid* decision confirmed Congress's narrow definition of an ATDS, the decision did nothing to blunt other pathways for the plaintiffs' bar to continue to take advantage of the TCPA's PRAs and its windfall statutory damages.[34] In the years since *Duguid*, claims involving the TCPA's other requirements have taken center stage. Prime examples are its do-not-call requirements for telemarketing calls and texts, and the TCPA's rules for artificial and prerecorded voice calls. The plaintiffs' bar has been focusing on these two provisions as new avenues for lawsuits, and they are also looking to state mini-TCPA laws to forge new paths to big paydays.

Do-Not-Call Claims

The TCPA has complex do-not-call rules—including rules about both the National Do-Not-Call Registry[35] and company-specific do-not-call policies[36]—the violation

of which may subject companies to one of the TCPA's PRAs. *Duguid* did not affect these types of claims—which do not hinge on whether a company uses an autodialer. As such, the inclusion of do-not-call claims in TCPA lawsuits[37] has remained strong and steady, with approximately 1,580 cases including a do-not-call claim in 2021, 1,400 such cases in 2022, and 1,500 such cases in 2023.[38] These cases turn on a number of factors, including whether the call constitutes a "telephone solicitation" or "telemarketing" under the TCPA; whether an exception applies; and whether the type of phone number called (i.e., residential versus business line) is covered under the TCPA. Given the fact-based nature of these claims, plaintiffs can bring suit and rely on these uncertainties to get them through motions to dismiss and into discovery. There, the litigation costs—even for companies making good faith efforts to comply—can be enormous.

Business-to-business calls are a good example of how uncertainty encourages vexatious litigation. Although the do-not-call rules only apply to telemarketing calls made to residential numbers and do not apply to business-to-business telemarketing calls,[39] such calls are risky, especially when made to dual-use business and residential numbers. Litigation risk stems from a problematic 2003 FCC decision that declined to "exempt from the do-not-call rules those calls made to 'home-based' businesses," suggesting instead that the agency expected callers to undertake a fact-based inquiry to determine whether such a line is used for residential or business purposes.[40] And for wireless business numbers, the FCC has explained that "since determining whether any particular wireless subscriber is a 'residential subscriber' may be more fact-intensive than making the same determination for a wireline subscriber, we will presume wireless subscribers who ask to be put on the national do-not-call list to be 'residential subscribers.'"[41]

Some courts have let plaintiffs take advantage of this flawed approach, and have allowed these claims to progress to the discovery stage in which the parties must pursue fact-specific inquiries about whether a phone number is exclusively residential, or if it is also used for business purposes.[42] For example, in a recent Ninth Circuit

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decision, the court cited the FCC's guidance to conclude that cellphone numbers listed on the Do-Not-Call Registry are "presumptively residential,"[43] but made it the defendant's burden to rebut that presumption. "After discovery, defendants may seek to argue that they have rebutted the presumption by showing that plaintiffs' cell phones are used to such an extent and in such a manner as to be properly regarded as business rather than 'residential' lines."[44]

The divided Ninth Circuit panel explained that the residential "presumption" favoring plaintiffs can be rebutted using a totality of the circumstances test that considers five factors: (1) how plaintiffs hold their phone numbers out to the public; (2) whether plaintiffs' phones are registered with the telephone company as

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residential or business lines; (3) how much plaintiffs use their phones for business or employment; (4) who pays for the phone bills; and (5) other factors bearing on how a reasonable observer would view the phone line.[45] This complex approach drew a dissent that argued the court "usurps the role of the [FCC] and creates its own regulatory framework for determining when a cell phone is actually a 'residential telephone,' instead of deferring to the FCC's narrower and more careful test."[46] This shifted the burden to defendants rather than "requir[ing] the subscriber to 'provide further proof of the validity of that presumption'"[47] as FCC precedent suggested. Creating such a presumption and essentially requiring defendants to make such fact-specific determinations through discovery encourages more lawsuits and class actions.[48]

Given this sort of legal and factual uncertainty, do-not-call TCPA claims for calls to mixed use landline and wireless numbers will continue to be a boon for plaintiffs, as these cases frequently proceed to discovery, necessarily increasing litigation costs and therefore creating incentive for defendants to settle prematurely, providing the plaintiffs a payday.[49] Even where a defendant prevails on the merits, the costs of litigating vexatious claims brought by repeat plaintiffs are substantial and do not advance consumer welfare.

Artificial and Prerecorded Voice Claims

The TCPA also imposes restrictions on outbound calls using an artificial or prerecorded voice message, separate from its restrictions on autodialers.[50] Neither the TCPA nor the FCC's rules define what an artificial or prerecorded voice is, but the FCC has issued rulings over the years that contribute towards expansive definitions, including rulings that ringless voicemails and AI-generated voice calls are covered under these provisions. *Duguid* did not impact these types of claims, and plaintiffs' lawyers are shifting their creative energy to seek to expand the concept of "artificial or prerecorded voices."

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For example, plaintiffs have tried to allege that SMS text messages are artificial or prerecorded voice calls. Thankfully, in a critical—yet seemingly obvious—decision, the Ninth Circuit recently rejected these types of claims, explaining that text messages that do not feature any linked or embedded audible content do not implicate the TCPA's artificial or prerecorded

voice message restrictions.[51] The plaintiff in that case attempted to appeal to the Supreme Court, but the Court denied the petition for certiorari.[52]

In terms of calls that have been the subject of recent TCPA litigation disputes, courts examine the content and characteristics of the message to determine whether an artificial or prerecorded voice call claim should survive a motion to dismiss. Problematically, some courts have allowed claims with threadbare allegations to proceed under this theory, despite apparently weak or speculative claims. In one recent case, the court found that the plaintiff plausibly pled that the defendant used a prerecorded voice message in violation of the TCPA where the plaintiff alleged that the call "involved a prerecorded voice 'because of the tone, cadence, and timing of the speaker, which sounded unnaturally perfect'."[53] In another case, a court found that an artificial or prerecorded voice claim was sufficient to survive a motion to dismiss where the plaintiff alleged that "(1) the messages sounded identical, (2) had the same voice, (3) used the same words, (4) had the same intonation, (5) had the same speech pattern, (6) were commercial, (7) were generic (e.g., didn't identify Plaintiff by name), (8) were unsolicited, (9) were incessant, and (10) continued despite Plaintiff's express request that the calls stop."[54] Given the current approach by some courts to pleading standards, weak or speculative allegations—such as that a call merely "sounds artificial"—may survive motions practice and lead to settlements to avoid the enormous damages that can accrue, regardless of the merit of the claim.

Overall, these types of disputes and creative claims show no signs of slowing down, with plaintiffs taking full advantage of both TCPA PRAs under a wide array of theories including:

- Novel interpretations of Footnote 7 in *Duguid*;
- Creative arguments about whether calling platforms have the capacity to function as an ATDS, even if they are not used as such;
- Text messaging claims brought under several TCPA provisions;
- Assertions of do-not-call rule violations, which are bolstered by ambiguity and totality of the circumstances tests embraced by the FCC and courts alike; and
- Evolving arguments about what constitutes an "artificial or prerecorded voice," a phrase that neither the TCPA nor the FCC have defined.

While these claims may not be successful, in many cases the plaintiffs' goal is not to win on the merits. Instead, the objective is to prolong litigation, which increases the prospect of a settlement payday and lucrative attorneys' fees.

Pivot to State Mini-TCPA Laws: A Study of Florida's Telephone Solicitation Act

Following *Duguid,* there was a misperception promoted by the plaintiffs' bar that the decision left consumer protection gaps in the federal framework. To fill these alleged gaps, and at the urging of the plaintiffs' bar lobby,[55] state legislatures across the country turned to "mini-TCPA" laws that the plaintiffs' bar has been leveraging—along with the TCPA—as a pathway around *Duguid*. While these laws vary from state to state, many are similar to the federal law in that they have multiple requirements companies must comply with if they want to communicate with consumers, such as consent, calling time restrictions, and do-not-call lists. In some instances, state mini-TCPA laws may be more expansive than the federal TCPA.[56]

While not all of these laws have an express PRA, those that do include a PRA have provided additional avenues for litigation abuse since *Duguid*. This section examines Florida's mini-TCPA, because it provides a good case study of a state law whose PRA and statutory penalties have been leveraged by the plaintiffs' bar. This law has been a springboard for state claims that can be added to or substituted for federal TCPA claims, and in any case, increases the potential for and amount of abusive litigation. In addition to bringing separate lawsuits under such state mini-TCPA laws, plaintiffs seem to be finding it strategically advantageous to include federal and state claims in one lawsuit in an attempt to avoid early dismissal of cases by avoiding federal standing issues.[57]

History of Florida's Mini-TCPA Law

The Sunshine State originally enacted its mini-TCPA—which defined autodialer broadly and allowed plaintiffs to seek statutory damages up to as much as $1,500 per violation—in 2021.[58]

The Florida law is complex—especially with respect to how its requirements overlap with those of the federal TCPA. For example, while the federal statute's applicable "quiet hours" for covered calls are from 9 p.m. to 8 a.m., Florida's applicable "quiet hours" for covered calls are from 8 p.m. to 8 a.m. This is notable because it represents a one-hour time difference as compared to the federal TCPA, further complicating compliance.[59]

As the data on Florida-based claims from 2020-2023 (detailed below) show, plaintiffs' attorneys are looking to this law as a pathway to ensure they do not miss a beat, especially in the wake of federal TCPA filings steadying off following *Duguid*.

"Nevertheless, we can expect litigation to continue to flow from the Florida law—as well as any other law that incentivizes frivolous suits with PRAs and high statutory damages."

Of note, the Florida law was amended in 2023 to, among other things, narrow the definition of "autodialer" to only include systems that both select and dial numbers automatically, rather than just one or the other,[60] and to require consumers to "notify the telephone solicitor that the called party does not wish to receive text messages from the telephone solicitor by replying 'STOP' to the number from which the called party received text messages from the telephone solicitor," before they can make a claim for damages.[61] This amendment was welcome news and has significantly decreased the potential for liability under Florida's law. Nevertheless, we can expect litigation to continue to flow from the Florida law—as well as any other law that incentivizes frivolous suits with PRAs and high statutory damages. As an example, Hiraldo P.A., the plaintiffs' firm that was the fourth most frequent filer of federal TCPA claims in 2023,[62] filed an early, high-profile lawsuit under Oklahoma's mini-TCPA, which has the same recipe for litigation abuse as the TCPA does.[63]

No Evidence That Florida's TCPA Helps Consumers

Despite the passage of Florida's mini-TCPA law and the threat of its PRA, it does not appear that consumers in that state have necessarily seen a decrease in robocalls. While it is hard to make causal connections between discrete legal developments and aggregate call volumes, it is notable that Florida has seen a steady rise in the number of robocalls annually; increasing from 3,752,949,000 in 2020 to 4,394,330,100 in 2023.[64]

ILR has explained that increasing punishments under the TCPA does little to stop the bad actors who openly flout the law and who are behind the robocalls that everyone agrees continue to plague consumers.[65] The same is true for state laws. Indeed, state mini-TCPA laws do not appear to be stymieing the number of robocalls and may just be providing a payday for lawyers.

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Mini-TCPAs Spread

Florida is not the only state to enact a mini-TCPA. For example, states such as Oklahoma and Washington have recently enacted telephone solicitation laws with PRAs, as well.

- In May 2022, Oklahoma passed the "Telephone Solicitation Act," Okla. Stat. tit. 15 § 775C, that broadly applies to telephonic sales calls that involve "an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called." Oklahoma's law allows a plaintiff to be awarded up to $500 per violation.

- In June 2022, Washington also passed its Telephone Consumer Protection Act, Wash. Rev. Code § 19.158.040(2), which it amended in 2023. The law revised two sections of the Washington state code, adding new requirements that align with the Florida and Oklahoma laws. Violations of Washington's law could lead to fines of up to $2,000 per violation.

Data Shows How Litigation Abuse in Federal and State Courts Continues in the Wake of *Duguid*

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To understand *Duguid's* impact on the landscape of TCPA litigation, we examined two types of claims—(1) claims alleging violations of the federal TCPA and (2) claims alleging violations of emerging state mini-TCPA statutes—in federal and state courts, spanning from the beginning of 2020 through 2023. As the data below show, while there has been an overall decrease in TCPA cases, the Supreme Court's decision has not led to as steep a decline in new TCPA actions as some predicted.

Plaintiffs' attorneys have continued to initiate a massive number of TCPA and mini-TCPA suits, and as a result, companies still face a significant volume of TCPA cases—including class actions—with the associated risks and costs.

After Initial Post-*Duguid* Dip, Federal TCPA Filings Rise

The chart below shows the number of federal court cases filed under the TCPA from 2020-2023—with 2021 divided between pre-*Duguid* and post-*Duguid*. The filings show a drop of approximately 35% from 2020 to 2022, with a slight rebound in 2023.

Figure 1: Federal TCPA Cases, 2020-2023*

Year	2020	Pre-*Duguid* 2021	April 1, 2021	Post-*Duguid* 2021	2022	2023
Total TCPA Cases	2,427	569	*Facebook v. Duguid* Decided	1,051	1,428	1,534
TCPA Class Actions	1,257	259		557	746	878
TCPA Class Actions as % Total Cases	51.8%	45.5%		52.9%	52.2%	57.2%

*The numbers in this chart are based on data pulled from Lex Machina's database of federal civil litigation complaints that are filed under 47 U.S.C. § 227. Data pulled on March 21, 2024.

TCPA Tops the Charts for Consumer Class Actions

The *Duguid* decision has not curbed class action litigation abuse under the TCPA. As the above chart shows, over half of federal TCPA cases continue to be class actions. This percentage is significantly higher than other federal consumer protection statutes and is growing.

Indeed, while a high volume of privately-filed consumer protection litigation is generated under the Fair Debt Collection Practices Act (FDCPA) and the Fair Credit Reporting Act (FCRA), as well as the TCPA, the chart below shows that of those three private litigation generators, the TCPA generates by far the most class action suits—and indeed, the proportion of TCPA cases that are filed as class actions has increased since 2020, while the proportion of FCRA and FDCPA cases that are class actions has decreased.[66]

Figure 2: Rate of Federal Class Action Cases Filed, 2020-2023*

Year	Percentage of Total FCRA Cases That Are Class Actions	Percentage of Total FDCPA Cases That Are Class Actions	Percentage of total TCPA Cases That Are Class Actions
2020	5.7%	21.6%	51.8%
2021	4.5%	21.7%	50.3%
2022	5.8%	13.7%	52.2%
2023	2.9%	9.1%	57.2%

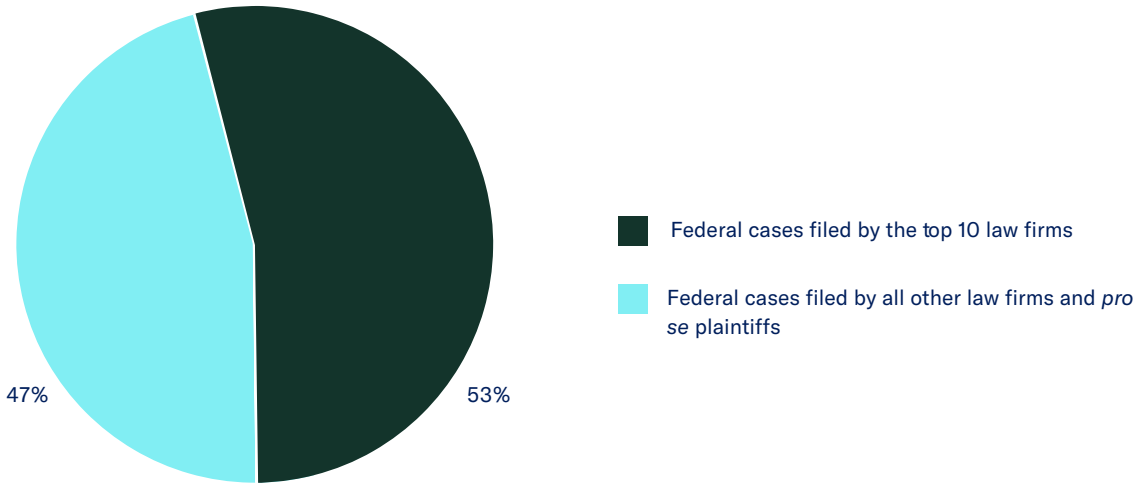
*The numbers in this chart are based on data pulled from Lex Machina's database of federal civil litigation complaints that are filed under 15 U.S.C. § 1681, 15 USC § 1692, 47 U.S.C. § 227. Data pulled on March 21, 2024. *See also* WebRecon Dec 2023 Stats & Year in Review.[67]

Repeat Players Fuel Over Half of Federal TCPA Filings

Another trend that remains uninterrupted by *Duguid* is that repeat players—a small group of law firms and professional plaintiffs—continue to drive most TCPA litigation. As shown below and detailed in Appendix A, for each year from 2020-2023, 10 law firms have been responsible for more than half of that year's TCPA filings. And while the list of firms that are in the "top 10" list varies from year-to-year, 6 of the firms consistently appear in each year's list of top 10 filers.

Figure 3 below shows that over the course of 2020-2023, a group of top 10 filers is responsible for over half of federal TCPA filings each year. For more data about these filer trends, see Appendix A for the breakdown from year-to-year, listing each of the top 10 firms for any given year and their outsized impact on the TCPA litigation landscape.

Figure 3: Percentage of Federal TCPA Cases Filed by Top 10 Plaintiffs' Law Firms, 2020-2023*



*The numbers in this pie graph are based on data pulled from Lex Machina's database of federal civil litigation complaints that are filed under 47 U.S.C. § 227. Lex Machina's analytics tool pulls data from complaints and compiles it into statistics. Among those statistics are all of the law firms representing plaintiffs or defendants, organized from most to least number of cases. Using this data, we were able to calculate how many cases were filed by the top 10 plaintiffs' law firms from January 1, 2020, to December 31, 2023, and divide that by the total number of TCPA cases filed from 2020 to 2023 to get the percentage of cases filed by the top 10 plaintiffs' law firms. Data pulled as of March 21, 2024.

"... [M]ore than half of the top serial litigants are *pro se* plaintiffs who regularly sue companies for alleged TCPA violations, with many such plaintiffs having filed over 30 lawsuits over the past four years."

There is also the matter of professional TCPA plaintiffs, who play a substantial role in TCPA litigation abuse by either pairing with a plaintiffs' firm or filing TCPA claims *pro se.* For example, Terry Fabricant—the most frequently appearing plaintiff—regularly partners with the Law Offices of Todd M. Friedman, the law firm that filed the most federal TCPA cases in 2020 and 2021.[68] Together they filed 126 federal TCPA cases from 2020-2023. And more than half of the top serial litigants are *pro se* plaintiffs who regularly sue companies for alleged TCPA violations, with many such plaintiffs having filed over 30 lawsuits over the past four years. The below chart shows the top 10 serial plaintiffs—from 2020-2023.

Figure 4: Top 10 Serial Plaintiffs by Number of Federal Cases Filed, 2020-2023*

Name	Number of Cases Filed in 2020-2023	Representation
Terry Fabricant	155	Law Firm
Brandon Callier	96	*Pro Se*
Jorge Alejandro Rojas	93	*Pro Se*
Erik Salaiz	76	*Pro Se*
Andrew Perrong	76	Law Firm and *Pro Se*
Anton Ewing	51	*Pro Se*
Joe Hunsinger	49	*Pro Se*
Craig Cunningham	44	Law Firm and *Pro Se*
Mark W. Dobronski	39	*Pro Se*
George Moore	34	Law Firm

*The numbers in this chart are based on data pulled from Lex Machina's database of federal civil litigation complaints that are filed under 47 U.S.C. § 227. Lex Machina's analytics tool pulls data from complaints and compiles it into statistics. Among those statistics are lists of plaintiffs and defendants, organized from most to least number of cases filed. Data pulled as of March 21, 2024.

Plaintiffs Are Using Florida's Mini-TCPA in State and Federal Courts

The data available from Florida state courts allows us to see that plaintiffs have quickly taken advantage of the enactment of Florida's law. Figure 5 shows that the number of state court lawsuits bringing claims under Florida's mini-TCPA law has increased each year from 2021 (when it was adopted) to 2023.

Figure 5: Florida State Court Filings Stating Florida Mini-TCPA Claims, 2021-2023*

Year	Filings
2021	35
2022	108
2023	118

*The numbers in this chart are based on data pulled from Bloomberg Law's Florida Telephone Solicitation Act Dockets as of March 27, 2024.

Figure 6: Cases Filed Under Florida State Law in State and Federal Court Prior to and After Its Amendment*

Date	January 1, 2023–May 25, 2023	May 25, 2023	May 26, 2023–December 31, 2023
Federal Court	72	Florida's amendment to narrow the scope of its Telephone Solicitation Act is signed into law and goes into effect.	27
State Court	75		43

*The numbers in this chart are based on data pulled from Bloomberg Law's Florida Telephone Solicitation Act Dockets as of March 27, 2024.

As discussed above, Florida amended its law in 2023 to address some litigation abuse issues. While the full impact of these amendments is yet to be determined, Figure 6 shows a substantial dip in the number of cases filed under Florida's telephone solicitation statute in state and federal court after the amendment went into effect on May 25, 2023.

Finally, as noted above, the data shows that plaintiffs are combining federal TCPA claims and Florida state claims into the same lawsuits. Our research revealed that following *Duguid*, there has been a notable rise in the number of federal cases asserting claims under both the federal TCPA and the Florida law, which is creating additional liability risk. Specifically, in 2021, 29 cases were filed in federal court under the TCPA and Florida statute § 501.059. In 2022, the number rose to 179 cases and remained high in 2023 at 165 cases.[69]

Conclusion

Chapter

04

TCPA litigation abuse remains a serious problem, with no signs of abating. To the contrary, abusive litigation over calling and texting appears to be entrenching itself through strenuous attempts to stretch the definition of autodialer, even after *Duguid*, as well as through creative uses of other provisions of the law and the advent of state mini-TCPAs with accompanying PRAs.

As this paper shows, increasingly, the plaintiffs' bar is waging TCPA litigation using novel theories. While some recent court of appeals decisions have brought clarity to gray areas under the TCPA, substantial uncertainties remain; and the plaintiffs' bar continues to explore creative and novel legal theories involving new issues, such as how the TCPA applies to texting, what exactly constitutes an "artificial or prerecorded voice," and whether landlines and wireless phones constitute residential or business lines. These and other interpretive disputes make litigation attractive because uncertainties can lead to settlements. Further, a rise in litigation brought under Florida's mini-TCPA law previews an additional pathway for such litigation abuse, especially where other states follow with mini-TCPAs that include PRAs and statutory damages.

Although overall federal litigation under the TCPA decreased somewhat after the *Duguid* decision, there was an uptick again in 2023, and abusive litigation practices and TCPA class actions remain a substantial ongoing source of litigation risk. More than half of the cases are brought by 10 plaintiffs' firms every year and a similar percentage of TCPA claims are class actions, a staggering percentage compared to other heavily litigated consumer protection statutes.

These trends make clear that despite the clarity that *Duguid* provided, the onslaught of TCPA litigation against legitimate organizations is not going away. Instead, it is evolving, and businesses must stay one step ahead of opportunistic plaintiffs and their attorneys seeking a payday. Policymakers considering regulatory or legislative responses to illegal and unwanted calls and texts should avoid anything that creates uncertainty for legitimate U.S. businesses or makes the environment more favorable to plaintiffs' lawyers to wield the threat of "financially crippling litigation" stemming from the TCPA's PRAs and statutory damages.[70]

Appendix

A

Top 10 Plaintiffs' Law Firms by Number of Cases Filed, 2020-2023*

Year	Firm	Cases Filed	Outsized Impact on Federal TCPA Litigation
2020	Law Offices of Todd M. Friedman	317	Total federal cases filed: **2,427** • Total cases filed by top 10 law firms: **1,328** • Total cases filed by other filers: **1,099** Percentage of cases filed by these 10 firms: **54%**
	Atlas Consumer Law	266	
	Kaufman	109	
	Kimmel & Silverman	103	
	Shamis & Gentile	99	
	Kazerouni Law Group	95	
	Edelsberg Law	92	
	Paronich Law	84	
	Price Law Group	83	
	Hiraldo	80	
2021	Law Offices of Todd M. Friedman	134	Total federal cases filed: **1,620** • Total cases filed by top 10 law firms: **914** • Total cases filed by other filers: **706** Percentage of cases filed by these 10 firms: **54%**
	Kimmel & Silverman	128	
	Kaufman	128	
	Atlas Consumer Law	125	
	Paronich Law	98	
	Hiraldo	92	
	IJH Law	74	
	Shamis & Gentile	50	
	Gale, Angelo, Johnson, & Pruett	44	
	Law Offices of Stefan Coleman	41	

Top 10 Plaintiffs' Law Firms by Number of Cases Filed, 2020-2023* (... continued)

Year	Firm	Cases Filed	Outsized Impact on Federal TCPA Litigation
2022	Kaufman	137	Total federal cases filed: **1,427** • Total cases filed by top 10 law firms: **737** • Total cases filed by other filers: **690** Percentage of cases filed by these 10 firms: **51%**
	Paronich Law	109	
	Hiraldo	93	
	Atlas Consumer Law	80	
	BLC Law Center	79	
	Shamis & Gentile	57	
	Edelsberg Law	52	
	Law Offices of Todd M. Friedman	44	
	Kimmel & Silverman	44	
	Law Offices of Jibrael S. Hindi	42	
2023	Kaufman	140	Total Federal Cases Filed: **1,535** • Total cases filed by top 10 law firms: **771** • Total cases filed by other filers: **764** Percentage of cases filed by these 10 firms: **50%**
	Paronich Law	133	
	BLC Law Center	98	
	Hiraldo	83	
	Kazerouni Law Group	70	
	Law Offices of Todd M. Friedman	60	
	Shamis & Gentile	51	
	Atlas Consumer Law	46	
	Coleman (stefancoleman.com)	45	
	The Weitz Firm	45	

*Law firms in red appear in the list of top 10 filers for each of the four years. The numbers in this chart are based on data pulled from Lex Machina's database of federal civil litigation complaints that are filed under 47 U.S.C. § 227. Lex Machina's analytics tool pulls data from complaints and compiles it into statistics. Among those statistics are all of the law firms representing plaintiffs or defendants, organized from most to least number of cases. Using this data, we were able to calculate how many cases were filed by the top 10 plaintiffs' law firms and divide that by the total number of TCPA cases, each year, to get the percentage of cases filed by the top 10 plaintiffs' law firms. Data pulled as of March 21, 2024.

Endnotes

[1] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; American Association of Healthcare Administrative Management, Petition for Expedited Declaratory Ruling and Exemption; et al.,* Declaratory Ruling and Order, 30 FCC Rcd. 7961, 8073 (2015) (Dissenting Statement of Commissioner Ajit Pai).

[2] 47 U.S.C. § 227(b)(3), 227(c)(5).

[3] *Turning the TCPA Tide: The Effects of Duguid*, U.S. Chamber of Commerce Institute for Legal Reform at 20 (Dec. 22, 2021), https://instituteforlegalreform.com/wp-content/uploads/2021/12/1323_ILR_TCPA_Report_FINAL_Pages.pdf ("*Turning the TCPA Tide*").

[4] *See, e.g.,* Final Judgment, *McMillion v. Rash Curtis & Associates*, No. 4:16-cv-03396 (N.D. Cal. May 4, 2020), ECF No. 430 ($267 million verdict).

[5] *See e.g., Jenkins v. Nat'l Grid USA Serv. Co., Inc.,* No. 15-CV-1219, 2022 WL 2301668, at *3 (E.D.N.Y. June 24, 2022).

[6] *Turning the TCPA Tide; TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits*, U.S. Chamber of Commerce Institute for Legal Reform (Aug. 31, 2017), https://instituteforlegalreform.com/research/tcpa-litigation-sprawl-a-study-of-the-sources-and-targets-of-recent-tcpa-lawsuits/.

[7] *See Turning the TCPA Tide.*

[8] *Facebook, Inc. v. Duguid*, 592 U.S. 395 (2021).

[9] *Id.* at 405.

[10] *See generally Turning the TCPA Tide.*

[11] *Turning the TCPA Tide* at 13.

[12] *Facebook*, 592 U.S. 395, 407 n.7.

[13] *Turning the TCPA Tide* at 13.

[14] *Borden v. eFinancial, LLC*, 53 F.4th 1230, 1235 (9th Cir. 2022); *see also Beal v. Outfield Brew House, LLC*, 29 F.4th 391, 396 (8th Cir. 2022) (collecting cases) ("Like other courts, we do not believe the Court's footnote indicates it believed systems that randomly select from non-random phone numbers are Autodialers.... The hypothetical system considered by the Court was a system in which numbers were sequentially generated before being stored and later randomly selected.").

[15] *Borden*, 53 F.4th at 1231.

[16] *Smith v. USAA Fed. Sav. Bank,* No. 1:20-cv-01303, 2023 WL 5564706, at *1 (D. Colo. July 11, 2023) ("[Plaintiff] cites dicta in a *Facebook* footnote, in explaining how a random generator might 'store' a number, notes that 'an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list. It would then store those numbers to be dialed at a later time.' *Facebook*, 141 S.Ct. at 1172 n.7. According to [Plaintiff], this means that the TCPA prohibits using a random number generator to select from a list of phone numbers that was not automatically generated.").

[17] *Borden*, 53 F.4th at 1235.

[18] *Turning the TCPA Tide* at 17.

[19] *ACA Int'l v. FCC*, 885 F.3d 687, 698 (D.C. Cir. 2018).

[20] *Panzarella v. Navient Solutions, Inc.*, 37 F.4th 867 (3d Cir. 2022).

[21] *Id.* at 881; *see also id.* at 876 (quoting *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 119, 121 (3d Cir. 2018)) ("We have held that, for a dialing system to qualify as an ATDS, it need only have the 'present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers.'").

[22] *See Panzarella*, 37 F.4th at 879 (holding that "to use an ATDS as an autodialer, one must *use* its defining feature—its ability to produce or store telephone numbers through random- or sequential-number generation").

[23] *Guthrie v. PHH Mortg. Corp.*, 79 F.4th 328, 348 (4th Cir. 2023).

[24] *See, e.g.*, *Jiminez v. Credit One Bank, N.A.*, 632 F.Supp.3d 381, 389 (S.D.N.Y. 2022) (citing *Panzarella* and granting defendant's motion to dismiss an ATDS claim because even if the defendant calling party "theoretically had the capacity to store or produce lists of random or sequential phone numbers to be called, there is no evidence showing that [the defendants] made the subject calls to Plaintiff's cell phone number using such a technique").

[25] *Turning the TCPA Tide* at 15, 17.

[26] In the *2003 TCPA Order*, the FCC determined that text messages constitute "calls" under the TCPA. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 68 FCC Rcd. 14014, ¶ 165 (2003). *See also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, ¶ 107 (2015) ("Glide raises the issue of whether SMS text messages are subject to the same consumer protections under the TCPA as voice calls. We reiterate that they are."); *Drazen v. Pinto*, 74 F.4th 1336 (11th Cir. 2023) (en banc); *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037 (9th Cir. 2017); *Cranor v. 5 Star Nutrition, LLC*, 998 F.3d 686 (5th Cir. 2021); *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458 (7th Cir. 2020); *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85 (2nd Cir. 2019).

[27] *See Facebook*, 592 U.S. 395 at 400 n.2 ("Neither party disputes that the TCPA's prohibition also extends to sending unsolicited text messages. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 156 (2016). We therefore assume that it does without considering or resolving that issue.") (parallel citations omitted).

[28] *Turning the TCPA Tide* at 15, 17.

[29] *See Drazen*, 74 F.4th at 1339 ("The question at the core of this appeal is whether the plaintiffs who received a single unwanted, illegal telemarketing text message suffered a concrete injury. To answer that question, we consider whether the harm from receiving such a text message shares a close relationship with a traditional harm. The plaintiffs contend that it does—namely, with the harm that underlies a lawsuit for the common-law claim of intrusion upon seclusion. We agree."); *Van Patten*, 847 F.3d at 1043; *Cranor*, 998 F.3d at 690; *Gadelhak*, 950 F.3d at 463; *Melito*, 923 F.3d at 95.

[30] *Serrano v. Open Road Delivery Holdings, Inc.*, No. 2:22-cv-07245 (C.D. Cal. Oct. 4, 2022).

[31] Final Judgment, *Serrano v. Open Road Delivery Holdings, Inc.*, No. 2:22-cv-07245 (C.D. Cal. Dec. 13, 2023), ECF No. 62.

[32] *DeMesa v. Treasure Island, LLC*, No. 2:18-cv-02007, 2022 WL 1813858 (D. Nev. June 1, 2022).

[33] *Id.* at *3.

[34] Notably, the TCPA's two PRAs permit individuals to bring claims alleging violations of the TCPA's National Do-Not-Call Registry, the FCC's time-of-day rules, the agency's company-specific do-not-call rules, and the TCPA's artificial and prerecorded voice call provisions. *See* 47 U.S.C. § 227(b)(3) ("A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State ... an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation [or three times that amount for knowing or willful violations], whichever is greater...."), *id.* § 227(c)(5) ("A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State ... an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation [or three times that amount for knowing or willful violations], whichever is greater....").

[35] *Do Not Call*, FCC, https://www.fcc.gov/general/do-not-call (last visited Feb. 26, 2024).

[36] 47 C.F.R. § 64.1200(d).

[37] 47 U.S.C. § 227(c)(5).

[38] *See* 47 C.F.R. §§ 64.1200(c)(1)-(2) ("No person or entity shall initiate any telephone solicitation to: (1) Any residential telephone subscriber before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), or (2) A residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the Federal Government."); *id.* § 64.1200(d) ("No person or entity shall initiate any artificial or prerecorded-voice telephone call pursuant to an exemption under paragraphs (a)(3)(ii) through (v) of this section or any call for telemarketing purposes to residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive such calls made by or on behalf of that person or entity.")

[39] Data based on Lex Machina's database of federal civil litigation complaints that are filed under 47 U.S.C. § 227(c). Data pulled on March 21, 2024.

[40] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Second Order on Reconsideration, 20 FCC Rcd. 3788, ¶ 14 (2005).

[41] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, ¶ 36 (2003).

[42] *See, e.g.*, *Abante Rooter & Plumbing, Inc. v. Creditors Relief, LLC*, No. 20-3272, 2020 WL 9397554, at *3 (D.N.J. Dec. 10, 2020), *report and recommendation adopted by* No. 20-3272, 2021 WL 1688679 (D.N.J. Jan. 11, 2021) (holding that a factual attack on whether plaintiff's cellphones were used for a business purpose was not appropriate at the motion to dismiss stage); *Huber v. Pro Custom Solar, LLC*, No. 3:19-cv-01090, 2020 WL 2525971, at *4 (M.D. Pa. May 18, 2020) (holding the same); *Boger v. Citrix Sys., Inc.*, No. 8:19-cv-01234, 2020 WL 1033566, at *4 (D. Md. Mar. 3, 2020) (deny defendant's motion to dismiss plaintiff's company-specific do-not-call claim because "[a]lthough [defendant's] argument may be of merit in the end, resolution is premature").

[43] *Chennette v. Porch.com, Inc.*, 50 F.4th 1217, 1225 (9th Cir. 2022); *Jackson v. Direct Bldg. Supplies LLC*, No. 4:23-cv-01569, 2024 WL 184449, at *3 (M.D. Pa. Jan. 17, 2024).

[44] *Chennette*, 50 F.4th at 1225-26.

[45] *Id.* at 1225.

[46] *Id.* at 1232 (Ikuta, J., dissenting).

[47] *Id.* at 1238.

[48] For example, after *Chennette v. Porch*, the Ninth Circuit reversed a district court's denial of class certification in a TCPA case. The Ninth Circuit was reviewing a district court decision that a plaintiff class "could not 'meet multiple requirements under Federal Rule of Civil Procedure 23 because individual questions concerning whether he is a "residential subscriber subject to the TCPA's protections [would] predominate the litigation.'" *Mattson v. New Penn Financial LLC*, No. 21-35795, 2023 U.S. App. LEXIS

7070, at *1-2 (9th Cir. Mar. 23, 2023). The Ninth Circuit sent the case back to the district court for further proceedings to apply *Chennette* and its rebuttable presumption that all numbers are residential unless the defendant can show otherwise. The District Court did so, and remained convinced that individual issues predominate and preclude certification, *Mattson v. New Penn Financial LLC*, 2023 WL 8452659 (D. Or. 2023), but that decision in turn has been appealed. This sort of additional litigation over uncertainties like dual use phones and rebuttable presumptions exposes business defendants to substantial costs and enormous exposure, encouraging settlement.

[49] *See* Order Granting Motion for Final Approval and Granting Motion for Award of Attorney's Fees and Costs and Costs and Service Awards at 12-14, *Chinitz v. Intero Real Est. Servs.*, No. 18-cv-05623 (N.D. Cal. Oct. 28, 2022), EFC No. 305 (granting an $11.4 million proposed class action settlement fund, including $2,775,000 in attorneys' fees and costs in dual-use case that proceeded to discovery).

[50] 47 U.S.C. § 227(b)(1)(A)-(B).

[51] *See Trim v. Reward Zone USA LLC*, 76 F.4th 1157 (9th Cir. 2023).

[52] *Trim v. Reward Zone USA LLC*, 144 S.Ct. 683 (2024).

[53] *Blair v. Assurance IQ LLC*, No. C23-0016, 2023 WL 6622415, at *1 (W.D. Wash. Oct. 11, 2023).

[54] *Moore v. Triumph CSR Acquisition, LLC*, No. 23-cv-4659, 2023 WL 8601528, at *3 (N.D. Ill. Dec. 12, 2023).

[55] *Will "Mini-TCPA" Laws Create A New Cottage Industry Of TCPA Lawsuits?*, U.S. Chamber of Commerce Institute for Legal Reform (June 16, 2022), https://instituteforlegalreform.com/blog/will-mini-tcpa-laws-create-a-new-cottage-industry-of-tcpa-lawsuits/; *see also Episode 25: State TCPA Legislation on the Rise*, Cause For Action: An ILR Podcast (May 17, 2022), https://instituteforlegalreform.com/podcasts/episode-25-state-tcpa-legislation-on-the-rise/.

[56] *See generally Will "Mini-TCPA" Laws Create A New Cottage Industry Of TCPA Lawsuits?*; *see also Episode 25*.

[57] *See* Carolyn Carter, *Protecting Federal Claims by Using State Courts*, NCLC Digital Library (June 26, 2023), https://library.nclc.org/article/protecting-federal-claims-using-state-courts ("In many states, when federal court standing is an issue, filing the case in state court can significantly improve a consumer's odds of success.... One advantage of filing in state court is that the defendant may decide against removal to federal court and then state court, not federal court, standing rules will apply.").

[58] *Turning the TCPA Tide* at 20.

[59] 47 C.F.R. § 64.1200(c)(1).

[60] Fla. Stat. § 501.059(10)(c); s*ee generally* Florida House Bill 761 (effective May 25, 2023).

[61] *Id.*

[62] *Infra* Appendix A.

[63] *Streater v. WhaleCo, Inc.*, No. 6:23-cv-00162 (E.D. Okla. May 19, 2023).

[64] *Historical Robocalls By Time For Florida*, YouMail:Robocall Index, https://robocallindex.com/history/time/florida (last visited Mar. 4, 2024).

[65] *See* Protecting Americans from Robocalls: Hearing Before the Subcomm. on Commc'ns, Media, & Broadband of the S. Comm. on Commerce, Science, & Transp., 118th Cong. 4 (2023) (statement of Megan L. Brown, Partner, Wiley Rein LLP), https://www.commerce.senate.gov/services/files/BAF11818-A747-4F5E-8FAF-80ABD40DF3AD.

[66] Compared to the FDCPA and FCRA, the relative popularity of the TCPA with plaintiffs' lawyers may stem from key differences that make jackpot recoveries easier under the TCPA. For example, the FDCPA caps damages, *see* 15 U.S.C. § 1692k(2), and only provides for attorneys fees that are "reasonable in relation to the work expended and costs." 15 U.S.C. § 1692k(2)(3). Both the FDCPA and FCRA require various showings of intent, with the FDCPA providing an affirmative defense where a defendant "shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1629k(c). The FCRA requires intent, whether willfulness or negligence. *See* 15 U.S.C. §§ 1681n, 1681o. By contrast, the TCPA has uncapped statutory damages and is a strict liability statute that can expose businesses to crushing liability despite good faith and robust compliance programs.

[67] *Webrecon Dec 2023 Stats & Year in Review,* WebRecon, https://webrecon.com/webrecon-dec-2023-stats/?utm_source=ActiveCampaign&utm_medium=email&utm_content=WebRecon+Dec++23+Stats+%26+Year+in+Review&utm_campaign=Nov+2023+Newsletter&vgo_ee=Q%2F5Xc9UaDldzbXzKxRPZp45Wh4DZ7JM7Q34OLB6ZPev3aQmdaLqmQ%2Fo2VMbOi4J8FA%3D%3D%3A7eDqKP%2BqWH9Y8OBNITjqupJzKr90pWIC (last visited Mar. 4, 2024).

[68] The Law Offices of Todd M. Friedman brought numerous cases against a range of litigants from large companies such as DoorDash and State Farm to small businesses such as Robert Kelley Unique Garage Door Inc. and Unik Marketing Solutions

LLC. *See Lendenbaum v. DoorDash, Inc.,* No. 23-cv-00370 (N.D. Cal. Jan. 25, 2023); *Fabricant v. State Farm Mut. Auto. Ins. Co.,* No. 20-cv-08012 (C.D. Cal. Sept. 2, 2020); *Stinnett v. Unique Garage Door Inc.,* No. 23-cv-03939 (C.D. Cal. May 22, 2023); *Fabricant v. Unik Marketing Solutions LLC,* No. 20-cv-09163 (C.D. Cal. Oct. 6, 2020).

69 The numbers are based on a search of Lex Machina's database of federal civil litigation complaints that are filed under 47 U.S.C. § 227. Florida's statute, § 501.059, was searched for within this data set for each time frame indicated. Data pulled as of March 27, 2024.

70 *Advanced Methods to Target and Eliminate Unlawful Robocalls,* Second Notice of Inquiry, 32 FCC Rcd. 6007, 6020 (2017) (Statement of Commissioner Michael O'Reilly).

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