

The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages

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I. Introduction: A Dangerous State of Affairs

What happens when uncapped statutory damages for certain phone calls, texts, and faxes collide with technologies capable of making millions of outbound contacts in the span of minutes? A staggering amount of litigation.

Companies that communicate with their customers for any legitimate reason (marketing, collections, or transactional) have been discovering in recent years that if they reach out to customers via call, text, or fax, they are at risk for being sued under the Telephone Consumer Protection Act (TCPA)¹ by a plaintiff claiming that the communication was not made with his or her consent. Simply put, the TCPA over-incentivizes individual plaintiffs and class counsel alike with the allure of a \$500 penalty per call, text, or fax (or \$1,500 if willfulness can be proven).

It is rare these days to see TCPA litigation brought against its original intended target—abusive telemarketers. Instead, essentially every American business, from large to small, now finds itself at risk of having to defend against a TCPA lawsuit alleging statutory damages thousands of times in excess of any conceivable actual “damage” associated with the mere receipt of a phone call (even if the call was not answered, and no voicemail left). The company must then decide whether to pay plaintiffs’ counsel or the complaining individual, or to spend significant money defending an action where the alleged statutory damages may be in the millions or billions of dollars.

The TCPA has become a juggernaut: a destructive force that threatens companies with annihilation for technical violations that cause no actual injury or harm to any consumer. TCPA litigation will continue to expand and to threaten well-meaning businesses with astronomical statutory damages unless something is done to limit those damages.

II. The Central Problem with the TCPA: Uncapped Statutory Damages and Over-Incentivized Plaintiffs

Section 227(b)(3) of the TCPA establishes a private right of action for consumers to bring claims under the TCPA for \$500 per violation caused by certain autodialed calls, prerecorded calls, and facsimiles that they did not consent to receive.² And Section 227(c)(5) establishes a private right of action for “up to” \$500 per violation for certain telemarketing calls made in violation of a consumer’s status on the federal Do Not Call (DNC) list. Just considering the base damages amount of \$500 per violation available under the TCPA, it is easy to see how those damages can multiply, especially when the damages are set at a flat \$500 for prohibited autodialed or prerecorded calls or facsimiles.

Twenty informational calls made in error over the course of two years to the cell phone of someone with whom the company actually has no relationship (which happens when a customer changes phone numbers without informing the company) can turn into a claim seeking \$10,000 in statutory damages; one promotional text message sent in minutes to 80,000 people who used cell phones to place earlier orders for services could lead to a class allegation that the company is liable for \$40 million in statutory damages; a collections campaign making three total call attempts over the course of a week to each of the 2 million customers who failed to pay their bills on time could spawn a class claim seeking \$3 billion in statutory damages—it only takes one named plaintiff claiming she did not provide consent for the calls to anchor such a suit. And while those numbers are staggering, plaintiffs generally treble those amounts by claiming that violations were willful.

When assessing how quickly the damages can pile up, it becomes clear why so many companies have been settling TCPA lawsuits early on, for significant millions of dollars, rather than risk the fight (even with legitimate defenses) against claims alleging literally billions of dollars in statutory damages. To illustrate, the chart below shows some of the recent TCPA class action settlements, for companies spanning several industries:

Industry Category	Settlement Amount	Date
National Food Retailer	\$16.5 MM	May 2013
	\$9.75 MM	June 2013
National Footwear Retailer/Manufacturers	\$10 MM	February 2013
	\$6.25 MM	February 2012
National Apparel Retailer/Manufacturer	\$10 MM	February 2013
Automotive Services	\$35-47 MM	August 2012
Mortgage Lenders	\$17 MM	June 2012
	\$7-9 MM	January 2012
Debt Collection	\$9 MM	September 2012
	\$24 MM	September 2012
Auto Warranty	\$17 MM	September 2012
Banks	\$17.1 MM	June 2013
	\$32 MM	September 2013

Unfortunately, these hefty class settlements then incentivize even more litigation, in what has become a vicious circle of litigation abuse.

Take, for example, the recently announced \$32 million dollar TCPA settlement entered into by Bank of America on September 30, 2013. In this litigation, Bank of America agreed to settle a series of TCPA class actions brought against it for calls and texts made related to mortgages and credit cards at various times between 2007 and 2013.³ Without conceding any violation, Bank of America agreed to settle with a class of 7.7 million people, for just over \$32 million, and agreed not to oppose any request from plaintiffs' counsel for fees up to 25% of the settlement (or \$8 million). Had the bank not settled, it could have faced damages in excess of \$35 billion. The class members (4,171,217 who received a mortgage call, 2,449,350 who received a credit card call, and 1,103,293 who received a credit card text) can make at most two claims (if they received both calls and texts), and the fund will be divided up to pay however many people turn in a claim. This settlement—which would provide less than \$5 *per plaintiff* if every single person submitted a claim, except for the seven named class representatives who get \$2,000 each—eliminated any risk going forward that judgments of \$500 *per call* could be levied (and one named plaintiff claimed personally to have received over 50 calls). It is not difficult to see why a company would settle rather than continue to spend money defending claims where the statutory damages for even one call per class member would be in excess of \$35 billion dollars.

Further, individual TCPA actions are also increasing at a rapid clip because individuals pursuing their own claims have also received significant settlements after stockpiling incoming calls. In one recent Michigan case, a plaintiff sought summary judgment under the TCPA for collections calls made to her husband's cell phone: she had failed to make payments on her truck and received 116 voicemail messages during a one-year period, as well as another 1,026 call attempts that she did not pick up and that did not result in a message. Finding that the calls were autodialed—and that she had not consented to receive such calls on the cell phone to which they were made, the trial court granted summary judgment in the amount of \$571,000 for 1,142 violations of the TCPA.⁴ In contrast, the Fair Debt Collection Practices Act or FDCPA (which was designed to apply to harassing collections calls by collections agencies) has a damages cap that would have provided that same individual plaintiff the ability to seek for collections calls (1) her actual damages, (2) her reasonable attorneys' fees in bringing her claim, and (3) an additional \$1,000 in statutory damages.⁵ There is no question that claims brought under the TCPA against debt collectors are increasing exponentially (up 65% this year alone, with lawsuits filed in August 2013 up 72% from August 2012), while FDCPA litigation is slowing down.⁶

The TCPA's damages are not tethered in any way to a defendant's net worth; as a result, staggering damages have been assessed by courts on summary judgment against small businesses with likely no ability to pay, forcing them to close up shop. A recent Seventh Circuit decision (for which rehearing was denied on September 24, 2013) upheld an over four million dollar (\$4,215,000) summary judgment verdict against an attorney who sent occasional faxes to 200 accountants that he felt may appreciate the free legal advice he provided in his "Daily Plan-It" newsletter (with the hope that one of the recipients might hire him down the road). For a total of 8,430 faxes sent over time to these 200 recipients, the Seventh Circuit thought the \$500 per call

award was justified, from which \$1,430,055.90 was to go to class counsel for their fees and expenses.⁷ The Seventh Circuit opined that the \$500 per fax award was appropriate even for “faxes” that may have been received as email and deleted without having been opened and read, since “[e]ven a recipient who gets the fax on a computer and deletes it without printing suffers some loss: the value of the time necessary to realize that the inbox has been cluttered by junk.”⁸

Sue-it-yourself online guides. Many individuals are now making their living as TCPA plaintiffs, sending out demand letters to companies for every call, text, or fax they receive, and working to ensure that they receive such calls by acquiring new cell phone numbers, signing up online for promotional campaigns, and making outbound calls to companies. Blogs and websites abound, telling consumers how a small investment in bringing a TCPA claim can reap great rewards—one “advisor” explains: “Adding up the above numbers, you can see that I invested \$195 (or \$250, if you consider the SBC claim that I let go) and received a total of \$6,160.00. Such is obviously a pretty good return on my investment and I doubt I spent more than three hours total on everything (five hours if you factor in the time I had to waste sitting in the court on the last action).”⁹ Some sites even instruct consumers about how to “set up” the perfect TCPA lawsuit to maximize potential damages before getting in contact with the company calling them, and how to then negotiate for thousands in a quick settlement.¹⁰

Plaintiffs’ firms specializing in TCPA class actions. Further, the “cottage industry” of TCPA plaintiffs’ law firms that once existed has grown, with certain law firms recovering millions of dollars in fees each year. Law firms around the country actively recruit clients and friends willing to act as class representatives for actions that can be brought on the basis of a single fax, text, or call and that can threaten to put at stake potentially billions of dollars on a class-wide basis. Especially in certain “hotbeds” of TCPA litigation (such as the Southern District of California, Southern District of Florida, Northern District of California, and Northern District of Illinois), plaintiffs’ firms race each other to bring TCPA class action lawsuits against not only the entity making the calls, but any “deep pocket” company that they can argue could be vicariously liable. And recently, the firms and attorneys most often involved in TCPA cases have been joining forces in these “big ticket” TCPA litigations. It is no longer uncommon to see four or more firms appearing together to split expenses from the plaintiffs’ side of litigation, hoping that the shared investment will reap major rewards, but minimizing individual losses of that “investment” if their venture fails.

With most courts applying a four-year statute of limitations to the TCPA, potential plaintiffs have an enormous window of time to sift through all communications received to look for anything that might be able to form the basis of a TCPA lawsuit. Significantly, it is not just collections calls and telemarketing calls that lead to TCPA lawsuits. Rebate reminder calls, fraud alert calls, equipment return reminder calls, and many other types of autodialed calls have also led companies to find themselves subject to a lawsuit and needing to prove an affirmative consent defense—sometimes needing to go all the way to summary judgment to do so—and companies are required to bear the expense of their litigation costs in proving that they did have consent to make the challenged calls.¹¹

This is the world in which businesses now find themselves. This world is not one that the sponsors of the TCPA originally intended, or even could have envisioned.

III. The Original Intent of the TCPA Has Been Perverted.

The largest driver of TCPA litigation currently is “autodialed” calls to cellular telephones, because so many Americans now use their cell phones as their primary point of contact¹² and have provided those numbers to companies with whom they do business. The TCPA defines an “autodialed” call as one made on an automated telephone dialing system (ATDS), “equipment which has *the capacity* (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”¹³ But because “capacity” is not a defined term in the statute, TCPA plaintiffs and their attorneys have been arguing in lawsuit after lawsuit that if a call was placed with equipment that has *even a hypothetical, future capacity to store or produce random or sequentially generated numbers*, that call was made with an ATDS.¹⁴

Disputes centering on hyper-technical arguments about whether calls to cell phones are “autodialed” based on a hypothetical capacity were not something considered back when the TCPA was enacted in 1991 to address the following:

- Concerns over consumer privacy;
- Concerns about pre-recorded telemarketing calls to residences;
- Concerns about autodialed and pre-recorded calls to cellular telephones; and
- Concerns about unsolicited facsimiles sent without an Existing Business Relationship (EBR).

As the Supreme Court recently noted in a 2012 case establishing that TCPA litigation can be brought in federal court under Section 1331 “federal question” jurisdiction, in enacting the TCPA, “Congress determined that federal legislation was needed because telemarketers, by operating interstate, were escaping state-law prohibitions on intrusive nuisance calls.”¹⁵

The TCPA set rules about the kinds of consent required to make such communications to residences, cell phones, and facsimile machines¹⁶ and further authorized the establishment of a national DNC list that would record consumers’ requests to not receive any telemarketing calls.¹⁷ The Federal Communications Commission (FCC) was tasked with interpreting the TCPA and promulgating the regulations that would create the national DNC, and over time the FCC has updated its regulations to add new requirements (such as the need for companies to maintain their own internal DNC list for requests to stop telemarketing otherwise permissible because of an EBR).¹⁸

The year 1991 was a very different technological era, and is now more than twenty years removed from present day calling and faxing technologies. The telemarketing calls and faxes that the TCPA was designed to curtail were being made by aggressive telemarketers employing tactics such as random number generation or sequential dials that worked through every possible number in an area code. Facsimile machines required expensive thermal paper; cellular phones were extremely uncommon (and very bulky), with expensive usage costs—thus, special protections were put in place for calls made to cell phones and for faxes.

On the Senate floor, the TCPA's sponsor, Senator Hollings, explained that the TCPA was intended to "make it easier for consumers to recover damages" from computerized telemarketing calls, and that the intent was for consumers to go into small claims courts in their home states so that the \$500 in damages would be available without an attorney:

The substitute bill contains a private right-of-action provision that will make it easier for consumers to recover damages from receiving these computerized calls. The provision would allow consumers to bring an action in State court against any entity that violates the bill. The bill does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine. Nevertheless, it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court... .

Small claims court or a similar court would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer. However, it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages. I thus expect that the States will act reasonably in permitting their citizens to go to court to enforce this bill.¹⁹

Indeed, it was so clear that TCPA claims were intended to be handled on an individual basis by consumers seeking amounts of damages that would not exceed a small claims court's jurisdiction that throughout the 1990s early TCPA litigants in many circuit's federal courts were told that there was no jurisdiction in federal court to hear TCPA claims, a matter only finally resolved by the Supreme Court in 2012 (when the question had essentially been mooted for large TCPA class actions by the earlier Class Action Fairness Act's provision that class actions alleging over \$5 million in damages could be removed to federal court).

The TCPA set out to regulate telemarketing calls made by dialers with the capacity to randomly or sequentially dial telephone numbers.²⁰ There was no real debate over the TCPA at the time of its passage; there was no indication of what the TCPA would grow to become. But now, a statute designed to provide a private right of action so that consumers would have the incentive to pursue their own claims against aggressive cold telemarketing calls, preferably in small claims court and without needing an attorney, now threatens to bankrupt not just abusive telemarketers, but any legitimate company placing legitimate business calls, as well as any "deep-pocket" entity that plaintiffs can claim could be vicariously liable for those communications.

The threat to small businesses: strict liability. Small businesses throughout the country are finding themselves brought into court when they had no intention of violating any law and had no knowledge of the TCPA and its strict liability that requires no intent or negligence on a company's part. One small, family-owned company from Michigan, Lake City Industrial Products, Inc., has been struggling for several years to defend a TCPA class action for 10,000 faxes it sent and provides a chilling example of how the risks of unknowingly violating the TCPA can be exacerbated by lead generators who reach out to small companies, promising to provide an inexpensive and legal way to get new businesses. Lake City received a faxed

advertisement from fax broadcasters who promised a legal approach to generating new business: faxes to be sent to approximately 10,000 targeted businesses, all for the low sending cost of \$92.²¹ The family-run company believed it was engaging in a legal marketing tactic when it designed the fax and had it sent out; on summary judgment, the court found Lake City liable for approximately 10,000 violations of the TCPA, even though Lake City noted that statutory damages of \$5,254,500 would force its bankruptcy.²²

The threat to large companies: vicarious liability. America's larger businesses find themselves the subject to claims that they are vicariously liable for TCPA violations purported to have been made by companies or persons acting as their agents, or even by anyone arguably acting in a way to "benefit" the company.²³ Companies find themselves subject to the expense of defending against claims that, for example, a text message was sent on their behalf, when the company did not send the message, did not authorize that such messages can be sent, and had no idea what business partner (if any) would be breaching its contract to perform illegal telemarketing. Simply the mention of the company's name in the text message subjects it to class-wide TCPA litigation by plaintiffs' attorneys hoping for the big payday of a settlement, since so many companies do settle because of the *in terrorem* specter of billions of dollars in potential damages, if it is found that millions of such text messages were sent out. The fact that a company has established and implemented reasonable practices and procedures to prevent TCPA violations—which is an affirmative defense under Section 227(c)(5) to a violation of the DNC policy²⁴—is not included in Section 227(b)(3) of the TCPA as an affirmative defense, so whatever the company does to try to prevent violations by its business partners is ignored by TCPA plaintiffs' attorneys and treated as irrelevant.

Finally, an additional and significant problem for all companies, big or small, is the general lack of insurance coverage for TCPA claims brought against the company. Because insurers noted early on the uncapped statutory damages available through the TCPA, many companies will find that coverage for TCPA litigations is expressly precluded by their commercial general liability policies. While the Illinois Supreme Court recently found that a general insurance policy would indeed cover TCPA claims (the insurer had argued that the statutory fines of over \$1.7 million for 3,478 faxes at \$500 each were so excessive, they constituted punitive damages, which were not covered by the insurance policy),²⁵ there are explicit carve outs in many policies that exclude coverage for any TCPA settlement or litigation.

The TCPA was designed to protect privacy and to stop invasive and persistent telemarketing, primarily of the "cold call" kind that ensues when telemarketers use dialing technology to randomly or sequentially dial numbers. It was not designed to subject companies to claims regarding "autodialed" calls when they reach out to targeted, segmented lists of their own customers who have a common need for information using the telephone numbers (including cellular phone numbers) provided by those customers. And it was not designed to cover collections calls, which have independent sets of rules that apply to ensure that those calls are not abusive or overly intrusive.²⁶

IV. The Only Certain Way to Combat the Juggernaut: Legislative Change and a Damages Cap

What is clear is that the TCPA's uncapped statutory damages pose a real threat to large and small well-intentioned American companies who have potentially millions of customers and who often need to communicate with those consumers. The situation developing under the current TCPA regime is an absurd result and not what Congress intended when, as bill sponsor Senator Hollings explained, TCPA damages were set high enough to encourage individual consumers to bring a claim without an attorney and preferably in small claims court, but at an amount that on balance, would still be fair to the company being sued.²⁷

Other consumer statutes (the Truth in Lending Act (TILA), the Electronic Funds Transfer Act, and the Fair Debt Collections Practices Act) with statutory damages and no need for proof of actual damages have damages caps for both individual and class actions. For example, TILA's damages cap establishes not only individual statutory damages caps, but establishes that a class action or series of class actions tied to the same lack of compliance "shall not be more than the lesser of \$1 million or 1 per centum of the net worth of the creditor."²⁸ It is worth consideration whether TCPA needs a similar structure for its damages' scheme.

Businesses are being hounded by TCPA lawsuits and now that high profile, multi-million dollar settlements and judgments have been raising awareness of the TCPA, the situation will only worsen. Now that the original intent of TCPA—claims being brought in small claims courts for small dollar total amounts, without attorneys—has been perverted, the statute needs to be amended so that it cannot continue to be used to threaten the very existence of well-meaning businesses causing no actual injury or damage to anyone.

¹ See 47 U.S.C. § 227, *et. al.*

² 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— (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation, (B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or (C) both such actions.”)

³ See Dkt. No. 59-1, *Rose et al. v. Bank of Am. Corp. et al*, N.D. Cal. Case No. 5:11-cv-02390-EJD (filed Sept. 27, 2013).

⁴ *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.

⁵ See 15 USC § 1692k(a) (civil liability section of Fair Debt Collections Practices Act or “FDCPA”).

⁶ “FDCPA Lawsuits Continue Steady Decline as TCPA Suits Rise,” online article from September 27, 2013 accessed on October 15, 2013, at <http://www.insidearm.com/daily/debt-collection-news/debt-collection/fdcpa-lawsuits-continue-steady-decline-as-tcpa-suits-rise/>.

⁷ See *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682 (7th Cir. 2013) (upholding statutory damages of \$4,125,000, but requiring trial court to re-assess ruling that unclaimed funds would go to a *cy pres* fund).

⁸ *Id.* at 684.

⁹ “Suing Telemarketers - Simple and Cheap”, online article accessed on October 15, 2013 at <http://www.killthecalls.com/suing-telemarketers.php>. See also “How To Make A Telemarketer Cry (or, Suing Bozos for Fun & Profit)”, online article accessed on October 15, 2013, <http://www.panix.com/~eck/telemarket.html> (explaining TCPA and how easy it is to get \$500 per call).

¹⁰ See, e.g., “How to Sue A Telemarketer”, <http://www.impactdialing.com/2012/05/how-to-sue-a-telemarketer/>, online article accessed on October 15, 2013 (disclosing the blog author’s strategies that led to a \$4,000 payment for the five calls he received).

¹¹ See, e.g., *Greene v. DIRECTV, Inc.*, 10 C 117, 2010 WL 4628734 (N.D. Ill. Nov. 8, 2010) (determination on summary judgment, after discovery and briefing, that plaintiff did consent to receive on her cell phone an autodialed fraud alert phone call in regards to a potential fraudulently opened DIRECTV account when she provided her cell phone number to the credit bureaus as the number at which she wished to be contacted for such purposes).

¹² The Center for Disease Control, which tracks cell phone usage rates in its National Health Interview Survey, tracked results from its surveys between 2003 and 2011 and saw an increase in adults using cell phones for all communications from less than 5% of adults in 2003 to over 30% of adults by late 2011. See <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201112.pdf>. By late June 2012, the CDC release data showing that the adults with only cell phones had increased to 34%, showing the continued trend. <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201212.pdf>

¹³ 47 U.S.C. § 227(a)(1) (emphasis added).

¹⁴ A petition brought in 2012 before the FCC asking it to clarify that predictive dialers that “do not have the current ability to generate and dial random or sequential numbers” are not automatic telephone dialing systems (“ATDS”) subject to liability has yet to lead to an order by the FCC. See *Petition for Expedited Declaratory Ruling and Clarification*, Communication Innovations, CG Docket No. 02-278, at 1 (filed June 7, 2012) (“CI Petition”).

¹⁵ *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 742 (2012).

¹⁶ See 47 U.S.C. § 227(b).

¹⁷ See 47 U.S.C. § 227(c).

¹⁸ See, generally, 47 CFR §64.1200.

¹⁹ 137 Cong. Rec. 30821–30822 (1991).

²⁰ See 47 U.S.C. § 227.

²¹ See *Am. Copper & Brass, Inc. v. Lake City Indus. Products, Inc.*, 1:09-CV-1162, 2013 WL 3654550 (W.D. Mich. July 12, 2013) (business retained fax blaster to send faxes; no question that the business first inquired whether such faxes were legal and received assurances that they were).

²² See *id.* at *6.

²³ While the FCC issued a recent order on May 9, 2013, explaining that the federal common law of agency is what controls the vicarious liability analysis under the TCPA, the FCC then provided some “helpful” examples of what could show agency that far exceeded the actual law of agency. That portion of the order is being challenged before the D.C. Circuit. See *DISH Network, LLC v. FCC*, (D.C. Cir. 2013) (No. 13-1182). The issue on appeal is whether “the FCC’s ‘guidance’ to courts on federal common-law principles of agency and the application of those principles in TCPA cases should be vacated because the Commission lacks the authority and expertise to opine on the common law of agency and because the Commission’s ‘guidance’ directly conflicts with the common-law principles it purports to explain.” *Id.* at p. 1-2.

²⁴ 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.”)

²⁵ See *Standard Mutual v. Lay*, 2013 IL 114617 (2013).

²⁶ See 15 U.S.C. § 1692 (Fair Debt Collection Practices Act (“FDCPA”).

²⁷ See 137 Cong. Rec. 30821–30822 (1991).

²⁸ 15 U.S.C. § 1640(a)(2)(B).