

The Telephone Consumer Protection Act: Privacy Legislation Gone Awry?

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The Supreme Court's 2012 decision in *Mims v. Arrow Financial Services LLC*¹ opened the floodgates to federal class actions under the Telephone Consumer Protection Act of 1991 (the TCPA). Although originally enacted to deter automated telemarketing calls and faxes, the TCPA has expanded over time to prohibit automated dialing or text messaging for almost any purpose. The TCPA is a strict liability statute, allowing for a penalty of \$500 per violation, which can be trebled for willfulness. The restrictions the TCPA places on the use of automated dialing equipment are being used by the plaintiffs' bar not only to bring multi-million dollar class action suits against telemarketers for unwanted calls and texts to consumers, but also to charge all types of businesses with violating the TCPA for using phone systems "capable" of automatic dialing to call or text both consumers' cell phones and advertised cell phone numbers of other businesses (business-to-business or B2B calls) for virtually any purpose.

Class action litigation under the TCPA has swelled into a rising tide, with TCPA class action cases increasing by 63 percent through most of 2012 according to one study,² and the number of TCPA cases in general rising by approximately 70 percent in 2013³ and again by over 32 percent in the first half of 2014.⁴ Indeed, as one commentator has put it:

The TCPA has become fertile ground for nuisance lawsuits because class action lawyers

are often rewarded with quick settlements, even in cases without any merit, simply because litigation uncertainty and the potential financial exposure resulting from a bad decision are too great a risk for a company to bear.⁵

Originally intended to curb intrusive telemarketing activities directed at consumers, the class action plaintiffs' bar increasingly uses the TCPA as a weapon against all manner of businesses, based on all types of calls. Faced with potentially ruinous consequences of an adverse verdict, defendants often have little choice but to reach some kind of settlement. Many of these settlement figures have been staggering.

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In September 2013, for example, Bank of America, N.A. and related entities (collectively, BOA) agreed to an approximately \$32 million class settlement of a dispute that arose out of BOA's calls to wireless phones and text messages relating to mortgages and credit card debt that had gone into default.⁶ The settlement helped BOA avoid potential liability of over \$35 billion. Even that settlement paled, however, in comparison with one recently entered by Capital One Bank (USA) N.A. and related entities (collectively Cap One). In a settlement that received preliminary court approval at the end of July 2014, Cap One agreed to pay approximately \$73 million to resolve claims based on its use (and its agents' use) of automatic dialers to connect live agents with Cap One's own customers, where many of those

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customers received these calls on their wireless phones.⁷

Weighed against Congress's stated concerns in enacting the TCPA—protecting consumer privacy—the uses to which the TCPA is put today approach the nonsensical. In one recent case, for example, a fan of the Los Angeles Lakers attended a preseason basketball game at the Staples Center and, at the prompting of the arena's scoreboard, texted a message to be displayed on the board.⁸ He received a reply text thanking him for his message. After texting "STOP" to avoid receiving messages from the team, he received a confirmation text. He then used this exchange to file a putative class action against the team for violating the TCPA. While the court dismissed that case, the rival Los Angeles Clippers were not so lucky: the team recently agreed to an approximately \$5 million settlement of a case based on similar allegations.⁹

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In another illustrative example of how the TCPA has expanded far beyond its intended purposes, a putative class representative has sued Walgreen Co. for making autodialed calls to its customers' cell phones... reminding them to refill their drug prescriptions. The Illinois federal district court, which had dismissed that case, recently reconsidered its decision and allowed the claim to proceed.¹⁰ The current reach of the TCPA, and suits such as the *Lakers* and *Walgreens* cases, have prompted numerous entities to actively seek declaratory rulings from the Federal Communications Commission (FCC). In one such petition, the Cargo Airline Association felt it necessary, understandably, to have the FCC bless its practice of sending package tracking information and status updates to consumers' wireless phones.¹¹

A number of factors have contributed to the explosion of TCPA litigation, including liberal constructions of the statute by some courts, the aforementioned Supreme Court decision

allowing for federal jurisdiction over TCPA class actions, and confusing, sometimes inconsistent interpretations of the TCPA by the FCC. One of the major factors in expanding TCPA litigation has been the technological development in the telecommunications field over the TCPA's 23 year history. These advances have led to more widespread use by both consumers and businesses of devices that are, or can be construed as, covered by the TCPA.

TCPA Prohibitions on Calls to Wireless Phones

The TCPA includes numerous prohibitions or limitations on the use of certain types of equipment in attempting to communicate with the public. For example, the TCPA bars the use of artificial or prerecorded voices to deliver messages to residential phone lines without the called party's prior express consent. In addition, the statute's well-known fax-related provisions—later enhanced by the Junk Fax Prevention Act of 2005—make it illegal to send unsolicited advertisements to fax machines absent certain conditions.¹² The statute also includes restrictions on the use of automatic dialing equipment to make any type of call to various types of phone numbers, including cell phones. Specifically, the TCPA makes it unlawful

to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call....¹³

The statute defines an "automatic telephone dialing system" (ATDS) as "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."¹⁴ The TCPA further empowers the FCC to promulgate rules and regulations to ensure that the TCPA's goals are met, and the FCC has indeed enacted extensive—but often confusing

and intricate—rules implementing the TCPA,¹⁵ as well as a series of orders and declaratory rulings interpreting the TCPA and its own rules. Indeed, even an FCC Commissioner has acknowledged that it is time for the FCC to provide clarity to the FCC’s and the courts’ interpretations of the TCPA.¹⁶

Private plaintiffs suing under the TCPA can recover the greater of their actual damages or \$500 in statutory damages—trebled in cases where the plaintiff can demonstrate willfulness by the defendant. It is this last section, with its provision for damages far in excess of any actual damage the called party may have suffered, that makes the TCPA such an attractive mechanism for class action counsel.

The legislative history of the TCPA makes it clear that Congress’s primary concern in enacting the statute was increasingly intrusive automated telemarketing directed at individual consumers, particularly where the calls employed artificial or prerecorded messages. For example, the Senate Report on the Act discussed the rise in unsolicited telemarketing being conducted *via* automatic dialing, a means of communication that made unsolicited telemarketing calls—an industry “growing by immense proportions”—more cost effective.¹⁷ Similarly, the House Report on the TCPA refers to the marked increase in telemarketing calls, noting that “[u]nrestricted telemarketing... can be an intrusive invasion of privacy” and “[m]any consumers are outraged [at] the proliferation of intrusive, nuisance calls to their homes from telemarketers.”¹⁸ Indeed, eight of the first nine congressional findings that introduce the final version of the TCPA reference telemarketing or telemarketers, and the findings repeatedly discuss consumer complaints and individuals’ privacy rights.¹⁹ After over 20 years of technological developments and increasingly aggressive interpretations of the statute, however, few TCPA litigations today actually address those concerns.

Developments in Modern Communications Technology, and the Proliferation of Wireless Phones, Have Pushed the TCPA Beyond Constitutional Limits

The US Constitution allows for content-neutral restrictions on non-misleading commercial speech concerning lawful activities only if the restrictions: (a) serve a substantial governmental interest; and

(b) do not suppress substantially more protected speech than necessary to advance that interest.²⁰ While the TCPA may have satisfied these standards 23 years ago, it is hard to argue that the statute still passes constitutional muster.

The scope of the TCPA’s ban on calls to wireless phones now is only tangentially related to the statute’s stated purposes, and the TCPA’s section relating to calls to wireless phones has become unconstitutionally overbroad.

A product of its era, the TCPA defines an ATDS as any device *capable* of dialing random numbers or numbers on a list, *regardless of whether the capability was used* in making a particular call.²¹ Today, however, the technology used to place phone calls has changed dramatically. *Every* smartphone, *every* computer capable of connecting to the Internet and using an Internet-based phone service, and *every* VOIP phone, is a computer, capable of being programmed like any other computer. Because they are programmable to randomly or sequentially dial phone numbers, every one of them thus arguably qualifies as an ATDS under the text of the statute. In the modern world of computerized telephone systems and VOIP calling, the wireless calling provisions of the language of the TCPA therefore could be read to ban far more telephone calls than Congress intended. Indeed, numerous entities have resorted to petitions to the FCC seeking rulings that predictive dialers—previously held by the FCC to constitute an ATDS despite the fact that they do not actually perform random number generation and dialing—and other devices that lack the *current* ability to carry out random or sequential dialing, or that employ some degree of human intervention before initiating calls, are not ATDSs under the Act.²²

The scope of the TCPA’s ban on calls to wireless phones now is only tangentially related to the statute’s stated purposes, and the TCPA’s section relating to calls to wireless phones has become unconstitutionally overbroad. When the TCPA was enacted in 1991, its limitation to calls made using automatic telephone dialing systems may have made logical sense, and may have been adequate to support its constitutionality. Automatic dialing was

then a relatively new technology used primarily for mass telemarketing activities. Today, however, the statute's broad definition of an ATDS encompasses many, if not most, devices used by ordinary people to place ordinary calls for all manner of purposes. Indeed, even an unplanned call placed to a friend's mobile phone, or a call made from a modern office VOIP telephone system to a misdialed number, would technically violate the statute, because the equipment has the "capacity" to do what the statute encompasses, and the caller is making a call without the consent of the recipient. This is not what Congress intended.

Nor does such a broad restriction on content-neutral speech serve any longer to provide cell phone users with substantial protection from any unwanted charges for incoming calls from the now-ubiquitous automatic telephone dialing systems. Cell phone use and cell phone service plans have evolved greatly over the past 20 years. Under today's cell phone plans, many cell phone users incur no unwanted charges for incoming calls. Indeed, cell phone plans regularly include "unlimited use," so that incoming calls subject the recipient to no additional charges. Even those plans that are use-based generally involve the contractual pre-purchase of minutes in amounts that exceed the minute-needs of the individual subscribers. Accordingly, there is little monetary interest supporting the governmental restrictions which the TCPA places on calls to cell phone users today.

In addition, wireless phones have proliferated greatly since the enactment of the TCPA in 1991. Indeed, wireless phones are ubiquitous today. Not only do more and more people possess wireless phones—as of January 2014, 90 percent of American adults had one²³—but an increasing number of Americans use a mobile phone as their *only* telephone number.²⁴ Even many businesses now use wireless numbers as one of their primary points of contact, publishing their wireless numbers in directories and advertising materials as a means of contacting the business. It is therefore far more likely in 2014 that in attempting to reach a business for any purpose, another business caller will be required to call them and/or will actually reach them on a wireless phone. TCPA claims based on this type of B2B call raise still additional issues.

The Use of the TCPA as a Weapon against Non-Telemarketing Calls Placed to Businesses' Wireless Phones

Under the TCPA, a called party's consent to be called constitutes an affirmative defense to any claim. As long ago as 1992, the FCC ruled that a wireless customer's voluntary release of his or her cell phone number for use by the caller is consent under the statute.²⁵ The FCC has reaffirmed this position a number of times since then.²⁶ When a wireless phone number has been advertised or otherwise published as a business number, then, the business should be deemed to have consented to receive calls at the number, absent instructions to the contrary. As the FCC has stated, "Congress did not expect the TCPA to be a barrier to normal, expected, and desired business communications."²⁷ Moreover, as one court recently said, "distributing one's telephone number is an invitation to be called..."²⁸ Yet at least one court has allowed a claim based on calls made to business phone numbers, though it is unclear if the phone number in that case was an advertised or publicized number.²⁹

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Additionally, the advertising of a business cell phone number raises constitutionality issues regarding the permissible restraint of commercial speech similar to those discussed above. Plaintiffs frequently invoke the governmental interest in protecting "consumer privacy" in support of the constitutionality of the TCPA. But the government simply has no legitimate interest in protecting business cell phones from invited calls. There is no legitimate governmental interest in protecting the privacy interests of a business that invites calls to its cell phone number by publishing that number as a means of contacting the business. B2B calls made to published phone numbers should thus be excluded from the TCPA's

purview. If they are not, the TCPA would be unconstitutionally overbroad, restraining commercial speech without advancing a legitimate governmental interest.

The application of the TCPA to B2B calls also presents constitutional issues of vagueness. It is not clear from the face of the TCPA that B2B calls are covered, and the FTC's express exemption of B2B calls from parallel FTC telemarketing regulations could lead a reasonable person to think they are not.

As an initial matter, the act bears the name "Telephone *Consumer* Protection Act," and the ordinary connotation of that term refers to natural persons who are consumers of goods and services, not businesses that provide those goods or services. In addition, after prohibiting autodialed calls to "any number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service," the TCPA provides a "catch-all" provision—reflecting the intent behind this section of the TCPA—that proscribes any autodialed call where "the called party is charged for the call." Indeed, the TCPA authorizes the FCC to create exemptions for "calls to a telephone number assigned to a cellular telephone service that are not charged to the called party," subject to conditions necessary to preserve "the privacy rights this section is intended to protect."³⁰ In the case of B2B calls made to a business cell phone, however, such calls do not truly implicate those privacy rights, and it is unclear whether such calls were intended to fall under the statute's provisions. Indeed, the "called party" for such a call—an individual employee answering his or her business cell phone, the bill for which is paid by the business—is not being charged for the call.

Moreover, the TCPA sets forth a specific type of autodialed calls to businesses that *are* prohibited—those that result in "two or more telephone lines of a multi-line business [being] engaged simultaneously."³¹ To a person of ordinary intelligence, that limited inclusion of business calls is consistent with the general exclusion of B2B calls from the reach of the TCPA's coverage.

Further still, the TCPA mandates that in implementing the TCPA, the FCC "shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or

prerecorded voice to which they have not given their prior express consent...."³² Here again, the statutory language suggests that businesses are not otherwise covered by the statute. Given these express references to businesses in the later sections of the statute, whether business mobile phones are covered by the general prohibition on autodialed wireless phones has been left unclear to persons of ordinary intelligence. The statute thus fails to put business owners on adequate notice as to whether they could be in violation of its terms for calling a phone registered to a business.

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Conclusion

TCPA litigation has strayed very far afield from Congress's vision of the TCPA when it came into being in 1991. The landscape of the telecommunications industry has changed significantly since Congress passed the TCPA, and the statute is now

being used in many cases, not to defend consumer privacy from intrusive telemarketing, but to attack normal communication activities that Congress was simply not contemplating. As a result of these factors, the TCPA has morphed from a consumer protection measure to a class action cash cow, and a sword of Damocles for all kinds of businesses, one that—absent some kind of intervention by Congress, the FCC, or the courts—pushes constitutional limits and shows no signs of slowing down.

Notes

1. *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012).
 2. See Patrick Lunsford, “Why Are TCPA Cases Against ARM Firms Rising as FDCPA Cases Fall?,” *InsideARM.com* (Dec. 6, 2012), <http://www.insidearm.com/daily/collection-laws-regulations/collection-laws-and-regulations/why-are-tcpa-cases-against-arm-firms-rising-as-fdcpa-cases-fall/> (citing data provided by research firm WebRecon, LLC).
 3. Patrick Lunsford, “TCPA Lawsuits Really Are Growing Compared to FDCPA Claims,” *InsideARM.com* (Oct. 22, 2013), <http://www.insidearm.com/daily/debt-buying-topics/debt-buying/tcpa-lawsuits-really-are-growing-compared-to-fdcpa-claims/>.
 4. Stephanie Levy, “Debt Collection Complaints and Lawsuits Fall Slightly in May 2014,” *InsideARM.com* (July 17, 2014), <http://www.insidearm.com/daily/debt-collection-complaints-and-lawsuits-fall-slightly-in-may-2014/>.
 5. Monica Desai et al., “A TCPA for the 21st Century: Why TCPA Lawsuits Are on the Rise and What the FCC Should Do About It,” 8 No. 1 *Int’l J. Mobile Mktg.*, 75, 75–76 (2013).
 6. *Ramirez v. Bank of Am., N.A.*, No. 3:11-cv-02008-LAB-KSC (S.D. Cal. filed Aug. 31, 2011); *Rose v. Bank of Am. Corp.*, No. 5:11-cv-02390-EJD (N.D. Cal. filed May 16, 2011); *Bradshaw v. Bank of Am. Corp.*, No. 3:13-cv-00431-LAB-WMC (S.D. Cal. filed Feb. 22, 2013).
 7. *In re Capital One Tel. Consumer Prot. Act Litigation*, No. 1:12-cv-10064 (N.D. Ill. filed as consol. action on Feb. 28, 2013).
 8. *Emanuel v. L.A. Lakers, Inc.*, No. CV-12-09936-GW (SHx) (C.D. Cal. filed Nov. 20, 2012).
 9. *Friedman v. LAC Basketball Club, Inc.*, No. CV-13-00818 (C.D. Cal. filed Feb. 6, 2013).
 10. *Kolinek v. Walgreen Co.*, No. 13 C 4806, 2014 U.S. Dist. LEXIS 91554 (N.D. Ill. July 7, 2014).
 11. See *Cargo Airline Ass’n*, 29 FCC Rcd. 3432 (2014) (decl. ruling).
 12. 47 U.S.C. § 227(b)(1)(C) (2006).
 13. *Id.* § 227(b)(1)(A).
 14. *Id.* § 227(a)(1).
 15. See 47 C.F.R. § 64.1200 *et seq.* (2013).
 16. Michael O’Rielly, FCC Commissioner, “TCPA: It is Time to Provide Clarity,” FCC (March 25, 2014), <http://www.fcc.gov/blog/tcpa-it-time-provide-clarity>.
 17. S. Rep. No. 102-178, at 2 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1969.
 18. H.R. Rep. No. 102-317, at 1 (1991).
 19. Tel. Consumer Prot. Act of 1991, Pub. L. No. 102-243 § 2, 105 Stat. 2394, 2394.
 20. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).
 21. See 47 U.S.C. § 227(a)(1); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009) (“a system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it”).
 22. See Petition of Comm’n Innovators for Decl. Ruling Regarding Non-Telemktg. Use of Predictive Dialers at 1, Rules and Regs. Implementing the Tel. Consumer Prot. Act of 1991, No. 02-278 (F.C.C. June 7, 2012); Petition of Prof’l Ass’n for Customer Engagement for Expedited Declaratory Ruling and/or Expedited Rulemaking at 1, Rules and Regs. Implementing the Tel. Consumer Prot. Act of 1991, No. 02-278 (F.C.C. October 18, 2013).
 23. Mobile Technology Fact Sheet, Pew Research Center, <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/> (last visited Aug. 14, 2014).
 24. According to data released by the Centers for Disease Control, from 2003 to mid-2012 the percentage of American adults using their cell phone as their only household telephone increased from under five percent to over 39 percent, and even in households with both wireless and landlines, over 33 percent received all or almost all calls on their wireless phone. Stephen J. Blumberg & Julian v. Luke, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July–December 2013*, Centers for Disease Control and Prevention, National Center for Health Statistics (July 2014), <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201407.pdf>.
 25. Rules and Regs. Implementing the Tel. Consumer Prot. Act of 1991, 7 FCC Rcd. 8752, 8769 (1992) (report and order).
 26. *E.g.*, Rules and Regs. Implementing the Tel. Consumer Prot. Act of 1991, 23 FCC Rcd. 559, 564 (2008) (decl. ruling on request of ACA Int’l).
 27. *GroupMe, Inc.*, 29 FCC Rcd. 3442, 3444 (2014) (decl. ruling).
 28. *Pinkard v. Wal-Mart Stores, Inc.*, No. 3:12-cv-02902-CLS, 2012 U.S. Dist. LEXIS 160938, at *14 (N.D. Ala. Nov. 9, 2012).
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29. *See* Cellco P'ship v. Plaza Resorts, Inc., No. 12-81238-CIV-MARRA, 2013 U.S. Dist. LEXIS 139337 (S.D. Fla. Sep. 27, 2013).
30. 47 U.S.C. § 227(b)(2)(C) (2006).
31. *Id.* § 227(b)(1)(D).
32. *Id.* § 227(b)(2)(A).
33. 15 U.S.C. §§ 6101-6108 (2012).
34. *See* FTC Telemarketing Sales Rule, 16 C.F.R. § 310.6(b) (2013), which provides: "The following acts or practices are exempt from this Rule: . . . (7) Telephone calls between a telemarketer and any business . . ."
35. Rules and Regs. Implementing the Tel. Consumer Prot. Act of 1991, No. 02-278, FCC 12-21, at 2 (2012) (report and order).