CAN I CALL YOU? OR WILL YOU SUE ME?

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If your business makes systematic telephone calls to consumers, you probably have heard of the Telephone Consumer Protection Act (TCPA), and if you are currently making such consumer calls and do not know about the TCPA, you need to find out about it—and fast! Whereas only 14 TCPA lawsuits were filed in 2007, literally thousands of consumer-initiated TCPA cases were being filed by 2016.[1] Indeed, a review of docket reports from around the country reveals that new TCPA cases continue to be filed almost every day, impacting nearly every industry.[2] And the explosive growth of TCPA litigation does not appear to be slowing.

Companies sued for alleged TCPA violations are often under tremendous pressure to settle because TCPA cases frequently are brought as class actions. With statutory damages ranging from $500 to $1,500 for *each call or text message* that violates the statute, defendant businesses face potentially ruinous exposure in such class action cases. It is thus no surprise that many well-known companies have paid enormous sums to resolve TCPA litigation in advance of trial, including Capital One ($75 million), AT&T ($45 million), Bank of America ($32 million), MetLife ($23 million), Papa John's Pizza ($16 million), and Walgreens ($11 million).[3]

The recent decision in *United States v. Dish Network LLC* likely will only increase the proclivity of businesses to settle large TCPA cases.[4] In that case, the court awarded the staggering sum of $280 million in civil penalties against Dish Network for violations of the TCPA and other statutes.[5] Not surprisingly, Dish Network has appealed the court's decision, which is currently pending in the U.S. Court of Appeals for the Seventh Circuit.[6] But even if the award is overturned, the prospect of such a colossal monetary payout should give heartburn to any business making calls to consumers or defending a large TCPA case.

What is the TCPA?

The TCPA was enacted by Congress on Dec. 20, 1991, "to address a growing number of telemarketing calls and certain telemarketing practices thought to be an invasion of consumer privacy and a risk to public safety."[7] In creating the TCPA, Congress sought to protect both consumers and businesses from abusive telemarketing calls, while still permitting companies to engage in legitimate telemarketing practices.[8] The TCPA limits calls, text messages, and unsolicited advertisements sent by automated dialing systems, artificial or prerecorded voice messages, and fax machines.[9] Absent an emergency or prior express consent from the called party, the TCPA prohibits callers from using autodialers or prerecorded messages (sometimes referred to as "robocalls) to call emergency lines, guests, or patients of a hospital or health care facility, wireless telephone numbers, or more than two telephone lines of a multi-business line.[10] Additionally, the TCPA bars calls to any residential line using an artificial or prerecorded voice without receiving consent from the called party, and prohibits the use of fax machines for sending unsolicited advertisements.[11]

Not all calls or fax transmissions to consumers fall within the scope of the TCPA. For instance, emergency calls, noncommercial calls, and commercial calls that do not constitute telephone solicitation or "telemarketing" calls are permitted under the TCPA.[12] Indeed, non-telemarketing calls can even be made to residences using an artificial or prerecorded voice.[13] If the sender has an established business relationship with the consumer, or the consumer has provided express consent to receive faxes, a sender is permitted to send unsolicited advertisements.[14] And if customers are not charged for the calls, the TCPA also does not prohibit calls made to wireless customers by their wireless carriers.[15]

Consumers play an important role in enforcement of the TCPA. In enacting the TCPA, Congress provided consumers with private causes of action against businesses that violate the statute. For instance, 47 U.S.C. § 227(b)(3)(A) permits consumers to seek an injunction against a company that violates § 227(b) of the TCPA or Federal Communications Commission (FCC) regulations.[16] Additionally, consumers can sue a business to recover actual monetary damages, or if greater than any actual monetary loss, up to $500 for each call or text in violation of the statute.[17] Further, consumers can seek both damages and injunctive relief for TCPA violations.[18] And if a company "intentionally" violates the TCPA, a court can award up to three times the amount of damages awarded to the consumer (e.g., up to $1,500 if the statutory amount of $500 is awarded) for each statutory violation.[19]

The FCC's 2015 Order

On July 10, 2015, in an attempt to address several important TCPA topics, the FCC issued what proved to be a fairly controversial Declaratory Ruling and Order (2015 Order).[20] To prevail on a TCPA claim, a consumer must establish, among other things, that the caller used an

"automated telephone dialing system" (ATDS) or played an artificial or prerecorded voice during the relevant calls.[21] Thus, whether a caller's telephone system constitutes an ATDS is often a critical and hotly contested issue in TCPA litigation. Because substantial uncertainty exists regarding whether various types of telephone systems constitute an ATDS for purposes of the act, the FCC sought to add some clarity to the definition of ATDS in its 2015 Order.

Essentially, an ATDS is a telephone system that has the "capacity" to make automatic calls.[22] Prior to the 2015 Order, it was generally accepted that telephone systems actually possessing the foregoing capacity constituted an ATDS. However, the 2015 Order expanded the definition of "capacity," ruling that a system that is not presently being used as an ATDS nevertheless constitutes an ATDS for TCPA purposes if the system has the *potential* ability to store or produce telephone numbers, using a random or sequential number generator, and to call such numbers.[23] In other words, according to the FCC, the characterization of a system is not limited to its current configuration, but also takes into account its potential functionalities.[24]

Significantly, the FCC did not attempt to definitively identify in its 2015 Order all types of telephone systems that constitute ATDS systems. Indeed, the 2015 Order expressly stated that the FCC does not "address the exact … contours of the [ATDS] definition or seek to determine comprehensively each type of equipment that falls within that definition that would be administrable industrywide."[25] Thus, whether a particular system constitutes an ATDS "is specific to each individual piece of equipment, based on how the equipment functions and depends on human intervention, and is therefore a case-by-case determination."[26]

Another key TCPA term addressed in the 2015 Order is a so-called "called party." Pursuant to the TCPA, certain calls that otherwise would be improper are permissible if made with "the prior express consent of the *called party*."[27] Because consent to be called must come from the "called party," whether proper consent for a call exists turns on who the called party is for purposes of a challenged call. But whether a person constitutes a called party for TCPA purposes is not as clear as one might hope.

The criteria for a called party has been particularly troublesome in situations where a business has received prior permission to call a cell phone number, but the number is later reassigned without the caller's knowledge to another consumer who has not given permission for calls to that number.[28] Because the caller had permission to call the number from the number's former holder, the caller believes the call is permissible. But because the number has been reassigned, the person actually receiving the call, unbeknownst to the caller, did not actually grant permission for the call. Is the called party the "intended recipient" of the call (i.e., the former subscriber to the number who gave permission to call) or the successor subscriber to the number who actually received, but did not give consent for, the call?

Expressly addressing this issue in the 2015 Order, the FCC concluded that the term "called party" should be defined as "the subscriber, i.e., the consumer assigned the telephone number dialed and billed for the call, or the non-subscriber customary user of a telephone number included in a family or business calling plan."[29] In settling on this definition, the FCC rejected suggestions by several commentators to construe a called party as the "intended recipient" of the call.[30] The FCC stated that "calls to reassigned wireless numbers violate the TCPA when a previous subscriber, not the current subscriber or customary user, provided the prior express consent on which the call is based."[31]

However, recognizing the draconian nature of its new called party definition, the FCC also created a very limited safe harbor for "callers who make calls without knowledge of reassignment and with a reasonable basis to believe they have valid consent to make the call."[32] In the FCC's view, such callers "should be able to initiate *one call* after reassignment as an additional opportunity to gain actual or constructive knowledge of the reassignment and cease future calls to the new subscriber. If this one additional call does not yield actual knowledge of reassignment, we deem the caller to have constructive knowledge of such."[33]

The 2018 ACA International Decision

Shortly after the FCC issued the 2015 Order, nine companies filed petitions with the U.S. Court of Appeals for the District of Columbia to seek review of the 2015 Order.[34] These petitions were later consolidated into a single case: *ACA International. v. Federal Communications Commission.*[35] The petitioners in *ACA* challenged four aspects of the 2015 Order: "(i) which sorts of automated dialing equipment are subject to the TCPA's restrictions on unconsented calls; (ii) when a caller obtains a party's consent, does a call nonetheless violate the act if, unbeknownst to the caller, the consenting party's wireless number has been reassigned to a different person who has not given consent; (iii) how may a consenting party revoke her consent; and (iv) did the [FCC] too narrowly fashion an exemption from the TCPA's consent requirement for certain health care-related calls."[36]

Nearly 17 months after oral argument, the D.C. Circuit issued its long-anticipated opinion in *ACA* on March 16, 2018.[37] Suffice it to say that the court's decision was a mixed bag for the parties. Persuaded by petitioners' arguments, the court set aside the FCC's "effort to clarify the types of calling equipment that fall within the TCPA's restrictions" and "vacated the agency's approach to calls made to a phone number previously assigned to a person who had given consent but since reassigned to another (nonconsenting) person."[38] However, the court upheld the FCC's approach to revocation of consent and sustained the agency's exemption for time-sensitive health care calls.[39]

In rejecting the FCC's approach to ATDS identification, the D.C. Circuit was particularly troubled by the FCC's broad interpretation of "capacity."[40] The FCC had expressly rejected arguments that a device's capacity must be measured solely by its present capacity without any modifications and determined that capacity includes a device's potential functionalities or future possibilities, and not just its present ability.[41] This was a problem in the D.C. Circuit's view because the FCC's expansive interpretation of capacity effectively rendered every smartphone an ATDS.[42] Unwilling to subject everyday smartphone users to TCPA liability, the D.C. Circuit determined that "it is untenable to construe the term 'capacity' … in a manner that brings within the definition's fold the most ubiquitous type of phone equipment known, used countless times each day for routine communications by the vast majority of people in the country. It 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."[43] In short, the D.C. Circuit concluded that the FCC's interpretation of "capacity" was unreasonable and impermissible.[44]

In setting aside the FCC's rules regarding calls made to reassigned telephone numbers, the circuit court first determined that the one-call post-assignment safe harbor provided by the 2015 Order was arbitrary and capricious.[45] The FCC had premised its one-call safe harbor on concepts of reasonable reliance—a caller with consent to call a number without knowledge that the number had been reassigned could reasonably rely on the prior consent to make one call to the number after reassignment.[46] But even the FCC conceded that a caller would not necessarily learn of a reassignment through just one call because, for instance, the call might go unanswered.[47] In striking down the one-call safe harbor, the D.C. Circuit concluded that the FCC had given "no explanation of why reasonable-reliance considerations would support limiting the safe harbor to just one call or message," notwithstanding the FCC's reasonable reliance rationale for creating the safe harbor in the first place.[48] In other words, why does a caller's reasonable reliance end after making only one call if that call does not disclose to the caller that the number had been reassigned? As the court succinctly stated: "No cognizable conception of 'reasonable reliance' supports the [FCC's] blanket, one-call-only allowance."[49]

And because the FCC also had expressed that its intent was to avoid strict liability for a caller who reasonably relied on prior express consent in calling a reassigned number, the D.C. Circuit further set aside the 2015 Order's overall treatment of reassigned numbers.[50] The D.C. Circuit reasoned that "when we invalidate a specific aspect of an agency's action, we leave related components of the agency's action standing only if 'we can say without any substantial doubt that the agency would have adopted the severed portion on its own.'"[51] Because the D.C. Circuit determined that it could not say with assurance that the FCC would "have embraced the 'severe' implications of a pure, strict-liability regime even in the absence of any safe harbor," the court set aside the FCC's treatment of reassigned numbers as a whole.[52] Thus, although the D.C. Circuit noted that the FCC had permissibly determined that the "called party" in a reassignment scenario is the current subscriber to the number and not the intended recipient of the call, the effect of the *ACA* decision is to set aside the FCC's ruling on that issue as well.[53]

However, all was not lost for the FCC in the *ACA* decision. The D.C. Circuit upheld the commission's ruling regarding consumer revocations of consent to call. After recognizing that the TCPA does not elaborate on the processes by which consumers can validly revoke consent, the circuit court approved the FCC's determination that "a called party may revoke consent at any time and through any reasonable means"—orally or in writing—"that clearly expresses a desire not to receive further messages."[54] The court further noted that, in issuing the 2015 Order, the FCC explicitly denied a request that callers be permitted to prescribe unilaterally the exclusive means for consumers to revoke their consent.[55] Thus, the 2015 Order bars businesses from unilaterally imposing on consumers specific mechanisms for consent revocation.

Significantly, the *ACA* decision left the door open for companies and consumers to contractually agree on procedures for revoking consents to call. In the *ACA* case, the FCC conceded that the 2015 Order did not address whether contracting parties can select a particular revocation procedure by mutual agreement, and the court concluded that "nothing in the [2015 Order] thus should be understood to speak to parties' ability to agree upon revocation procedures."[56] Although presently unclear how far businesses can go with such contractual agreements, some opportunities appear to exist under the 2015 Order and the *ACA* decision for companies to control how consent revocations can be effectuated by consumers through inclusion of revocation provisions in their consumer contracts.

Additionally, it is unclear what the rules are regarding calls made to reassigned telephone numbers—without the one-call safe harbor following the ACA decision, are callers going to be strictly liable for every call made to a reassigned number unless and until a sustainable safe harbor is created in the future?

Finally, the D.C. Circuit approved the FCC's decision to exempt certain health care-related calls from the TCPA's prior-consent requirements.[57] Under the 2015 Order, calls for which an exigency exists and that have a health care treatment purpose, are exempt from the prior-consent requirements of the TCPA.[58] However, this exemption does not cover calls "that include telemarketing, solicitation, or advertising content, or which include accounting, billing, debt-collection, or other financial content."[59]

Although the goal of the 2015 Order was to clarify various unsettled TCPA issues, many questions remain following the *ACA* decision. For instance, uncertainty still exists regarding what types of telephone equipment constitute ATDS systems under the TCPA. Additionally, it is unclear what the rules are regarding calls made to reassigned telephone numbers—without the one-call safe harbor following the *ACA* decision, are callers going to be strictly liable for every call made to a reassigned number unless and until a sustainable safe harbor is created in the future? The answers to such questions, and many others, remain to be decided through future FTC action and judicial decisions.

Other Recent Developments in TCPA Litigation

As one would expect given the exponential growth of TCPA litigation, new decisions are issued regularly that seek to clarify key TCPA issues or decide novel arguments. A few other recent developments in TCPA case law are discussed below.

"Human Touch" Matters

TCPA decisions regarding whether a company's telephone system is an ATDS often turn on the degree of human intervention involved in placing calls to consumers.[60] For instance, an opinion issued shortly after the *ACA* decision, *Marshall v. The CBE Group Inc.*,[61] emphasized the importance of human intervention in determining whether a telephone system constitutes an ATDS. In *Marshall*, the court reasoned that even if the portion of the *ACA* decision regarding ATDS systems was not binding on the court, the subject telephone system was not an ATDS because of the degree of human intervention required for making calls.[62] Citing several other recent decisions that expressly rejected claims similar to those made by the consumer,[63]

the court concluded that the undisputed human intervention element that existed with the subject system "weighs in favor of a finding that the [system] is not an ATDS."[64]

Unfortunately, no bright-line test yet exists for determining whether a particular telephone system constitutes an ATDS. Absent definitive guidance, this determination must be made on a case-by-case basis. But cases like *Marshall* demonstrate that a key factor in determining whether a telephone system amounts to an ATDS is the degree that "human touch" is involved in making consumer calls. The more human intervention required to place a call, and the less "automation" involved, the more likely it is that a court will conclude a particular system is not an ATDS for TCPA purposes.

When Can I Call You?

As discussed above, a key issue in TCPA litigation involves whether *consent* was given to be called. The level of consent required to remove a call from the grips of the TCPA can turn on the character of the call.[65] For instance, texts or calls that include advertisements or constitute telemarketing can be sent with the recipients' "prior express *written* consent."[66] In contrast, texts or calls that do not include advertisements or constitute telemarketing require only "prior express consent."[67] Because the TCPA requires consent before certain types of calls can be made to consumers, whether a consumer validly *revoked* a prior consent to be called before calls were made to the consumer frequently becomes an issue in TCPA litigation.

Perhaps following the lead of the 2015 Order's provisions regarding consent revocation (which have now been upheld by the *ACA* decision), courts are continuing to broaden the ability of consumers to revoke prior consents to be called. Indeed, a recent decision by the U.S. Court of Appeals for the Eleventh Circuit has the potential to create administrative nightmares for businesses calling consumers. In *Schweitzer v. Comenity Bank*, the court considered whether a consumer could *partially* revoke prior consent to be called via an ATDS.[68] After first concluding that "the TCPA allows a consumer to provide limited, i.e., restricted, consent for the receipt of automated calls," the court ruled that "it follows that unlimited consent, once given, can also be *partially* revoked as to future automated calls under the TCPA."[69]

Obviously, the *Schweitzer* decision has significant potential impacts for businesses making telephone calls to consumers. Under *Schweitzer*, a consumer can provide *partial* consent to be called and can *partially* revoke a previous unlimited consent to be called. Thus, a consumer presumably can limit a company to calling the consumer only at certain times, only on certain days, etc. Unless a company has effective policies and procedures in place to handle such selective and limited calling consent, substantial risk exists that a consumer's stated consent limitations could fall through the cracks, resulting in improper calls to the consumer and increased risk to the caller business of inadvertent TCPA violations.

Fortunately, the *ACA* decision might provide some comfort to businesses making calls to consumers. After acknowledging fears that the absence of standardized revocation procedures could require businesses to take "exorbitant precautions" to avoid TCPA liability, the D.C. Circuit noted that the 2015 Order "absolves callers of any responsibility to adopt systems that would entail 'undue burdens' or would be 'overly burdensome to implement.'"[70] In short, although companies cannot dictate how a consumer can revoke prior consent to be called, the 2015 Order, as interpreted by the *ACA* decision, apparently does not require businesses to invoke unduly burdensome procedures to ensure that consumer consent revocations do not fall through the cracks.

Obviously, the *Schweitzer* decision has significant potential impacts for businesses making telephone calls to consumers. Under *Schweitzer*, a consumer can provide partial consent to be called and can partially revoke a previous unlimited consent to be called.

Am I Liable if a Third Party Made the Call for Me?

As one would expect, a business incurs direct liability under the TCPA if the business itself initiates telephone calls in contravention of the TCPA.[71] A company "initiates" a telephone call when "it takes the steps necessary to physically place a telephone call," but a call that is placed by a third-party generally is not deemed to be initiated by the company.[72] Significantly, the FCC expressly rejected in the past a proposal to treat businesses as initiators of calls for TCPA purposes where the calls were made on behalf of those businesses by third parties.[73] A business thus is generally not *directly* liable under the TCPA for calls made by third parties hired to make telemarketing or other calls on behalf of the business.

Notwithstanding the foregoing, common law agency principles have been applied to impose *vicarious* or "indirect" liability on businesses for the actions of third-party agents who violate the TCPA.[74] In a recent decision by the U.S. Court of Appeals for the Ninth Circuit, *Jones v. Royal Administration Services Inc.*, a consumer sought to hold a company vicariously liable for calls made by telemarketers hired by another company that also was sued in the case.[75] After noting that a company possesses vicarious liability for the actions of telemarketers if the telemarketers were acting as agents (versus independent contractors) of the company, the Ninth Circuit applied a 10-factor "agency" test to conclude that the telemarketers and the company who hired them were independent contractors and not agents.[76] Although no vicarious liability existed under the specific facts of *Jones*, vicarious liability could have been imposed under the court's reasoning if the facts had established the existence of an agency relationship between the company and the telemarketers.

Conversely, other cases suggest that the existence of an agency relationship between a business and a third party might not be enough to impose vicarious liability on the business for third-party calls made in violation of the TCPA. For example, in *Keating v. Peterson's Nelnet LLC*, the U.S. Court of Appeals for the Sixth Circuit concluded that a business was not vicariously liable under the TCPA for a third party's unauthorized texting of advertisements to consumers.[77] The court rejected the consumer's effort to hold the company liable under an agency theory because the contract between the company and its subcontractor clearly provided that the

marketer was an "independent contractor" and the subcontractor lacked the authority to make or accept any offers or representations on behalf of the company.[78] The court further reasoned that, even if the third party was the company's agent, there was no evidence that the consumer who had received the unauthorized text messages reasonably believed that the third party possessed the apparent authority to send the texts as required to hold the company liable for TCPA violations under an apparent agency theory.[79]

In sum, whereas most courts accept that common law agency principles can be applied to impose vicarious liability on businesses for improper calls made by agents of the businesses, there is still some authority that the existence of an agency relationship between a company and the third party making the calls is not enough to impose vicarious liability under the TCPA.

Common Litigation Strategies

A variety of different strategies are commonly employed in response to consumer claims under the TCPA.

Challenge the Standing of the Consumer to Bring the Case

Companies sued for TCPA claims frequently seek dismissal of the claims by arguing that the plaintiff consumers cannot meet their burden of establishing jurisdictional standing to bring their claims.[80] Article III of the U.S. Constitution limits the jurisdiction of federal courts to actual cases or controversies.[81] To establish Article III standing, a consumer must, among other things, demonstrate an injury-in-fact,[82] which requires a showing that the consumer suffered an invasion of a legally protected interest that is concrete and particularized, as well as actual or imminent, versus conjectural or hypothetical.[83] A concrete injury must actually exist, although it can be intangible,[84] as discussed below, and a particularized injury must affect the plaintiff in a "personal and individual way."[85]

The Supreme Court recently addressed jurisdictional standing in the context of consumer protection litigation in *Spokeo v. Robbins*.[86] Although *Spokeo* was not a TCPA case (having arisen under the federal Fair Credit Reporting Act (FCRA)), it involved a standing question that many businesses ultimately hoped would curb the ability of consumers to bring TCPA claims. In *Spokeo,* the Supreme Court considered whether mere procedural statutory violations, without accompanying actual injury, were sufficient to establish standing for a class action lawsuit.[87] If more than a bare violation of a federal statute was required to invoke the jurisdiction of the federal courts, litigation under the TCPA and other similar statutes potentially would have been dealt a major blow. Much to the disappointment of the business community, the Supreme Court essentially "punted" on the standing issue. Although noting that a consumer cannot establish standing by alleging a bare procedural violation, and that Article III requires a concrete injury even in the context of a statutory violation, the Supreme Court held that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute an injury in fact."[88] Thus, although a concrete injury must be a real injury that actually exists, it does not necessarily have to be a tangible injury.[89]

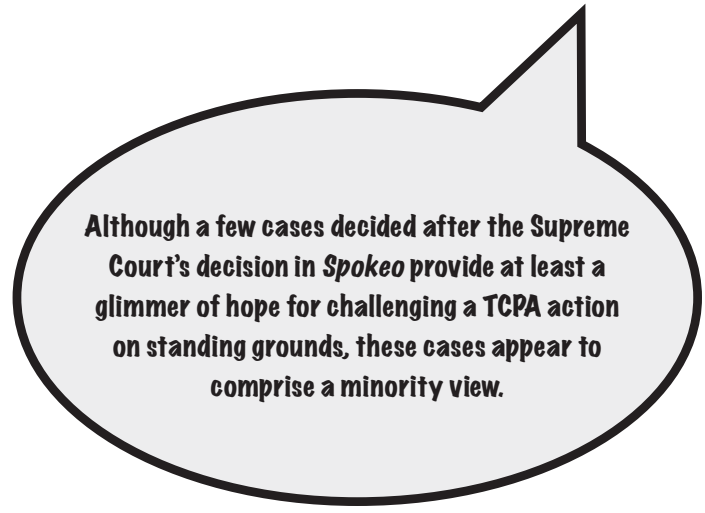
Ultimately, the Supreme Court avoided ruling on the sufficiency of the alleged injury in the *Spokeo* case, holding that the circuit court had not properly analyzed the standing issue and remanding the case for further analysis by the circuit court.[90] On remand, the Ninth Circuit considered whether the alleged violation of a consumer's rights under the FCRA constituted a harm sufficiently concrete to support Article III standing.[91] Although recognizing that a plaintiff does not automatically satisfy the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize a lawsuit to vindicate that right, the Ninth Circuit concluded that the plaintiff had alleged a concrete injury for Article III standing purposes.[92]

Following the Supreme Court's *Spokeo* decision, another circuit court decision reached a consistent result in a TCPA setting. In *Van Patten v. Vertical Fitness Group*, the plaintiff alleged TCPA claims arising out of purported unauthorized telemarketing text messages.[93] The court held that the plaintiff had standing to sue the company under the TCPA because the telemarketing texts at issue presented the precise harm and infringed upon the same privacy interests that Congress sought to protect in enacting the TCPA.[94] Concluding that "unsolicited telemarketing phone calls or text messages, by their nature, invade the privacy and disturb the solitude of their recipients," the court held that "a plaintiff alleging a violation under the TCPA 'need not allege any additional harm beyond the one Congress has identified.'"[95] In other words, because "a violation of the TCPA is a concrete, de facto injury," the plaintiff's allegations of such a statutory violation, without more, were deemed sufficient to establish a concrete injury-in-fact for standing purposes.[96]

Although a few cases decided after the Supreme Court's decision in *Spokeo* provide at least a glimmer of hope for challenging a TCPA action on standing grounds, these cases appear to comprise a minority view. For instance, in *Kostmayer Construction LLC v. Port Pipe & Tube Inc.*, the court concluded that a plaintiff's general references to damages contemplated by Congress, without more, were insufficient to establish standing.[97] In *Smith v. Aitima Medical Equipment Inc.*, the court held that a plaintiff's allegations, although more specific that the vague allegations in *Kostmayer*, were still insufficient to establish the requisite standing because the alleged harm was too "*de minimus*."[98] But the persuasiveness of these cases is probably limited in light of circuit court decisions in cases like *Van Patten* and the *Spokeo* ruling on remand.

Try to Pick Off the Named Plaintiffs in Class Actions

Some companies have sought to render class action TCPA lawsuits moot by trying to eliminate or "pick-off" the named plaintiffs/consumers. If there are no named plaintiffs, a class action cannot proceed. However, the viability of this strategy remains unclear under current case law.



The Supreme Court recently addressed one common "pick-off" strategy in *Campbell-Ewald Co. v. Gomez*,[99] where a defendant made an offer of judgment under Federal Rule 68 for the full amount of the named plaintiff's/consumer's individual claim. Even though the plaintiff/consumer rejected the offer, the defendant argued that the case (and thus the class action) was moot because the offer of judgment would have fully resolved the individual claims of the plaintiff/consumer.[100] Although the Supreme Court held that a company's unaccepted offer of judgment generally will not moot a case,[101] the Court left open the possibility that an actual deposit of the full amount of the relief requested by the named plaintiff/consumer in an account payable to the plaintiff/consumer might produce a different result.[102]

Seizing upon the foregoing perceived opening in *Campbell-Ewald*, some companies have attempted to obtain dismissal of TCPA class action lawsuits by depositing with the court the full of amount of the named plaintiffs'/consumers' claims, and then seeking dismissal on mootness grounds. To date, such "pick-off" efforts have met with mixed results. Whereas a few courts have concluded that a defendant's deposit of the full amount of the relevant claim will nullify the lawsuit, other courts have rejected efforts by businesses to moot class actions in this manner.[103]

Conclusion

Because the TCPA creates significant potential liability exposure for companies that regularly make telephone calls to consumers, such companies must remain vigilant in their compliance efforts to minimize the risk of future TCPA litigation. Unfortunately, because many unanswered questions remain regarding important TCPA issues, navigating through the mine-laden TCPA waters remains treacherous at best. If your business is regularly making consumer calls and the thought of future TCPA litigation is not keeping you up at night, it probably should be. ⊙

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Endnotes

[1]*TCPA Cracks 4K, Smashes Record with 2 Months Still to Go, 5K in Sight?*, WebRecon LLC, https://webrecon.com/tcpa-cracks-4000-smashes-record-with-2-months-still-to-go-october-2016-stats-from-webrecon (last visited May 29, 2018).

[2]*See, e.g., Roberts v. Paypal Inc.*, 621 F. App'x 478 (9th Cir. 2015); *Lathrop v. Uber Tech. Inc.*, No. 14-CV-05678-JST, 2016 WL 97511 (N.D. Cal. Jan. 8, 2016); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483 (N.D. Ill. 2015); *Sherman v. Yahoo! Inc.*, 997 F. Supp. 2d 1129 (S.D. Cal. 2014). Even professional sports teams and Donald Trump's presidential campaign have been sued for alleged TCPA violations. *See, e.g.*, *Emanuel v. Los Angeles Lakers Inc.*, No. CV 12-9936-GW(SHx), 2013 WL 1719035 (C.D. Cal. Apr. 18, 2013); *Roberts v. Donald J. Trump For President Inc.*, No. 1:16-cv-04676, (N.D. Ill. 2016); *Thorne v. Donald J. Trump For President Inc.*, No. 1:16-cv-04603 (N.D. Ill. 2016).

[3]Adonis Hoffman, *Sorry, Wrong Number, Now Pay Up*, Wall Street J. (June 15, 2015, 7:06 PM), https://www.wsj.com/articles/sorry-wrong-number-now-pay-up-1434409610.

[4]*United States v. Dish Network LLC*, 256 F. Supp. 3d 810 (C.D. Ill. June 5, 2017).

[5]*Id.* at 991-92.

[6]U.S. Court of Appeals for the Seventh Circuit, Case No. 17-3111.

[7]18 FCC Rcd. 14018 ¶ 4 (2003); Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394 (codified as 47 U.S.C. § 227); *see also Bridgeview Health Care Ctr. Ltd. v. Clark*, 816 F.3d 935, 941 (7th Cir. 2016).

[8]Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394 (codified as 47 U.S.C. § 227).

[9]*See* 47 U.S.C. § 227(b) (2018).

[10]*See* 47 U.S.C. §§ 227(b)(1)(A)(i)-(iii); 47 C.F.R. §§ 64.1200(a)(1)(i)-(iii) (2018).

[11]*See* 47 U.S.C. § 227(b)(1)(B) & (C); 47 C.F.R. § 64.1200(a)(3)-(4).

[12]*See* 47 U.S.C. § 227(b)(2)(B). With certain exceptions, a "telemarketing" or telephone solicitation call under the TCPA generally is a call that is made "for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services." 47 U.S.C. § 227(a)(4).

[13]*See* 47 U.S.C. § 227(b)(2)(B); 47 C.F.R. §§ 64.1200(a)(3)(i)-(iii).

[14]*See* 47 U.S.C. §§ 227(b)(1)(C)(i)-(ii); 47 C.F.R. §§ 64.1200(a)(4)(i)-(ii).

[15]*See* 47 U.S.C. § 227(b)(1)(A)(iii).

[16]The FCC is the federal agency authorized to issue regulations under the TCPA. *See* 47 U.S.C. § 227(b)(2).

[17]*See* 47 U.S.C. § 227(b)(3)(B).

[18]*See* 47 U.S.C. § 227(b)(3)(C).

[19]*Id.*

[20]In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 F.C.C. Rcd. 7961 (2015) [hereinafter "2015 Order"].

[21]*See, e.g., Mejia v. Time Warner Cable Inc.*, No. 15-CV-6445, No. 15-CV-6518, 2017 WL 3278926, at *8 (S.D.N.Y. Aug. 8, 2017); *see also* 47 U.S.C. § 227(b)(1) (It shall be unlawful … to make any call … using any automatic telephone dialing system or an artificial or prerecorded voice.…").

[22]As defined by the TCPA, an ATDS is "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." 47 U.S.C. § 227(a)(1) (emphasis added).

[23]*See* 2015 Order at ¶ 10.

[24]*See id.* ¶ 16; *see also Declue v. United Consumer Fin. Servs. Co.*, No. 16CV2833 JM (JMA), 2017 WL 4541668, at *1 (S.D. Cal. Oct. 11, 2017).

[25]2015 Order at ¶ 17.

[26]*Id*.
[27]*Id.* at ¶ 73 (emphasis added).
[28]*Id.* at ¶¶ 83-84.
[29]*Id.* at ¶ 73.
[30]2015 Order at ¶ 74.
[31]*Id.* at ¶ 73.
[32]*Id.* at ¶ 72.
[33]*Id.* (emphasis added). The 2015 Order also addressed other significant TCPA issues, including how consumers can revoke a previously given consent to call and permissible health care-related calls, which are discussed further below.
[34]*See Fontes v. Time Warner Cable Inc*., No. CV14-2060-CAS(CWx), 2015 WL 9272790, at *3 (C.D. Cal. Dec. 17, 2015).
[35]*ACA Int'l v. Federal Commc'ns Comm'n*, 885 F.3d 687 (D.C. Cir. 2018).
[36]*ACA Int'l,* 885 F.3d at 691.
[37]*Id.* at 687.
[38]*Id.* at 691.
[39]*Id.*
[40]*Supra* note 22.
[41]*ACA Int'l,* 855 F.3d at 695.
[42]*Id.* at 696. Because software and applications exist that can give smartphones the same characteristics of an ATDS, smartphones possess the *potential* to become an ATDS and thus would be treated as an ATDS under the FCC's expansive ATDS definition. *Id.*
[43]*Id.* at 698.
[44]*Id.* at 700. The D.C. Circuit further concluded that the FCC's efforts to clarify what constitutes a ATDS was inadequate because the FCC failed to offer consistent and meaningful guidance regarding whether their equipment is subject to the TCPA's restrictions. In the court's view, "the [FCC's] ruling, in describing the functions a device must perform to qualify as an autodialer, fails to satisfy the requirement of reasoned decision making. The order's lack of clarity about which functions qualify a device as an autodialer compounds the unreasonableness of the [FCC's] expansive understanding of when a device has the 'capacity' to perform the necessary functions." *Id.* at 703. The court also noted that the FCC's ruling "endorsed a broad understanding under which the statute prohibits any calls made from a device with the capacity to function as an autodialer, regardless of whether autodialer features are used to make a call." *Id.* at 704. However, because no petitioner challenged this latter aspect of the 2015 Order, the court did not address the merits of this issue. *Id.*
[45]*Id.* at 704-06.
[46]*Id.* at 707.
[47]*ACA Int'l,* 885 F.3d at 707
[48]*Id.* at 706-07.
[49]*Id.* at 707.
[50]*Id.* at 706-09.
[51]*Id.* (quoting *Am. Petroleum Inst. v. EPA*, 862 F.3d 50, 71 (D.C. Cir. 2017)).
[52]*Id.* at 708-09.
[53]*ACA Int'l,* 885 F.3d. at 706, 708-09.
[54]*Id.* at 709.
[55]*Id.*
[56]*Id.* at 710.
[57]*Id.* at 714.
[58]2015 Order at ¶ 146.
[59]*Id.*
[60]As discussed above, a consumer must prove that the defendant utilized an ATDS or an artificial prerecorded voice to prevail on a TCPA claim. *See supra* note 23*; see also* 47 U.S.C. § 227(b)(1); *Pollack v. Nations Recovery Ctr. Inc.*, No. 2:17-CV-10599, 2017 WL 4682320, at *1 (E.D. Mich. Oct. 18, 2017).
[61]No. 2:16-cv-02406-GMS-NJK, 2018 WL 1567852, at *7 (D. Nev. Mar. 30, 2018).
[62]*Id*.
[63]*See, e.g., Arora v. Transworld Sys. Inc.,* No. 15-CV-4941, 2017 WL 3620742 (N.D. Ill. Aug. 8, 2017); *Pozo v. Stellar Recovery Collection Agency Inc.,* No. 8:15-cv-929-T-AEP, 2016 WL 7851415, at *6 (M.D. Fla. Sept. 2, 2016); *Smith v. Steller Recovery Inc.*, No. 2:15-cv-11717, 2017 WL 955128, at *3 (E.D. Mich. Mar. 13, 2017); *Smith v. Steller Recovery Inc.,* No. 15-cv-11717, 2017 WL 1336075, at *6 (E.D. Mich. Feb. 7, 2017).
[64]*Id*. 65 *See Pedro-Salcedo v. Haagen-Dazs Shoppe Co.*, No. 5:17-CV-03504l-EJD, 2017 WL 4536422, at *2 (N.D. Cal. Oct. 11, 2017).
[66]*Id.*; *see also* 47 C.F.R. § 64.1200(a)(2).
[67]*Pedro-Salcedo*, 2017 WL 4536422, at *2; *see also* 47 C.F.R. § 64.1200(a)(1).
[68]866 F.3d 1273, 1274 (11th Cir. 2017).
[69]*Id.* at 1277.
[70]*ACA*, 885 F.3d at 709.
[71]*See, e.g., Smith v. State Farm Mut. Auto. Ins*., 30 F. Supp. 3d 765, 771 (N.D. Ill. 2014).
[72]*Id.*
[73]*See In re Dish Network LLC*, 28 F.C.C.R. 6574, 6582, 2013 WL 1934349 (F.C.C. 2013).
[74]*See, e.g., Smith*, 30 F. Supp. 3d at 773-74 (nothing contained in the TCPA bars vicarious liability on common law principles of agency). Vicarious liability makes a person indirectly liable for the actions of another person, even though the person deemed vicariously liable did not actually commit the wrongful conduct. *Id.* at 772-75; *see also Collins v. Schweitzer Inc.*, 774 F. Supp. 1253, 1264 (D. Idaho 1991) (effect of vicarious liability is that one can be held liable for the acts of another, even though not the actual wrongdoer).
[75]*Jones v. Royal Admin. Servs. Inc.*, 866 F.3d 1100, 1102-03 (9th Cir. 2017).
[76]*Id.* at 1106 (factors included (1) the control exerted by the employer, (2) whether the one employed is engaged in a distinct occupation, (3) whether the work is normally done under the supervision of the employer, (4) the skill required, (5) whether the employer supplies tools and instrumentalities [and place of work], (6) the length of time employed, (7) whether payment is by time or by the job), (8) whether the work is in the regular business of the employer, (9) the subjective intent of the parties, and (10) whether the employer is or is not in the business).
[77]*Keating v. Peterson's Nelnet LLC*, 615 F. App'x 365 (6th Cir. 2015).
[78]*Id.* at 372.
[79]*Id.* at 373-74.
[80]*Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992).
[81]*Spokeo Inc. v. Robbins,* 136 S. Ct. 1540, 1547 (2016).
[82]*Lujan,* 504 U.S. at 560-61.
[83]*Spokeo,* 136 S. Ct. at 1548.
[84]*Id.*
[85]*Id.*

[86]*Spokeo v. Robbins*, 136 S. Ct. 1540 (2016).
[87]*Id.* at 1549-50.
[88]*Id.* at 1549.
[89]*Id.*
[90]*Id.* at 1550.
[91]*Robins v. Spokeo*, 867 F.3d 1108, 1110 (9th Cir. 2017).
[92]*Id.* at 1112, 1118.
[93]847 F.3d 1037 (9th Cir. 2017).
[94]*Id.*
[95]*Id.* (quoting *Spokeo*, 136 S. Ct. at 1549).
[96]*Id.* at 1043; *see also Montegna v. Ocwen Loan Servicing LLC*, No. 17-CV-00939-AJB-BLM, 2017 WL 4680168, at *7 (S.D. Cal. Oct. 18, 2017); *Quinones v. Ocwen Loan Servicing LLC*, No. 17-03536 DDP-PLAx, 2017 WL 4641083, at *2 (C.D. Cal. Oct. 16, 2017); *Crooks v. Rady Children's Hosp.*, No. 17CV246-WQH-MDD, 2017 WL 4541742, at *5 (S.D. Cal. Oct. 10, 2017).
[97]No. 2:16-CV-01012, 2016 WL 6143075, at *12 (W.D. La. Oct. 19, 2016); *see also Sartin v. EKF Diagnostics Inc.*, No. CV 16-1816, 2016 WL 3598297, at *3 (E.D. La. July 5, 2016).
[98]No. ED 16 CV 339 ABD-TBX, 2016 WL 4618780, at *4 (C.D. Cal. July 29, 2016); *see also Supply Pro Sorbents LLC v. Ringcentral Inc.*, No. C 16-02113 JSW, 2016 WL 5870111, at *3 (N.D. Cal. Oct. 7, 2016).
[99]*See generally Campbell-Ewald Co. v. Gomez,* 136 S. Ct. 663 (2016).
[100]*Id.* at 668.
[101]*Id.* at 670-72.
[102]*Id.* at 672.
[103]*Contrast South Orange Chiropractic Ctr. LLC v. Cayan LLC*, No. 15-13069-PBS, 2016 WL 1441791, at *2 (D. Mass. Apr. 12, 2016); *Leyse v. Lifetime Entm't Servs. LLC*, 171 F. Supp. 3d 153, 154 (S.D.N.Y. 2016), *aff'd*, 679 F. App'x 44 (2d Cir. 2017), *with Brady v. Basic Research LLC*, 312 F.R.D. 304, 306 (E.D.N.Y. 2016); *Bridging Cmtys. Inc. v. Top Flite Fin. Inc.*, 176 F. Supp. 2d 725, 729 (E.D. Mich. 2016); *Fulton Dental LLC v. Bisco Inc.*, 860 F.3d 541, 545 (7th Cir. 2017); *Ung v. Universal Acceptance Corp.*, 198 F. Supp. 3d 1036, 1038 (D. Minn. 2016); *Radha Giesmann, MD P.C. v. American Homepatient Inc.*, No. 4:14CV1538 RLW, 2016 WL 3407815, at *3 (E.D. Mo. June 16, 2016); *Chen v. Allstate Ins.*, 819 F.3d 1136, 1147 (9th Cir. 2016); *Family Med. Pharm. LLC v. Perfumania Holdings Inc.*, No. 15-0563-WS-C, 2016 WL 3676601, at *6 (S.D. Ala. July 5, 2016).