**WHAT EVERY BUSINESS NEEDS TO KNOW ABOUT THE TCPA**

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 A statute originally enacted by Congress in 1991 to mitigate the perceived scourge of unwanted telemarketing calls and to avoid expensive charges to users of cellular telephones has, 25 years later, morphed into a tool for entrepreneurial plaintiffs’ counsel to extract settlements by threatening to saddle businesses both large and small with potentially ruinous liability, either through individual suits or by class actions. The Telephone Consumer Protection Act of 1991 (“TCPA”), 47 U.S.C. § 227, and regulations promulgated by the Federal Communications Commission (“FCC”), the agency tasked with overseeing it, can present a myriad of traps for the unwary business. Successfully navigating those pitfalls is critical, especially since the uncapped liability for TCPA claims is generally not covered by most business insurance policies. Businesses and the lawyers who counsel them must therefore educate themselves about the TCPA and how to avoid the severe consequences that can come with non-compliance.

Businesses need to be keenly aware of the potentially devastating impact that violations of the TCPA can have. The TCPA places strict limits on a company’s ability to use landline or cell phones, SMS text messages, and faxes to engage in direct marketing, advertising and other activities absent a recipient’s prior express consent (though in the case of a faxing, an existing business relationship may permit it if FCC-prescribed opt-out language is included). Notably, the TCPA provides for damages of between $500 and $1,500 for each violation. While this might render individual claims fairly easy to remedy, in recent years plaintiffs’ attorneys have taken advantage of the TCPA’s allowance of private rights of action to pursue class actions, and a large majority of courts have granted certification absent strong evidence that the claims of the putative class are highly individualized. (By contrast, for so-called “spam” emails, the CAN-SPAM Act’s prohibition on private rights of action by recipients has largely precluded similar suits.)[[2]](#footnote-2) Moreover, because the TCPA places no cap on the aggregate damages available and does not limit the ability to pursue claims via class actions, the damages available can be potentially catastrophic. Recent settlements in TCPA cases evidence this fact. For instance, Capital One recently agreed to a settlement of $75.5 million over claims related to autodialed calls to cell phones, and Jiffy Lube agreed to a settlement valued at between $35 and $47 million for a text message promotional claim. While FCC enforcement in this area has been very limited, the potentially massive civil liability such marketing can generate warrants careful consideration. This is particularly true because computer or internet-based services are often used both to collect customer contact lists and to generate and transmit calls, texts and even faxes.

**I. What Is The TCPA And Why Should I Care?**

* Federal statute enacted by Congress 25 years ago
* To protect consumers from unwanted telephone calls and faxes
* Implemented and interpreted by the FCC
* Enforced by the FCC, state Attorneys General, and private litigants
* Cottage industry of class action lawsuits
* Essentially a strict liability statute

Numerous courts have determined that the TCPA does not require intent to impose liability, except when awarding up to treble damages for “willfully or knowingly” violating the act. *See, e.g.*, *Universal Underwriters v. Lou Fuze Auto. Network, Inc.,* 401 F.3d 876, 882 (8th Cir. 2005) (“[I]ntent is not a prerequisite to liability under the [TCPA].”); *Melrose Hotel Co. v. St. Paul Fire & Marine Ins. Co.*, 432 F. Supp. 2d 488, 510 (E.D. Pa. 2006) (“knowledge about the TCPA and … lack of intent to violate the TCPA are irrelevant” to whether defendant intended to cause harm), *aff'd sub nom.* *Subclass 2 v. Melrose Hotel Co.*, 503 F.3d 339 (3d Cir. 2007); *Park Univ. Enters., Inc. v. Am. Cas. Co. of Reading, PA.,* 314 F. Supp.2d 1094, 1103 (D. Kan. 2004) (“The TCPA is essentially a strict liability statute” where liability can be found for erroneous unsolicited faxes).

**A. General Prohibitions of the TCPA**

* Making calls (or sending text messages) to cellular phones using an automated telephone dialing system or an artificial or prerecorded voice without appropriate consent.
* Initiating telephone calls to residential telephone lines using an artificial or prerecorded voice to deliver a message without (i) prior express consent (if for a commercial purpose) or (ii) appropriate disclosure language.
* Sending unsolicited fax advertisements without appropriate consent or opt-out disclosure.
* Making telemarketing calls to residential consumers who list their numbers on the National Do-Not-Call Registry.

**1. Cell phone calls**

 The TCPA generally prohibits calls – including text messages – to cell phones made using any automated telephone dialing system (“ATDS”) or artificial or prerecorded voice. 47 U.S.C. § 227(b)(1)(A). The only exceptions are for calls made for “emergency purposes” or with “prior express consent.” *Id.*

The restrictions governing use of ATDSs and artificial or prerecorded voice calls to cell phones apply not only to telemarketing calls and text messages, but also to most other types of non-emergency calls, including debt collection, promotional, and informational calls. *See* 47 C.F.R. § 64.1200(a)(1), (3); *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 273 (3d Cir. 2013) (“The only exemptions in the TCPA that apply to cellular phones are for emergency calls and calls made with prior express consent.”); *Golan v. Veritas Enter’t, LLC*, 2015 WL 3540573, at \*4-5 (8th Cir. Jun. 8, 2015); *Chesbro v. Best Buy Stores, Inc.*, 705 F.3d 913, 918 (9th Cir. 2012); *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1040 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 2361 (2013); *see also Gager,* 727 F.2d at 265 (TCPA’s prohibition on automated dialing applies to both voice calls and text messages).

Regardless of whether a call to a cell phone is for commercial or non-commercial purposes, oral or written consent (depending on whether the call of for telemarketing) is always required. *Gager*, 727 F.2d at 273; *see also* 47 C.F.R. § 64.1200(a)(2), (3).

**2. Residential landline calls**

Unlike calls to cell phones, telemarketing calls to residential landline telephone numbers can be made using an ATDS without prior consent; however, calls using an artificial or prerecorded voice can be made only with the prior express written consent of the called party. *See* 47 C.F.R. § 64.1200(a)(3). In addition, the FCC recently heightened the level of consent required for these residential calls (from “prior express consent” to “prior express written consent”) and also eliminated the established business relationship (“EBR”) exception. *See Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1118–19 (11th Cir. 2014).

**3. Fax advertisements**

In 2005, Congress amended the TCPA by enacting the Junk Fax Prevention Act (“JFPA”), which codified the EBR exception for advertisements by fax. *See* 47 U.S.C. § 227(b)(1)(C) (amended to make it unlawful for any person “to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless … the unsolicited advertisement is from a sender with an established business relationship with the recipient”). Under the JFPA, a sender of a fax advertisement must provide notice and contact information on the fax explaining how to opt out of future fax transmissions from the sender. 47 U.S.C. § 227(b)(2)(D).

 **B. Unlimited Per-Call Liability**

The most significant feature of the TCPA that makes it so appealing for plaintiffs’ lawyers – and potentially disastrous for businesses – is the fact that the TCPA does not contain any cap on damages. Indeed, the TCPA provides aggrieved private party litigants with the following remedies: (i) injunctive relief; (ii) $500 per violation of the TCPA *or* actual damages (whichever is greater); or (iii) both injunctive relief and damages. *See* 47 U.S.C. § 227(b)(3). Furthermore, the TCPA also vests courts with discretion to treble damage awards if a violation of the TCPA is willful or knowing – *i.e.*, each $500 violation can be increased to $1,500 in the court’s discretion.

Although the TCPA does not provide for recovery of attorneys’ fees or costs, the imposition of statutory damages of at least $500 per violation (with potential trebling) creates the prospect of crippling damage awards. For example, in *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 724 (7th Cir. 2011), the U.S. Court of Appeals for the Seventh Circuit recognized the gravity of certifying a TCPA class in the action given that the defendant purportedly sent 500,000 faxes, which could result in a damage award of between $250 million and $750 million. As Judge Posner observed, “Some statutes, such as the Fair Debt Collection Practices Act and the Truth in Lending Act, cap damages . . . . The Telephone Consumer Protection Act does not.” *Id.*

Further compounding the risk to companies that run afoul of the TCPA, some courts like the Sixth Circuit Court of Appeals haves held that a person may recover statutory damages of $1,500 for a willful or knowing violation of the automated-call requirements under 227(b)(3), *plus* $1,500 for a willful or knowing violation of the do-not-call-list requirements in Section 227(c)(5) – even if both violations occurred in the same telephone call. *Charvat v. NMP, LLC*, 656 F.3d 440, 449 (6th Cir. 2011).

 **C. Notable Recent TCPA Settlements**

 In case a client needs to be convinced that it should take seriously the need to comply with the TCPA and operative regulations, a sampling of only some of the notable TCPA settlements reported over the last few years should be enough to convince even the most reluctant client.

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| --- | --- | --- | --- |
| **Date** | **Amount** | **Company** | **State** |
| 9/2016 | $56 million - $76 million | Caribbean Cruise Line Inc., Berkley Group, Inc. and Vacation Ownership Marketing Tours Inc. | Illinois  |
| 9/2016 | $2.75 million | Navy Federal Credit Union | California  |
| 9/2016 | $10.5 million | Dun & Bradstreet | California  |
| 8/2016 | $30 million | Wells Fargo  | Georgia  |
| 8/2016 | $35 million | SiriusXM | Virginia  |
| 8/2016 | $7 million | State Farm | Illinois  |
| 7/2016 | $20.5 million | Midland Credit Management Inc. | California  |
| 7/2016 | $1.5 million | JPMorgan  | Illinois  |
| 7/2016 | $9 million | American Express | Illinois  |
| 7/2016 | $4.5 million | Citizens Bank | California  |
| 7/2016 | $16.3 million | Wells Fargo | Georgia  |
| 6/2016 | $3.75 million | JPMorgan Chase Bank NA  | Florida  |
| 6/2016 | $8 million | Clark County Collection Service LLC, Dollar Loan Center LLC and DLC Empire LLC (“Payday Lenders”) | Nevada  |
| 4/2016 | $18 million | Portfolio Recovery Associates LLC  | California  |
| 4/2016 | $1 million | Bank of America | Florida  |
| 1/2016 | $7.4 million | Mortgage Investors Corp. | Oregon  |
| 12/2015 | $ 4 million | Verizon | California  |
| 11/2015 | $15 million | PharMerica | Florida  |
| 10/2015 | $8.5 million | Western Union  | Illinois  |
| 10/2015 | $10.2 million | JPMorgan | Illinois  |
| 6/2015 | $75.4 million | Capital One | Illinois |
| 6/2015 | $6.25 million | Anthem Blue Cross Blue Shield | Missouri  |
| 3/2015 | $11 million | Walgreen Co. | Illinois  |
| 2/2015 | $10 million - $15 million | Life Time Fitness | Minnesota  |
| 2/2015 | $6 million | Vivint  | Florida  |
| 12/2014 | $14.5 million | Wells Fargo | California  |
| 12/2014 | $5.4 million | Kaiser Permanente | California  |
| 11/2014 | $8. 5 million | Burger King | Maryland  |
| 11/2014 | $40 million | Interline Brands  | California  |

**II. What Is The Role Of The FCC?**

 **A. Rulemaking**

Congress explicitly set forth the FCC’s role in implementing the overarching aims of the TCPA, and the FCC continually issues declaratory rulings and order interpreting and implementing aspects of the TCPA.

Section 227(b)(2) of the TCPA authorizes and requires the FCC to promulgate implementing regulations: “The Commission shall prescribe regulations to implement the requirements of this subsection.” The FCC is also authorized under the TCPA, “by rule or order, [to] exempt from the [prohibition regarding prerecorded calls] . . . (i) such classes or categories of calls made for commercial purposes as the Commission determines (I) will not adversely affect . . . privacy rights . . . ; and (II) do not include the transmission of any unsolicited advertisement.” Thus, the TCPA both explicitly leaves gaps for the FCC to fill and authorizes and requires the FCC to engage in notice-and-comment rulemaking. *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 268 (3d Cir. 2013) (“Congress authorized [FCC] to implement rules and regulations enforcing the TCPA.”)

Even through its statutory findings, Congress made clear that it envisioned a large role for the FCC in fashioning rules that strike an appropriate balance between protecting consumers’ privacy and permitting legitimate telemarketing:

While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, *the [FCC] should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution*.

TCPA, PL 102–243, December 20, 1991, 105 Stat 2394 § 2(13) (emphasis added); *see also id.* at 105 Stat 2394 § 2(9).

 **B. National Do-Not-Call Registry**

In 2003, the FCC established the National Do-Not-Call Registry (“NDNCR”) in coordination with the Federal Trade Commission. If telephone subscribers place their phone numbers on the NDNCR (either by phone or online at *www.donotcall.gov*), telemarketers may not call them unless either: (i) there is an established business relationship with the consumer; or (ii) the consumer has given express written consent. *See* 47 U.S.C. § 227(c); 47 C.F.R. § 64.1200(c)(2), (f)(14); 16 C.F.R. § 310.4(b)(1)(iii)(B)(i-ii).

The NDNCR’s restrictions apply only to telemarketing calls made by or on behalf of sellers of goods or services, and not to charitable or political fundraising calls. *See* 16 C.F.R. §§ 310.4(b)(1)(iii)(B), 310.6(a); 47 C.F.R. §§ 64.1200(c)(2), 64.1200(f)(9). *See also Mainstream Mktg. Servs., Inc. v. F.T.C.*, 358 F.3d 1228, 1234 (10th Cir. 2004).

Telemarketers must stop making calls to numbers on the NDNCR within 31 days of when a number is added to it. *See* 47 C.F.R. § 64.1200(c)(2)(i)(D). To access the NDNCR, telemarketers must pay an annual fee for each area code to which they will be placing telemarketing calls. The NDNCR provisions of the TCPA include a safe harbor defense if a company can demonstrate both that: (i) the call “is the result of error” and (ii) the company meets certain specific, such as having written compliance procedures, training of personnel, recordkeeping, and using a process to prevent calls in violation of the NDNCR. *See* 47 C.F.R. § 64.1200(c)(2)(i).)

Companies are also required to maintain internal lists of phone numbers of consumers who have asked not to be called. Companies must cease making calls to these numbers within a reasonable timeframe not exceeding 30 days. *See* 47 C.F.R. § 64.1200(d)(3), (5), (6). A seller-specific do-not-call request “terminates an [EBR] for purposes of telemarketing and telephone solicitation even if the consumer continues to do business with the seller.” 47 C.F.R. § 64.1200(f)(5)(i).

**V. What Is An ATDS?**

 Although the inquiry is seemingly simple, what exactly constitutes an ATDS is one of the least clear and most divisive issues under the TCPA.

The TCPA itself defines an automated telephone dialing system 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.” 47 U.S.C. § 227(a)(1).

Since 2003, the FCC has taken an increasingly expansive view, broadly holding that almost any predictive dialer qualifies as an ATDS. *See In re Rules and Regulations Implementing the TCPA*, Report and Order, 18 FCC Rcd. 14014, 14115 (July 3, 2003) at ¶¶ 131-34; *see also In re Rules and Regulations Implementing the TCPA, Declaratory Ruling and Order*, FCC 15-72, Released July 10, 2015, MCP No. 134 (July 24, 2015) ¶¶ 13-24 (clarifying that the question of “capacity” refers to a system's “*potential capacity*,” as opposed to its “present capacity,” and stating that “the present use or present capacity test could render the TCPA’s protections largely meaningless by ensuring that little or no modern dialing equipment would fit the statutory definition of an autodialer”) (emphasis added).

Further, the FCC does not interpret the TCPA to require that an ATDS always have the capacity to use a *random or sequential* number generator. Thus, even where a company uses a pre-existing list or database of phone numbers, such a system will likely constitute an ATDS. *See* *In Re Rules & Regulations Implementing the TCPA*, 18 F.C.C. Rcd. 14014, 14092 (2003) (“to exclude from these restrictions equipment that use predictive dialing software from the definition of ‘automated telephone dialing equipment’ simply because it relies on a given set of numbers [instead of creating and dialing 10-digit telephone numbers arbitrarily] would lead to an unintended result. Calls . . . would be permissible when the dialing equipment is paired with predictive dialing software and a *database of numbers*, but prohibited when the equipment operates independently of such lists and software packages.”) (emphasis added). There has been some pushback by courts on this point, however. *See, e.g.*, *Johnson v. Yahoo!, Inc.*, 2014 WL 7005102, at \*3 (N.D. Ill. Dec. 11, 2014) (“the FCC’s interpretation on this point conflicts with the statutory requirement that an ATDS have the capacity “to store or produce telephone numbers to be called, *using a random or sequential number generator* [.]” 47 U.S.C. § 227(a)(1)) (emphasis in original).

Given that the use of an ATDS is an element of a TCPA claim, “it is not sufficient [for plaintiffs] to recite that fact verbatim without other supporting details.” *Izsak v. Draftkings, Inc.*, 2016 WL 3227299, at \*3 (N.D. Ill. June 13, 2016) (internal quotation omitted). Rather, a plaintiff must plead additional, independent facts that “suggest beyond the speculative level that Defendant actually used an ATDS and is liable under the TCPA.” *Id.* (internal quotation omitted). Although a TCPA plaintiff is not be expected to plead details regarding the technical functionality of the alleged ATDS, the complaint must include at least some facts to support the conclusion that an ATDS was used, such as a description of the promotional content of the call or the generic, impersonal nature of the text message allegedly sent using an ATDS. A plaintiff might also allege that identical messages were sent to many potential customers at the same time. *Id.*

**VI. When Is Consent Required and How Do I Get It?**

Under the TCPA consent rules, some types of calls require prior express written consent, while other types of calls do not require that the consent be in writing. “Prior express written consent” is required for:

* all telemarketing/promotional calls/texts made using an ATDS placed to wireless numbers, and
* all artificial or prerecorded telemarketing/promotional voice calls to wireless and residential numbers. Companies may obtain oral consent for non-telemarketing voice and text calls to wireless numbers made using an automatic telephone dialing system. *In re Rules and Regulations Implementing the TCPA*, CG Docket No. 02-278, Report and Order, FCC 12-21, ¶ 28 (February 15, 2012); § 64.1200(a)(3).

A helpful progression to understand when the TCPA requires consent is as follows:[[3]](#footnote-3)

**(1) For residential landline phones, do calls use an artificial voice or prerecorded message?**

* If no 🡪 the TCPA does not apply. The TCPA does not prohibit the use of autodialers to call residential phones.
* If yes 🡪 See (3) below.

**(2) For cell phone calls, do calls use an artificial voice or prerecorded message or an “automatic telephone dialing system”?**

* If no 🡪 the TCPA does not apply.
* If yes 🡪 proceed to **(3)**

**(3) Does the call contain “telemarketing”?**

* If no 🡪 the written consent rules do not apply, but either ***oral or written consent is still required*** for calls made to cell phones, regardless of content. ***Consent may also be required for residential calls if an exemption does not apply****.*
* If yes 🡪 ***written consent is required* prior to initiating the telemarketing call.**

\* \* \*

The FCC’s TCPA rules define “prior express written consent” as “an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.” The rules further state that the written agreement shall include a clear and conspicuous disclosure informing the person signing that (A) by executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an ATDS or an artificial or prerecorded voice and (B) the person is not required to sign the agreement or agree to enter into such an agreement as a condition of purchasing nay property, goods, or services. *See* 47 C.F.R. § 64.1200(f)(8)(i). “Clear and conspicuous” means that the disclosure must be apparent to the reasonable consumer, separate and distinguishable from any advertising copy or other disclosures, and must not be hidden, printed in small, pale or non-contrasting type, or buried in unrelated information.

An electronic or digital form of signature is sufficient if it would be recognized as a valid signature under applicable federal or state contract law. Consent obtained in compliance with the E-SIGN Act[[4]](#footnote-4) (including through email, website form, text message, telephone keypress or voice recording) is also sufficient.

 “For non-telemarketing and non-advertising calls, express consent can be demonstrated . . . in the absence of instructions to the contrary, by [the called party] giving his or her wireless number to the person initiating the autodialed or prerecorded call.” However, “[b]y itself, the fact that a phone number is in a contact list fails to provide any evidence that the subscriber to that number even gave the number to the owner of the contact list. *In re Rules & Regulations Implementing the TCPA*, 30 F.C.C.R. 7961, 7991–92 ¶ 52 (F.C.C. July 10, 2015). And “the consumer may revoke his or her consent in any reasonable manner that clearly expresses his or her desire not to receive further calls.” *Id.* at 7998-99, ¶ 70.

 As to text messages, *prior express consent*, rather than prior express *written* consent, is all that is required for text messages that include or introduce an advertisement or which constitute telemarketing in two narrow circumstances: (i) when the call or text is made or sent by or on behalf of a tax-exempt nonprofit organization; or (ii) if the call or text delivers a “health care” message made by, or on behalf of, a “covered entity” or its “business associate” (as those terms are defined under HIPAA.

**VII. How Can TCPA Claims Be Defended?**

 While the TCPA’s imposition of virtually no-fault liability might seem daunting, there are still several significant possible lines of defense that businesses should explore when faced with a TCPA claim.

**A. Article III Standing after *Spokeo***

Most courts permit either a subscriber or a regular user of a telephone number, even if not the subscriber, to recover under the TCPA. *See, e.g.*, *Olney v. Progressive Cas. Ins. Co.*, 993 F. Supp. 2d 1220, 1226 (S.D. Cal. 2014) (holding that “the regular user of a cellular telephone has standing to bring claim under TCPA, regardless of whether he is responsible for paying bill”). However, statutory standing alone does not necessarily satisfy Article III’s “case or controversy” requirement.

On May 16, 2016, the Supreme Court of the United States issued its decision in *Spokeo, Inc. v. Robins[[5]](#footnote-5)*, a closely-watched case concerning the issue of whether Article III’s “injury-in-fact” requirement for standing to sue in federal court may be satisfied by alleging only a statutory violation without any associated real-world injury. The Court held that a plaintiff must allege “concrete” harm, which it described as harm that is “real,” to have standing to sue, and that the existence of a private right of action under a federal statute does not automatically meet the “real” harm standard.[[6]](#footnote-6)

In *Spokeo*, the plaintiff alleged that Spokeo, a web-based search engine, violated certain provisions of the Fair Credit Reporting Act concerning information about the plaintiff and sought statutory damages on behalf of himself and every other individual whose information appeared on Spokeo’s site. The Ninth Circuit held that he had standing based on his allegation that Spokeo “violated *his* statutory rights” and the fact that the plaintiff’s “personal interests in the handling of his credit information are individualized.”

However, the Supreme Court held that “the injury-in-fact requirement requires a plaintiff to allege an injury that is both ‘concrete *and* particularized.’” The Ninth Circuit erred because it ignored the “concreteness” element, which requires that the plaintiff show that his or her alleged concrete harm “actually exist[s]” and that it is “real,” *i.e.*, not “abstract.”[[7]](#footnote-7)

As the Supreme Court explained: “[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles.” Therefore “it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.” Although Congress’s judgment about whether a particular intangible harm satisfies Article III is “instructive and important,” it is not dispositive – “Congress’ role in identifying and elevating intangible harms does not mean that a plaintiff *automatically* satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation,” and a “bare procedural violation, divorced from any concrete harm,” cannot “satisfy the injury-in-fact requirement of Article III.”

The Supreme Court also pointed out that the plaintiff need not have suffered concrete harm in order to sue: a “risk of real harm” can in some circumstances satisfy the concrete harm requirement.[[8]](#footnote-8)

Although the Supreme Court’s decision in *Spokeo* eliminates the “no injury” class action and might give companies an additional tool to defend themselves, *Spokeo* has certainly not shielded defendants from TCPA liability based upon a plaintiff’s lack of Article III standing. In fact, district courts applying *Spokeo* since its issuance have found that TCPA plaintiffs can satisfy Article III standing. For example, in *Aranda v. Caribbean Cruise Line, Inc.*, 2016 WL 4439935 (N.D. Ill. Aug. 23, 2016), the district court held that the TCPA establishes substantive, not procedural, rights to be free from telemarketing calls that consumers did not consent to receive, and thus consumers suffered concrete injury required to establish standing as result of TCPA violations by a cruise line – even though consumers sought only statutory damages. The court found that Congress enacted the TCPA to protect consumers from annoyance, irritation, and unwanted nuisance of telemarketing phone call and granted protection to consumers’ identifiable concrete interests in preserving their rights to privacy and seclusion. *See also Ung v. Universal Acceptance Corp.*, 2016 WL 4132244, at \*2 (D. Minn. Aug. 3, 2016) (“Cases . . . have repeatedly recognized that the receipt of unwanted phone calls constitutes a concrete injury sufficient to create standing under the TCPA”); *Caudill v. Wells Fargo Home Mtg., Inc.*, 2016 WL 3820195, at \*2 (E.D. Ky. July 11, 2016) (noting that calls caused harms “such as the invasion of privacy [that] have traditionally been regarded as providing a basis for a lawsuit in the United States”); *Rogers v. Capital One Bank (USA), N.A.*, 2016 WL 3162592, at \*2 (N.D.Ga. June 7, 2016) (rejecting argument plaintiffs lacked standing under TCPA where they alleged “the Defendant made unwanted phone calls to their cell numbers”); *Cour v. Life360, Inc.*, 2016 WL 4039279, at \*2 (N.D. Cal. July 28, 2016) (receipt of single unauthorized text message sufficient to create standing under TCPA).

**B. Class Claims**

TCPA claims brought on behalf of a purported class as opposed to just an individual plaintiff open up a whole host of issues under Fed. R. Civ. P. 23 in addition to the threat of exponentially greater liability. One possible tactic to consider is attempting to moot a class plaintiff’s claim through use of an offer of judgment or actual tender of payment of the full amount of the class plaintiffs’ claim. In light of the Supreme Court’s recent decision in *Campbell-Ewald* that unaccepted offers of judgment cannot moot potential class claims,[[9]](#footnote-9) attempts to moot TCPA class actions by “picking off” the named plaintiff are at this juncture unlikely to succeed. *See, e.g., Kilpatrick v. Caribbean Cruise Line, Inc.*, No. 14-cv-61572 (S.D. Fla. Aug. 1, 2016) (Dkt. Entry No. 157) (denying defendants’ motion to deposit funds into court to satisfy named plaintiffs’ TCPA claims and moot class action).

A company facing a TCPA class action might have more success at the class certification stage where plaintiffs are required to satisfy the requirements of Rule 23. Critical defenses to explore are whether individual issues of class members such as consent (or revocation) predominate over common issues, whether the identities of members of the purported class are readily ascertainable so as to make a class action administratively feasible, and whether the class method is superior to the bringing of individual claims, especially since the TCPA’s uncapped statutory damages (with potential for trebling) may provide individual plaintiffs with adequate incentive to pursue their own claims.

**C Factual Investigation**

 Regardless of whether a company is faced with an individual TCPA claim or a purported class action, an adequate factual investigation into the alleged calls can make all the difference in mounting a successful defense. As always, it is critical to quantify the scope of potential liability as soon as possible – gather and preserve all records related to the number and nature of calls made to the plaintiff. Early assessment helps in making an informed judgment about whether the case is worth fighting or whether a quick settlement should be pursued.

 Equally important is understanding how the calls were made, *i.e.*, whether an ATDS was used. Given both the fluid and evolving definition of an ATDS by the FCC and courts, as well as the often highly technical nature of the systems and software used to place calls or send texts and faxes, involving a knowledgeable expert early may allow a business to knock out a claim – even at the motion-to-dismiss stage.

 Likewise, a TCPA defendant must explore all avenues by which a plaintiff may have given (or revoked) his or her express consent. The burden rests with the caller to prove through its business records the called party’s consent to receive calls. Gather and review all paper and electronic contracts, forms, marketing materials or other documents by which a plaintiff may have provided a cell phone number or otherwise evidenced consent to receive calls, texts or faxes. On the flip side, it is important to understand whether the plaintiff at any time attempted to revoke a previously-given consent. Under the current FCC view, consent may be revoked “in any reasonable manner,” whether orally or in writing, so long as the called party clearly expresses his or her desire to no longer receive calls. Furthermore, a caller may not limit or control a consumer’s right to consent by designating an exclusive means to revoke.

 Last but certainly not least, be sure to thoroughly investigate the actual plaintiff. The expansive scope and uncapped liability of the TCPA make it a focus of serial filers and professional plaintiffs, and courts may finally be starting to act to blunt this burgeoning cottage industry. *See, e.g., Stoops v. Wells Fargo Bank, N.A.*, No. 3:15-cv-83, 2016 U.S. Dist. LEXIS 82380 (W.D. Pa. June 24, 2016) (finding plaintiff who admitted buying multiple prepaid cell phones to receive autodialed calls from creditors for purposes of bringing TCPA claims lacked prudential standing since her claims did not fall within personal privacy zone of interests TCPA is designed to protect).

 **D. TCPA Exceptions**

 **1. Emergencies**

On its face, the TCPA exempts calls made for “emergency purposes.” 47 U.S.C. § 227(b)(1)(A). *See also Grant v. Capital Mgmt. Servs., L.P.*, 449 Fed. App’x 598, 600 n.1 (9th Cir. 2011). In fact, “[t]he only statutory exceptions to the [TCPA prohibitions] are calls made for emergency purposes or with the prior consent of the call recipient.” *Iniguez v. The CBE Grp.*, 969 F. Supp. 2d 1241, 1247 (E.D. Cal. 2013); *see also Ibey v. Taco Bell Corp.*, 2012 U.S. Dist. LEXIS 91030, at \*6 (S.D. Cal. June 18, 2012) (calls made for emergency purposes are exempt from TCPA liability).

The FCC has indicated that the “emergency purposes” is to be construed broadly: “The term emergency purposes means calls made necessary in any situation affecting the health and safety of consumers.” Restrictions on Telemarketing, Telephone Solicitation, and Facsimile Advertising, Delivery Restrictions, 47 C.F.R. § 64.1200(f)(4) (2012).

Just recently, the FCC made clear how expansive the emergency exception can be in response to a petition filed by Blackboard, Inc., the educational technology company, concerning its mass notification system utilized by schools and other educational institutions to communicate with parents, students, faculty and staff. The FCC “confirm[ed] that autodialed calls to wireless numbers made necessary by a situation affecting the health and safety of students and faculty are made for an emergency purpose.” *In the Matter of Rules & Regulations Implementing the TCPA*, 65 Communications Reg. (P&F) 226 (F.C.C. Aug. 4, 2016). In such situations, the FCC determined, “autodialed calls made by school callers do not require consent pursuant to the TCPA's ‘emergency purpose’ exception as defined in the Commission's implementing rules.” Examples provided by the FCC that “impact the health and safety of students and faculty” include: (1) calls or messages relating to weather closures, (2) incidents of threats and/or imminent danger to the school due to fire, dangerous persons, health risks (*e.g.*, toxic spills), (3) and unexcused absences. The rationale of the Blackboard decision is not just limited to schools, but can be expected to apply to other users of mass-notification systems such as healthcare providers or large employers.

 **2. No exception for reassigned numbers**

One of the more vexing problems for businesses is the case of the reassigned cell phone number, which happens hundreds of thousands if not millions of times a year. Even if a company had received consent from the owner of the number, what happens to that consent once the number is reassigned to another user, almost always with no actual notice to the company that had obtained previously obtained consent? In its July 2015 omnibus declaratory ruling, the FCC clarified the meaning of the phrase “called party.” The FCC held “that the ‘called party’ is 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.” *See In re Rules & Regulations Implementing the TCPA*, Declaratory Ruling & Order No. 15–72, 30 FCC Rcd. 7961, 8001 (F.C.C. July 10, 2015).

In connection with this holding, the FCC found that even “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.” *Id.* The FCC, however, carved out a very limited safe-harbor exception to this rule to “balanc[e] the caller’s interest in having an opportunity to learn of reassignment against the privacy interests of consumers to whom the number is reassigned.” *Id.* at 8007: “[C]allers who make calls without knowledge of reassignment and with a reasonable basis to believe that they have valid consent to make the call 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.” *Id.* at 8000 (emphasis added; footnotes omitted). Thus, the TCPA requires the consent not of the intended recipient of a call, but of *the current subscriber* (or non-subscriber customary user of the phone).

**VIII. What Does the Future Hold for TCPA Liability?**

Absent action by Congress to amend the TCPA to reflect the realities of 21st-century technology, the primary battlegrounds over the TCPA continue to be the FCC and the Circuit Court of Appeals for the District Columbia. A significant case scheduled to be argued on October 19, 2016[[10]](#footnote-10) presents a number of challenges to the FCC’s July 15 omnibus declaratory ruling. Key issues to be decided include (1) what “capacity” equipment must have in order to be deemed an ATDS, *i.e.*, whether the focus be on present or potential capacity; (2) whether prior express consent of a “called party” only must come from the “intended recipient” of a call, or whether the term “called party” encompasses any user of the number, whether the intended recipient or not (and including users of reassigned numbers); and (3) whether the FCC could determine that consumers can revoke consent to receive calls “using any reasonable method,” a right which cannot be waived or limited by contract. Resolution of these issues will go a long way to helping businesses assess their risk of TCPA liability and develop processes for TCPA compliance.

**IX. TCPA Takeaways**

Businesses and their counsel need to be vigilant about TCPA compliance both internally and for third-party marketing partners and must ensure that consumer communications fall within the scope of consent provided by the recipient. However, the TCPA was not intended to “be a barrier to normal, expected, and desired business communications.” While it is impossible to completely protect against the possibility of having to face a TCPA claim, the following are some considerations and best practices for any business that wishes to reduce its risk of TCPA liability or to at least ensure that key defenses are available in the event of TCPA litigation:[[11]](#footnote-11)

* **DO** Obtain Express Written Consent Prior to Initiating or Sending Telemarketing Calls to Consumers.

* **DO** Provide One or More Opt-Out Mechanisms.
* **DO** Require All Third-Party Vendors or Marketing Partners to Be in Compliance with the TCPA.
* **DO** Review and Categorize Messages Sent.
* **DO** Keep “Informational” Messages Content-Neutral.
* **DO** Make Consent Forms Clear, Conspicuous and User-Friendly.
* **DO** Keep All Records of Consent for At Least Four Years.

* **DO NOT** Assume That Consent Received in the Past Remains Valid.
* **DO NOT** Place Unnecessary Restrictions on the Scope of Consent.
* **DO NOT** Assume That a Device Is Not an ATDS.
* **DO NOT** Assume That You Are Safe From TCPA Liability by Using a Third-Party Marketer or Vendor.
1. Gerald E. Arth is a partner in the Philadelphia, Pennsylvania office of the national law firm Fox Rothschild LLP. Steven J. Daroci is an associate in Fox Rothschild’s Princeton, New Jersey office. [↑](#footnote-ref-1)
2. *See* 15 U.S.C. §§ 7701-7713 (2003). [↑](#footnote-ref-2)
3. Veronique Tu, Christine M. Reilly and Michael Mallow; “They’re Here: The FCC’s New Regulations Under the TCPA - Now What?”; Association of Corporate Counsel; http://www.acc.com/accdocket/onlineexclusives/tcpa.cfm. [↑](#footnote-ref-3)
4. 15 U.S.C. §§ 7001, *et seq.* (2000). [↑](#footnote-ref-4)
5. 136 S. Ct. 1540 (2016). [↑](#footnote-ref-5)
6. Andrew J. Pincus, Archis A. Parasharami and John Nadolenco; “Supreme Court Holds in Spokeo that Plaintiffs Must Show ‘Real’ Harm to Have Standing to Sue for Statutory Damages”; May 16, 2016; https://www.classdefenseblog.com/2016/05/3824/ [↑](#footnote-ref-6)
7. *Id.* [↑](#footnote-ref-7)
8. *Id.* [↑](#footnote-ref-8)
9. *Campbell-Ewald v. Gomez*, 136 S. Ct. 663 (2016). [↑](#footnote-ref-9)
10. *ACA Int’l v. FCC*, No. 15-1211 (D.C. Cir.). [↑](#footnote-ref-10)
11. Bradley M. Baglien, Heather Zachary and D. Reed Freeman Jr.; “TCPA Do’s and Don’ts: Lessons Learned From the Recent Litigation Wave and FCC Order”’ July 2, 2015; http://www.bna.com/tcpa-dos-donts-n17179929013/. [↑](#footnote-ref-11)