The Telephone Consumer Protection Act (TCPA) - 47 U.S.C. § 227

What’s the TCPA all about?

The TCPA is one of the most popular federal consumer laws of all time. Its purpose is to protect our right to privacy. This law allows “we the people” to choose how, when and by what means we are contacted by telemarketers and debt collectors. Even members of Congress and Federal judges get annoying telephone calls from telemarketers and debt collectors. These calls wake people up and interrupt our dinnertime. These calls are even more irksome when we realize it’s not even a human being calling us; it’s a blasted computer. So Congress acted and the federal Judges are enforcing this law. This article concerns prohibited telephone calls, not junk faxes.

Over 20 years ago, in 1991, Congress enacted the TCPA in response to an increasing amount of complaints consumers had regarding the practices and frequency of phone calls made by telemarketers and debt collectors. Congress was concerned with balancing the privacy interests of telephone subscribers who were frequently harassed and inconvenienced by incessant calling from telemarketers and debt collectors with the interests of facilitating interstate commerce. Congress found that unwanted automated calls were a “nuisance and an invasion of privacy, regardless of the type of call.” Banning such calls was “the only effective means of protecting telephone consumers from this nuisance and privacy invasion.” Pub. L. No. 102-243, §§ 2(10-13)(Dec. 20, 1991) codified at 47 U.S.C. § 227. The purpose of the TCPA is to reduce the number of nuisance calls. The following statement was made part of the congressional record back in 1991. The situation is not much different 20 years later.

“Computer telephone calls are invading our homes and destroying our privacy. Consumers around the country are crying out for Congress to put a stop to these computerized telephone calls. Congress has a clear opportunity to protect the interests of our citizens, and we should not pass up this chance.

Computerized telephone calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall. These machines are out of control, and their use is growing by 30% every year. It is telephone terrorism, and it has got to stop”.

Congress found that unwanted automated calls were a “nuisance and an invasion of privacy, regardless of the type of call.” The trend of automated calls has sky-rocketed since 1990. Technological advancements have reduced the cost of robotic dialers allowing many small businesses to afford and incorporate this equipment as part of their marketing or debt collection campaigns. Congress believed that banning such calls was “the only effective means of protecting telephone consumers from this nuisance and privacy invasion.” Pub. L. No. 102-243, §§ 2(10-13)(Dec. 20, 1991) codified at 47 U.S.C. § 227. In response Congress created a private right of action for consumers, on three claims, 1) calls to cell phones, 2) calls to residential lines and 3) calls to numbers registered on the “Do Not Call List” (DNC). As quirky side note, the TCPA legislation gave ultimate interpretation and rule making authority to the Federal Communication Commission (FCC), which does not provide for federal District Court review. So it is essential to review to the expanding body of FCC rulings to fully understand intricacies of the TCPA. The “Hobbs Act” a/k/a “Administrative Orders Review Act” 28 USC 2342(1); 47 USC 402(a) provides specific procedures for reviewing FCC orders which are otherwise considered final. Federal District courts cannot overturn FCC rulings.

The TCPA allows for actual and statutory damages. Statutory damages are a penalty for non-compliance with the TCPA or, essentially, “for getting caught.” Unlike other consumer protection laws, statutory damages are generally more than actual damages in a TCPA case. Unlike other federal consumer laws such as the Fair Debt Collection Practice Act (FDCPA) and the Fair Credit Reporting Act (FCRA), the TCPA does not have an attorney fee shifting provision when the consumer wins. Nevertheless, these cases can attract competent counsel when there is a high volume of calls and multiple section violations. In certain circumstances, a single call may warrant up to $3000.00 in statutory damages. TCPA cases are also ideal for class action remedy because of the common questions of law and fact and the uniformity of statutory damages. In Michigan, there is a four-year statute of limitation on TCPA violations.

WHAT VIOLATES THE TCPA?

**Calls to Cell Phones – Section 227(b)(1)(A)(iii)**

The TCPA makes it unlawful for any person within the United States . . . to make any call using any automatic telephone dialing system or an artificial or prerecorded voice . . .” 47 U.S.C. § 227(b)(1)(A)(iii) The TCPA defines 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.” 47 U.S.C § 227(a)(1). According to the FCC, an ATDS is any telephone equipment that has the capacity to dial numbers without human intervention. This is an extremely broad standard. If the telephone equipment can potentially be configured or programmed to auto dial, then it is considered an ATDS and is regulated by the TCPA and the FCC.

Presumably, this broad definition resulted because Congress anticipated and pre-empted loopholes by TCPA defendants, who could simply flip a switch on their phone systems and say “it never happened” to avoid liability. In both Satterfield v Simon et al and Griffith v Consumer Portfolio Recovery, the courts have followed the FCC’s broad definition of an ATDS:

“When evaluating the issue of whether equipment is an ATDS, the statute’s clear language mandates that the focus must be on whether the equipment has the capacity “to store or produce telephone numbers to be called, using a random or sequential number generator. Accordingly, a system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it.” Satterfield v Simon et al No. 07-16356 D.C. No. CV-06-02893-CW

“The FCC concluded that predictive dialers are governed by the TCPA because, like earlier autodialers, they have the capacity to dial numbers “without human intervention.” In doing so, it interpreted “automatic telephone dialing system” to include equipment that utilizes lists or databases of known, nonrandom telephone numbers.” Griffith v. Consumer Portfolio Serv., Inc., 838 F.Supp.2d 723 (N.D.Ill. 2011)

The TCPA prohibits both the use of an “Automatic Telephone Dialing System” (“ATDS”) for, 1) Automated dialing calls to cellular telephones and/or 2) leaving “Artificial or Prerecorded Voice” messages. An “artificial” voice message is a computer-generated message that sounds like a robot. A “pre-recorded” voice message, on the other hand, is a recorded human voice message that the caller uses when contacting consumers. Section 227(b) applies to all cell phones whether used for business or personal use. The TCPA also prohibits text messages to cell phones sent by an ATDS. The TCPA does not require the consumer to answer the call in order to establish a violation. Fillichio v M.R.S. Associates, Inc., Case No. 09-61629-CIV-JORDAN.
It’s illegal every time you receive a robo call and / or an artificial or pre-recorded voice message to your cell phone. The only defense is that you previously gave the caller permission to call you. Courts have held that consumers have “consented” to calls from a debt collector if the consumer provided her cell phone number on the credit application or gave express permission to either the creditor or collector over the phone. You can revoke consent previously given to a collector or creditor by sending a certified letter asking the creditor/collector to stop calling your cell phone.

An automated or “robo” call is a call dialed by a computer. Computers allow debt collectors and telemarketers to make billions of calls per day. You know that you have been robo- dialed when you hear dead air while trying to answer the call, and then hear some clicking noises and then you finally hear an pre-recorded voice message or your call is transferred to a live person.

Sometimes bill collectors will mistakenly data enter an innocent (stranger to the debt) person’s cell phone number into their automated dialer, instead of the true debtor’s number. This frequently happens because phone companies are recycling and re-selling old cell phone numbers soon after terminating service with the cell phone number’s previous owner. In Soppet v Enhanced Recovery Co 679 F.3d 637 (7th Cir 2012), the court held that its caveat emptor when it comes to dialing the wrong numbers and even suggested that the collector seek indemnification against the original creditor (jointly liable) for its TCPA violation losses. The court specifically held, “Wrong Number” calls, where plaintiff inherited a debtor’s phone number, are actionable because such calls are not made with the “prior express consent” of the recipient. Soppet also held that the use of airtime minutes on cells phones constitutes “out of pocket” damages. Robo-dialed calls to the wrong person are GOLDEN CASES! It’s just a matter of how much the statutory damages calculate to be. These calls and damages can add up fast.

Even if you owe a debt and are in collections, robo-calls to your cell phone are illegal unless you provided express consent to be contacted on your cell phone, either to the collector or the original creditor. Creditors and collectors who skip trace your cell number and fail to scrub it (determine whether it’s a cell number they are calling) are violating the TCPA unless you consented. Sometimes the original creditor will obtain a consumer’s cell number by skip tracing or by capturing it on its own caller ID when the debtor returns a call. The creditor may provide
the skipped traced cell number with the account to the collector. In these cases, the creditor can be sued for TCPA violations right along with the collector. Banks, pay-day lenders and mortgage companies are all subject to the TCPA, to name a few.

**Calls to Residential Lines - 47 U.S.C. 227(b)(1)(B).**

The TCPA prohibits “Artificial or Prerecorded Voice” messages for calls to residential line phones. This TCPA section only applies to solicitation from sellers with which the consumer does not have an “Established Business Relationship” (EBR). If the seller uses a telemarketing contractor who violates the TCPA, then both seller and telemarketer are jointly liable. If you have done business with a seller within the last eighteen months or made inquiry within the last three months, then the TCPA presumes that you have an EBR with that seller, absent evidence to the contrary. Evidence to the contrary would be a letter to the seller or telemarketer requesting that they stop calling you.

A terrible loophole in this section of the TCPA is that calls from debt collectors to residential lines are not illegal. And here’s the kicker; debt collection calls to residential lines are not considered illegal under the TCPA even when the collector mistakenly calls a person who does not owe the debt. A consumer’s remedy in this situation would be under the Fair Debt Collection Practice Act (FDCPA), for harassment where the collectors continue to call after the consumer has pointed out the mistake and requests them to stop.

There is no need to prove that the caller is using an ATDS under this TCPA section. The consumer only needs to show that the call is a solicitation and that seller used an artificial or pre-recorded voice message.

**Telemarketing Calls to “Do-Not-Call” … “DNC” Numbers Prohibited - 47 USC 227(c)(5)**

This section only applies to telephone solicitation calls. Anyone whose numbers are registered on the DNC list that has received two telemarketing calls within a twelve month period can sue for all calls including the first. It does not matter if calls are live, pre-recorded or robo calls.

It is easy to register your numbers on the national DNC list. Simply Google the “Do-Not-Call Registry” and register up to three numbers on its website. You will receive email
confirmation of your registration. Make sure you hold on to this, as it would be the exhibit # 1 to your federal lawsuit. You can also register your numbers with the DNC over the phone.

The DNC provision is a powerful section of the TCPA because it prohibits calls to both cell phone and residential lines, which are registered on the federal or company specific do-not-call lists. It is not necessary to prove the telemarketer used an ATDS or used artificial or pre-recorded voice messages. Live calls to numbers registered on the DNC are prohibited.

The best part about DNC violations from the consumer perspective is that the Sixth Circuit Court of Appeals has held that damages under this section may be stacked on top of the TCPA 227(b) section covering “calls to cell phones.” This means that the consumer can get up to $3000.00 per call for violations of the cell phone prohibitions and the DNC provisions. Charvat v NMP, LLC, 656 F. 3d 440 (6th Cir. 2011).

**TCPA Damages**

According to the TCPA, as codified in 47 U.S.C. § 227, an individual or entity has a private right of action to bring an action based on a violation of a subsection of the Act. (47 U.S.C. § 227(b)(3) (calls to a cell phone). An individual or entity may bring an action to enjoin such violations, for monetary loss for such violations, for $500.00 for each such violation, whichever is greater, or for both injunction and damages. If the court finds that the defendant willfully or knowingly violated the regulations under the TCPA, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount of the statutory compensatory damages above.

The body of case law addressing the available damages for a plaintiff suing under a TCPA private right of action reflects the general rule that where the court finds that the defendant caller has violated a subsection of the Act, it will at least award to the plaintiff $500 per violation as required by the Act.

Furthermore, when the facts of the specific case rise to the level of showing a knowing or willful violation of the Act, the court will, in its discretion and within its jurisdiction, also award exemplary or treble damages that may be as much as three times the damages award. In determining willfulness, the court looks at whether the defendant’s actions show its knowledge of the facts that constitute the offense (knowing); at the prior interactions between the plaintiff
and the defendant; and at whether the defendant attempted to stall, evade or avoid its obligations under the TCPA.

**Willful and Knowing – Treble Damages**

One of the best arguments for trebling damages is the standard set forth in 47 USC § 312 F, Administrative sanctions, which is part of the same section of the United States Code that the TCPA falls under.

(f) **“Willful” and “repeated” defined**

For purposes of this section:

1. The term “willful”, when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States.

2. The term “repeated”, when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

Courts may treble the damages award if the court finds that defendant's violations were committed "willfully or knowingly." 47 U.S.C. § 227(b)(3). Although neither the TCPA nor the FCC regulations define the terms "willfully or knowingly", courts have generally interpreted willfulness to imply only that an action was intentional. *Smith v. Wade*, 461 U.S. 30, 41 n.8 (1983). While the TCPA does not define willful, the Communications Act of 1943, of which the TCPA is a part, defines willful as "the conscious or deliberate commission or omission of such act, irrespective of any intent to violate any provision, rule or regulation." In *Dubsky v. Advanced Cellular Communications, Inc.*, No. 2008 cv 00652, 2004 WL 503757, at * 2 (Ohio Com. Pl. Feb. 24, 2004), the court found that in the context of the TCPA, the term acting "willfully" means that "the defendant acted voluntarily, and under its own free will, regardless of whether the defendant knew that it was acting in violation of the statute." 47 U.S.C.§ 227(b)(3).

"Importantly though, the intent for treble damages does not require any malicious or wanton conduct, but rather is satisfied by merely ‘knowing’ conduct. Alea London Ltd., 638 F.3d at. 776. The court in SENGENBERGER, held: “the statute does not require an entity to state its telephone number at any given time during the message. The fact that Plaintiff's personal voice message recording did not record Defendant's message in its entirety is
insufficient to constitute a violation …. In Dubsky v. Advanced Cellular Communications, Inc., No. 2008 cv 00652, 2004 WL 503757, at * 2 (Ohio Com. Pl. Feb. 24, 2004), the court found that in the context of the TCPA, the term acting "willfully" means that "the defendant acted voluntarily, and under its own free will, regardless of whether the defendant knew that it was acting in violation of the statute.”

Sengenberger v Credit Control Services, Inc., Case No. 09-C-2796

In summary, damages under the TCPA are:

1. $500 per violation minimum for Autodialer or prerecord violations, 227(b)(3).

2. “up to” $500 per violation for DNC violations, 227(c)(5).

3. Up to $1,500 per violation if found to be willful. You only have to show the caller intended to call your number but it’s better if the caller ignores your request to stop calling.

4. Injunction against future violations.

HOW TO DOCUMENT EVIDENCE OF TCPA VIOLATIONS

If you think that you are getting illegal calls from telemarketers or debt collectors, call a consumer lawyer who specializes in TCPA law right away. Damages from these calls can add up quickly and sometimes exceed six figures and may be considered for class action.

1. Try to answer your phone as much as possible. This ensures the incoming call will appear on your phone bill.

2. Research who is calling you. Google the caller ID number and read what other have to say on popular websites “1 800 notes, “whocalledus” and other website bulletin boards with discussion about calls from these numbers.

3. Take digital photos of the specific caller ID, showing the date and time of call. Avoid taking photos which display your other calls.

4. Save and digitalize all voice messages to your computer.

5. Obtain and save all phone records and highlight incoming calls from debt collectors and telemarketers.
6. Transfer this information to written or electronic form so that you can see the total number and summary of the calls.

7. Keep track of the following information. 1) date of call, 2) time of call, 3) caller ID, 4) Caller’s identity, 5) Summary of conversation.

8. You can always revoke consent to receive calls on your cell phone – an example of a revocation letter follows:

    Citibank Client Services
    100 Citibank Dr.
    San Antonio, TX 78245
    Date: ______

    RE: Acct# xxxx-xxxx-xxxx-xxxx

    I don’t believe that I have ever given you permission to call me at my cell phone number (xxx) xxx-xxxx, but if I did, I am now revoking consent for you to call my cell phone number. Please stop calling me at this number.
    You may contact me by mail at my residence and I will respond accordingly.
    Thank you for your cooperation regarding this matter.

    Signed,
    XXXXX
    Address, city and state

    Make sure you keep a photocopy of your letter and envelope with correct addresses to and from, with the stamp on it. If your spouse is receiving calls – add that number to the above letter. All robo calls or pre-recorded voices messages to your cell phone after you revoke consent to be called are actionable.

    CONCLUSION

    Many sellers, telemarketers and collection agencies ignore their responsibilities to comply with the Telephone Consumer Protection Act. They have not implemented reasonable practices and procedures to avoid violating the TCPA. It is relatively easy and inexpensive to scrub numbers against the DNC registry and cell phones lists. Instead, these businesses choose to
operate in the grey areas and on the fringes of the law and treat consumer lawsuits as a cost of doing business. Most consumers cannot find lawyers to represent them on TCPA cases and so some will file pro per cases in small claim courts. These cases are inevitably removed to higher courts where corporate defense lawyers often get their clients off the hook. State district court judges who are bogged down with criminal and landlord eviction cases are generally not interested in learning about this relatively complex and technical law. Federal judges on the other hand, are much better equipped and more experienced in deciding TCPA cases. It will be as a result of costly litigation by consumer advocates that telemarketers and collectors will finally decide it is less costly to comply with the TCPA than to risk expensive lawsuits.
Attorney Rex C. Anderson has been practicing law in the State of Michigan since 1992. He is the principle of Rex Anderson, P.C. in Davison, MI. Mr. Anderson practices exclusively in consumer bankruptcy, FDCPA, TCPA, FCRA, State Consumer Law, Collection Defense and Serious Injury Litigation. He is a council member of the Michigan Consumer Law Section and a member of the National Association of Consumer Bankruptcy Attorneys, the National Association of Consumer Advocates, Michigan Association for Justice and the Flint Bay City Bankruptcy Bar Association. He was lead counsel in a successful appeal to the 6th Circuit Court of Appeals involving a fraudulent mortgage. *Sutter v U.S. Bank, Saxon* - CA No 10-1656 and a successful appeal holding Qualified Written Requests are allowable in Bankruptcy Adversary Proceedings. *Conley v Central Mortgage Company*, (08-CV-13432 ED Mich 2009). He has tried or settled multiple cases exceeding six figure consumer damage awards.

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