

Telephone Consumer Protection Act: Illegal Calls to Cell Phones



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Statute: 47 U.S.C. § 227; Delegation to FCC

The Telephone Consumer Protection Act of 1991 (TCPA) amended the Federal Communications Act of 1934. Protects consumers from unwanted automated phone calls, telemarketing, and junk faxes

The FCC is the federal agency given the administrative authority to interpret and enforce the TCPA. 47 U.S.C. §227(b)(2).

FCC interpretations or orders are litigators best friend as many key definitions of the TCPA are not addressed per statute

FCC interpretations/orders must be given “Chevron” deference. *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Under *Chevron*, Federal District Courts must give deference to FCC’s interpretation of a statute it is responsible forenforcing so long as its interpretation does not clearly conflict with the intent of Congress, and is based on a facially permissible construction of the statute

Also, Under the “Hobbs Act”, only the United States Courts of Appeals have the jurisdiction to enjoin, set aside, suspend (in whole or in part), or determine the validity of final orders of the FCC. 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a).

Thus fed district courts must give deference to FCC’s TCPA Order/interpretation even if the court does not believe it is supported by the language of the statute or else it equates to a request to set aside or reinterpret the Order, and falls within the reach of the Hobbs Act. *Leckler v. Cashcall, Inc.*, 2008 WL 5000528 *2-*3 (N.D. Cal. Nov 21, 2008).

Calls to Cell Phones

47 U.S.C. § 227:

(b) Restrictions on use of automated telephone equipment

(1) It **shall be unlawful for any person** within the United States, or any person outside the United States if the recipient is within the United States--

(A) **to make any call** (other than a call made for emergency purposes or made with the **prior express consent** of the called party) **using any automatic telephone dialing system or an artificial or prerecorded voice--**

(i) to any emergency telephone line...;

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) **to any telephone number assigned to** a paging service, **cellular telephone service**, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

Why the Focus on Calls to Cell Phones?

Separate section that regulates calls to land lines using an autodialer w/o express consent. 47 U.S.C. § 227(b)(1)(B).

However, FCC has adopted a rule exempting any call that is made to landline for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing. 47 C.F.R. § 64.1200(a)(3)(iii).

Debt collection calls to landlines are specifically exempted because it is not advertising/telemarketing. In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, 23 F.C.C. Rcd. 559, ¶ 11 (F.C.C. 2008).

Also calls to landlines to individuals with whom the caller, directly or indirectly, possessed an **established business relationship** are also exempted.

These two exemptions dramatically curtail actionable calls made to PCs that seek us out and these exemptions do not apply to calls made to cell phones.

Threshold Issues

Jurisdiction: Concurrent jurisdiction- U.S. Supreme Court resolved the split in the Circuit Courts of Appeal, and ruled that federal courts possess “federal-question” jurisdiction over private TCPA suits. *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012).

Standing: Wrong number or reassigned number calls (plaintiff inherited a debtor’s phone number) are actionable because not made with “prior express consent” of recipient. *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637 (7th Cir. 2012). FCC recently resolved issue: “called party” refers to 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.” July 10, 2015 FCC Declaratory Ruling and Order, ¶ 15. But FCC created safe harbor rule: Callers are permitted to make one wrong number call to a party who has not consented to be called after the number is reassigned, so long as the caller does not have actual knowledge of that fact.

Limitations period: TCPA claims are governed by the four-year federal statute of limitations in 28 U.S.C. § 1658(a). *Giovanniello v. ALM Media, L.L.C.*, 726 F.3d 106 (2d Cir. 2013)

Defendants: Who is Liable?

Direct liability: “any person” who “*make[s] any call,*” without prior express consent, to a cell phone, using an automatic telephone dialing system or an artificial or prerecorded voice. 47 U.S.C. § 227(b)(1)(A).

Vicarious Liability: FCC has expressly found that vicarious liability principles apply to the TCPA: “[A] creditor on whose behalf an autodialed or prerecorded message call is made to a wireless number bears the responsibility for any violation of the Commission’s rules. Calls placed by a third party collector on behalf of that creditor are treated as if the creditor itself placed the call.” FCC 2008 Order at ¶ 10 (Jan. 4, 2008).

Agency principles: “In construing and enforcing the provisions of this chapter, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or user as well as that of the person.” 47 U.S.C. § 217. *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), cert. granted, 135 S. Ct. 2311 (2015)(Third-party marketing consultant hired by merchant can be liable on agency principles if an entity to which it outsources the work violates the TCPA).(other issues on cert). Make sure to expressly allege agency theory: *Smith v. State Farm Mut. Auto. Ins. Co.*, 2013 U.S. Dist. LEXIS 135230 (N.D. Ill. Sept. 23, 2013)(dismissal for failing to sufficiently allege theory/facts RE agency). See also *Thomas v. Taco Bell Corp.*, 582 Fed. Appx. 678, 679, 2014 U.S. App. LEXIS 12547, *5, 60 Comm. Reg. (P & F) 1270, 2014 WL 2959160 (9th Cir. Cal. 2014)(Seller may be vicariously liable under the TCPA if a P can demonstrate that the telemarketer had “apparent authority” from the seller to make call/send text or that seller ratified any conduct by the telemarketer that violated the TCPA. P did not allege sufficient evidence for either to hold Taco Bell parent company liable

New Technology-Dialing/Texting Apps

A calling or texting platform/application may be directly liability under the TCPA as the “caller” on a case-by-case basis :does entity takes steps necessary to physically place the telephone call/text, or is so involved in the placing of a call to have been deemed to initiate it? Internet to phone (texts) qualify. See July, 2015 FCC Order.

See also *Dominguez v. Yahoo, Inc.*, 2015 U.S. App. LEXIS 18460, *9 (3d Cir. Pa. Oct. 23, 2015)(Yahoo service that allowed account holders to have incoming truncated email messages to cell as text messages. Former account holder, Jose Gonzalez, did not disable or update the service after number reassigned to Dominguez. Dominguez contacted Yahoo!-told him that service could only be stopped if former account holder (Gonzalez) disabled it himself. Dominguez then filed suit and sought statutory damages of at least \$500 per text -\$14,000,000 for him, before trebling, and an unknown but presumably enormous number for the pot. class). On remand to district court by 3rd Circ. after July 2015 Order.

Central Elements: Illegal Calls to Cell Phones

- 1) “Any person” calling a **cellular telephone number**;
- 2) using an **automatic telephone dialing system (ATDS)**, or **artificial or prerecorded voice message**;
- 3) without the recipient’s **prior express consent**.

Meyer v. Portfolio Recovery Associates, LLC, 707 F.3d 1036, 1043 (9th Cir. 2012).

What “Calls” Are Actionable?

Calls made= calls that are placed to number even if unanswered. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953-54 (9th Cir. 2009) (holding that "to call" in the TCPA means "to communicate with or try to get in communication with a person by telephone.") (emphasis added); *Fillichio v. M.R.S. Accocs.*, No. 09-61629-CIV, 2010 U.S. Dist. LEXIS 112780, 2010 WL 4261442, at *3 (S.D. Fla. Oct. 19, 2010) (The TCPA "does not include a requirement . . . that the recipient of a call must answer the phone or somehow be aware of the call in order for there to be a violation."). *King v. Time Warner Cable*, 2015 U.S. Dist. LEXIS 88044, *12-13, 62 Comm. Reg. (P & F) 1533 (S.D.N.Y. July 7, 2015).

Texts = Calls. FCC 2015 Order, ¶ 107- FCC reiterated that text messages are subject to the same consumer protections under the TCPA as voice calls and rejected the argument that they are more akin to instant messages or emails. See also *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009) (“a text message is a ‘call’ within the meaning of the TCPA”).

Internet-to-phone text messaging is the functional equivalent of phone-to-phone SMS text messaging and is therefore covered by the TCPA.

(iii) **to any telephone number assigned to** a paging service, **cellular telephone service**, specialized mobile radio service, or other radio common carrier service, **or any service for which the called party is charged for the call.** The phrases “cellular telephone service” and “any service for which the called party is charged for the call” are distinct; cell phone user does not need to be charged for the call. *Osorio v. State Farm Bank*, 746 F.3d 1242, 1258 (11th Cir. 2014); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 950 (9th Cir. 2009)

What is an Automatic Telephone Dialing System (ATDS)?

Frequent issue litigated and alleged by D (didn't use ATDS)-**Burden on P to prove ATDS**

Statute 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).

Correct inquiry is whether system has capacity to dial w/o human intervention NOT whether it actually used that capacity during calls in question. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009).

FCC clarifies capacity of ATDS in recent 2015 Order (broadens definition):

TCPA's use of the term "capacity" in the definition of "automatic telephone dialing system... does not exempt equipment that lacks the "present ability" to dial randomly or sequentially... "In other words, the capacity of an autodialer is not limited to its current configuration but also includes its **potential functionalities.**" July 10, **2015 FCC Order**, ¶ 15-16.

Speed dialer functionality does not automatically=ATDS, rotary phone not ATDS, but predictive dialers does =ATDS
ATDS can include separately owned and operated equipment that is integrated to perform a dialing campaign.

Smart phones not automatically = ATDS, but they could?

Extremely broad definition and thsi part of 2015 Order is currently being challenged in DC Circuit

A case-by-case determination is necessary to determine if dialing equipment that requires human intervention.

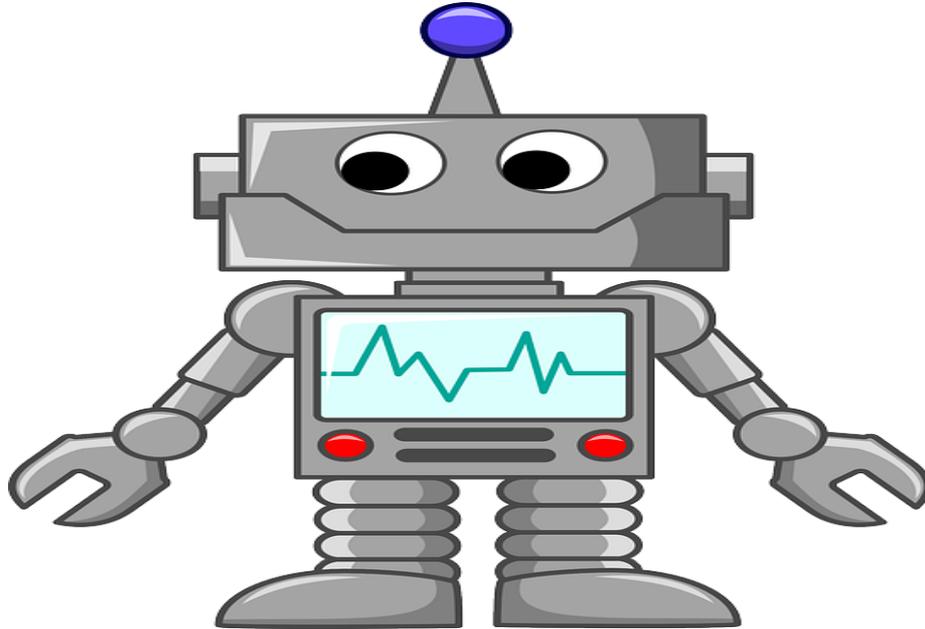
Texas requires regisrty of "Automatic Dial Announcing Devices" at

https://www.puc.texas.gov/industry/communications/directories/adad/report_adad.aspx?ID=ADSQL01DB124546270

00. Could be evidence of use of ATDS and could get name of ATDS system? Although slightly different definition

ATDS **OR** Artificial/Prerecorded Voice Message

Remember- Don't need to prove ATDS if artificial/prerecorded voice message- these are exclusive prohibitions.



Prior Express Consent

Prior express consent is an exception to the prohibitions.

Thus **burden of proof is on Defendant** to prove P gave prior express consent to receive robocalls to cell. In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 F.C.C. Rcd. 1830, n.68 (F.C.C. 2012) . See also *Gutierrez v. Barclays Group*, 2011 WL 579238, at *2 (S.D. Cal. Feb. 9, 2011); *Osorio v. State Farm Bank*, 746 F.3d 1242 (11th Cir. 2014).

July 10, **2015 FCC Order** reaffirmed burden of proof on D to show consent in stating that: “Regardless of the means by which a caller obtains consent, under longstanding Commission precedent, if any question arises as to whether prior express consent was provided by a call recipient, the burden is on the caller to prove that it obtained the necessary prior express consent...The well-established evidentiary value of business records means that callers have reasonable ways to carry their burden of proving consent. We expect that responsible callers, cognizant of their duty to ensure that they have prior express consent under the TCPA and their burden to prove that they have such consent, will maintain proper business records tracking consent. Thus, we see no reason to shift the TCPA compliance burden onto consumers and affirm that they do not bear the burden of proving that a caller did not have prior express consent for a particular call.” In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, WC Docket No. 07-135, 2015 WL 4387780, ¶¶ 64-70 (July 10, 2015).

*** Still need to allege no prior express consent to shift burden.

Prior Express Consent- Telemarketing Calls

Prohibition of autodialed or artificial voice calls to cell phones does not apply if called party has provided “**prior express consent.**” 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1).

2013 FCC Order clarifies prior express consent but only in **telemarketing calls**, debt collection calls and several other categories of calls are not affected:

Signed by the consumer and be sufficient to show that he or she:

- (1) received “clear and conspicuous disclosure” of the consequences of providing the requested consent, i.e., that the consumer will receive future calls that deliver prerecorded messages by or on behalf of a specific seller; and
- (2) having received this information, agrees unambiguously to receive such calls at a telephone number the consumer designates.
- (3) Consent may be provided electronically (e-signature).

Thus to make **telemarketing calls** to cell phones caller must have **prior express written consent**

Prior Express Consent- Non-Telemarketing Calls

Written or oral prior express consent is sufficient for autodialed or prerecorded non-telemarketing or debt collection calls to cell phones.

Thus express consent could be express in written/signed contract or oral (recorded in phone call during application process), or online clickwrap agreement, etc.

Cases on what constitutes prior express consent and consent for what type of calls are mixed and many are bad...

Prior Express Consent- Non-Telemarketing Calls, Cont.

The Bad:

Patten v. Vertical Fitness Group, LLC, 22 F. Supp. 3d 1069, 1078, 2014 U.S. Dist. LEXIS 69937, *23-24 (S.D. Cal. 2014)(Court found that Plaintiff consented to receiving texts by merely provided his cell number upon joining the gym and citing other bad cases holding similarly)

Wills v. Optimum Outcomes, Inc., 2014 WL 220707 (D. Utah Jan. 21, 2014)(Court found prior express consent when the plaintiffs provided their cell phone number in letter to the original creditor and the debt collector/defendant although the plaintiff's dispute letter stated that "any further correspondence on this account should be in writing and sent to my attention at the address listed above." *Id.* at *2).

Baird v. Sabre, Inc., 995 F.Supp.2d 1100 (C.D. Cal. 2014)(P provided her cell number under "contact Information" when booking flight online and court found that plaintiff merely providing cell phone number as contact info = prior express consent to receive text message. *Id.* at 1103.

Roberts v. PayPal, Inc., No. C 12-622 PJH, 2013 U.S. Dist. LEXIS 76319, 2013 WL 2384242 (S.D. Cal. May 30, 2013)(P expressly consented to receive text messages "closely related to the circumstances under which [he had] . . . provided his cell phone number" merely by providing cell number along with account sign up).

Baisden v. Credit Adjustments, Inc., 2016 U.S. App. LEXIS 2465 (6th Cir. 2016)(Providing a cell phone number to a hospital that then provided the number to an affiliated physicians' group that provided medical services to patients arising out of the same occurrence could constitute "prior express consent" to receipt of calls under the FCC's interpretations of the TCPA. Patients sought medical treatment from the hospital, gave the hospital their cell phone numbers, and authorized the hospital to disclose their cell phone numbers to others. The patients therefore gave prior express consent to calls made to their cell phones by a debt collector seeking to collect amounts the patients owed to the physicians' group.

Prior Express Consent- Non-Telemarketing Calls, Cont.

The Good:

Mais v. Gulf Coast Collection Bureau, Inc., 768 F.3d 1110 (11th Cir. 2014)(wife providing husband's cell number to hospital for emergency med. services not sufficient prior express consent for debt collector to call husband's cell with ATDS /c consent must be given by subscriber).

Meyer v. Portfolio Recovery Assocs., LLC, 707 F.3d 1036, 1042 (9th Cir. 2012) (Cell numbers obtained via skip-tracing had not been given to the creditors in the course of the underlying consumer transactions thus no prior express consent).

Castro v. Green Tree Servicing, 959 F. Supp. 2d 698 (S.D.N.Y. 2013) (Caller capturing cell number from consumer's call to creditor is not consent).

Olney v. Job.Com, Inc., 2014 U.S. Dist. LEXIS 60843, *23, 2014 WL 1747674 (E.D. Cal. May 1, 2014)(Issues of material fact existed as to whether the scope of P's express consent extended to D's calls ATDS calls regarding educational opportunities, when he provided D cell number within a job application).

Nigro v. Mercantile Adjustment Bureau, L.L.C., 769 F.3d 804 (2d Cir. 2014). Utility co. requested P's cell number in order to disconnect mother-in-law's service after she died. Debt collector subsequently made 72 robocalls to his cell number to collect. Court held that number was not provided during the transaction that resulted in the debt owed,so no prior express consent.

Prior Express Consent- Non-Telemarketing Calls, Cont.

July, 10 2015 FCC Order somewhat clarified scope of consent:

“By ‘within the scope of consent given, and absent instructions to the contrary,’ we mean that the call must be closely related to the purpose for which the telephone number was originally provided. For example, if a patient provided his phone number upon admission to a hospital for scheduled surgery, then calls pertaining to that surgery or follow-up procedures for that surgery would be closely related to the purpose for which the telephone number was originally provided.” In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 2015 WL 4387780, at ¶ 47, n.474 (July 10, 2015).

However, the absent instructions to the contrary language is still troubling and the example is not terribly instructive.

Prior Express Consent-Transferred to Debt Collector

“Because we find that autodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt are made with the ‘prior express consent’ of the called party, we clarify that such calls are permissible. We conclude that the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.” In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, 23 F.C.C. Rcd. 559,2008 WL 65485, ¶¶ 9–10 (F.C.C. 2008) (“ACA Declaratory Ruling”).

This FCC interpretation allows the consumer’s consent for the creditor to make calls to transfer over to the debt collector making debt collection calls with ATDS/prerecorded voice (but how can this be express consent...this is implied at best? Has not yet been successfully challenged).

Note: This is NOT the “established business relationship” exemption as that applies only to landlines!

Revocation of Consent

Previous court split on whether consent could be revoked, especially how (oral or needs to be in writing).

Revocation can be oral see *Osorio v. State Farm Bank*, 746 F.3d 1242 (11th Cir. 2014); *Adamcik v. Credit Control Servs., Inc.*, 832 F. Supp. 2d 744 (W.D. Tex. 2011); *Gutierrez v. Barclays Group*, 2011 WL 579238, at *4 (S.D. Cal. Feb. 9, 2011), *Munro v. King Broad. Co.*, 2013 U.S. Dist. LEXIS 168308, *11 (W.D. Wash. Nov. 26, 2013)

But July, **2015 FCC Order** reaffirmed that **consent can be revoked and clarified that it can be revoked at any time in any reasonable way**: “Consumers have a right to revoke consent, using any reasonable method including orally or in writing. Consumers generally may revoke, for example, by way of a consumer-initiated call, directly in response to a call initiated or made by a caller, or at an in-store bill payment location, among other possibilities. . . . We conclude that callers may not abridge a consumer’s right to revoke consent using any reasonable method.

FCC discussed common law principle of revocation of consent- not overridden by TCPA

Still - ideally would want to have some sort of written revocation for evidence of revocation.

New Exceptions

Besides calls made for emergency purposes:

- Texts or calls by **financial institutions** (and agents?) related to fraud and identity theft; data security breaches of consumers' personal information; steps taken to prevent or remedy the harm of identity theft or a data breach; and money transfers and calls/texts. Very specific limitations on these calls/texts.
- Some **healthcare-related** calls/texts where there is an “exigency” and the message has a “healthcare treatment purpose,” including: appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, and home healthcare instructions. Very specific limitations-not account or collection related. As to express consent-consent may be obtained through a third-party when the patient is medically incapacitated, but that “ just as a third party’s ability to consent to medical treatment on behalf of another ends at the time the patient is capable of consenting on his own behalf, the prior express consent provided by the third party is no longer valid once the period of incapacity ends.”
- Both exceptions only apply if the messages are free to the end user so these entities/callers would be required to come to terms with the various wireless carriers to ensure that charges and data/minutes are not affected, before sending the allowed messages.

Call Safe Harbor for Reassigned Numbers:

2015 FCC ORDER

“In balancing the caller’s interest in having an opportunity to learn of reassignment against the privacy interests of consumers to whom the number is **reassigned**, we find that, where a **caller believes he has consent** to make a call and **does not discover that a wireless number had been reassigned** prior to making or initiating a call to that number for the first time after reassignment, liability should not attach for that **first call**, but the caller is liable for any calls thereafter.”

Exception for collection of Government backed debts

2016 Federal Budget Bill -- Section 301, allows exception for autodialed and prerecorded calls to the cell phones in collection of all government owned or guaranteed/backed loans including student loans, taxes, VA loans, etc.

- Even allows calls prerecorded calls to the cell phones to debtor's relatives, references, and even persons who have reassigned numbers of those debtors.
- NO prior express consent necessary!
- NO right of revocation?
- Bad :(
- Supported by the Administration.

BUT...FCC Rulemaking to put limits on gov debt calls

FCC recently NPRM which proposes:

that only calls made after a debtor has become delinquent are covered by the exception;

to limit the calls to creditors and those calling on their behalf, including debt servicers;

that these robocalls can only be made to the debtor, so as to prevent unwanted robocalls to relatives, friends, and other acquaintances of debtors;

to limit the number of calls to three per month per delinquency; and

to empower consumers with the right to stop calls from a federal creditor at any time and to require callers to inform debtors of this right.

Evidence

- Preserve call log (screen shot, tech, and written call log of exact time/date)
- Call log only holds so many.
- Preserve any messages/texts.
- Have client obtain phone records (note: basic phone records usually will not show calls that go unanswered and no message).
- Subpoena more detailed call records from wireless provider.
- Discovery of all D's records/system entries for calls placed to P's #.
- Revocation: pinpoint oral revocation, copy of any written revocation, proof of mailing/text/email.

Damages

TCPA offers an express private cause of action for actual monetary loss or **\$500** damages for each violation (call/text), whichever is greater. Court “must” award- no discretion. 47 U.S.C. § 227(b)(3)(B).

\$500 per call statutory damage award “can” be **trebled to \$1,500 per call** if the court finds that the defendant **willfully or knowingly** violated the statute or regulations. Fact finder has discretion. 47 U.S.C. § 227(b)(3).

What is willfull or knowing? Just knowingly or willfully making the calls...*Sengenberger v. Credit Control Services, Inc.*, 2010 U.S. Dist. LEXIS 43874 at *6 (N.D. Ill. May 5, 2010)(court held that defendants willfully and knowingly violated the TCPA because they "intentionally made the contested phone calls to Plaintiff...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”).

Communications Act of 1943 (which TCPA is a part of) defines “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 Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.” 47 USCS § 312(f).

Roylance v. ALG Real Estate Servs., 2015 U.S. Dist. LEXIS 44930, *31 (N.D. Cal. Mar. 16, 2015)(“The case law supports Roylance's position that a person need not have intent to commit an unlawful act in order to act willfully or knowingly under the TPCA.

THANKS!