

Privacy & Data Security Law News

## **INSIGHT: As TCPA Litigation Skyrockets, Defense Costs Grow**

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Sept. 24, 2019, 4:01 AM

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The TCPA, intended to thwart unwanted robocalls, has led to skyrocketing plaintiffs' lawsuits and numerous market distortions for legitimate businesses. Eckert Seamans attorneys look at what the TCPA is costing business and predict congressional interest in making changes will grow with technology changes.

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While watching the 1979 horror classic *When a Stranger Calls*, you might find that one of the most surprising elements is that a person was willing to answer an unidentified and unexpected call in the middle of the night.

Today, only about half of all calls placed are answered, according to Hiya, a Seattle-based company that provides caller profile information. This movie predates such innovations as caller ID and the Telephone Consumer Protection Act (TCPA or Act), a statute designed, among other things, to decrease the number of unwanted robocalls.

The TCPA has drawn considerable attention in recent years, as its prevalence in the court system continues to be matched only by the growth of unwanted robocalls.

One of the more remarkable qualities about the Act is how quickly the amount of litigation surrounding it skyrocketed. Even though there are editorials from as early as 1999 indicating that some people had discovered a way to make a living out of TCPA claims, in 2007, there were only 14 TCPA cases filed or removed to federal court, according to WebRecon, an organization that keeps track of such filings.

Between 2009 and 2010, there was a more than 900% growth in the number of claims filed. Similarly, between 2010 and 2015, the number of cases filed again grew by 900%. From 14 cases in 2007 to more than 4,600 in 2016, the TCPA has enjoyed remarkable popularity, at least among the plaintiffs bar.

**TCPA's Impact on Businesses**

The TCPA has led to numerous market distortions. As a result of the Act, businesses are forced to rely on less efficient and more expensive means to contact customers, such as mass mailings. Many businesses are forced to avoid the use of the telephones or text messages even to provide their existing customers with needed information, such as fraud alerts provided by financial institutions or power outage updates provided by some utilities.

In addition, compliance with the Federal Communications Commission's various TCPA-related regulations often represents a significant expense for companies without a meaningful reduction in the potential liability they face from frivolous TCPA lawsuits.

Moreover, because of the prevalence of professional plaintiffs, businesses are also often faced with the expense of buying one of several private phone number registries of serial TCPA litigants to ensure that they avoid contact with individuals or businesses who are likely to initiate a TCPA lawsuit. A subscription to such a registry can cost thousands of dollars a year.

If a business becomes entangled in a TCPA case, it can become expensive quickly. According to the Institute for Legal Reform, the average settlement for such a claim is \$6.6 million. Such a sum is daunting for even the largest companies and potentially disastrous for small or medium sized businesses.

The above detailed costs, and the ever-present potential threat of litigation, harm the ability for companies to conduct business in the most efficient way possible.

To compound this problem, legitimate companies are likely to disproportionately be affected by litigation, as more transient or internationally-based callers are difficult to locate and might not have the money to make the suit worth it.

Thus, private enforcement of the TCPA has resulted in a crushing amount of liability for many legitimate companies, while at the same time doing little to deter the entities that pose the greatest threat to consumers.

### **Uncertain Future Ahead for the TCPA**

Members of Congress have taken notice of the increasing amount of litigation surrounding the Act. In a 2016 Communications and Technology subcommittee meeting for the Energy and Commerce Committee, Rep. Greg Walden (R-Ore.) characterized the law as "counterproductive" in some cases and stated that updates to it have resulted in "a decline in legitimate, informational calls that consumers want." The discussions about reforming the TCPA did not stop with the previous administration; a House Judiciary subcommittee held a meeting on a similar topic in 2017, where they heard a witness characterize the Act as "Total Cash for Plaintiffs Attorneys."

A sign that Congress is looking for more effective methods for blocking unwanted robocalls is its continuing support of STIR/SHAKEN technology. In essence, this technology creates a digital signature on each end of a call, making it difficult for an unwanted caller to alter a number to get users to answer the phone.

Unfortunately, this technology will not be as effective against calls originating from international numbers. However, most consumers can go through their telecommunications carrier to have international numbers blocked, which would make the STIR/SHAKEN framework much more effective. Thus, advances in technology could finally stop the current flood of unwanted automated calls received by consumers.

It would likely be politically difficult for Congress to repeal or weaken a statute that has existed for more than a quarter century and which has consistently maintained a high level of approval from the general public.

However, as technology continues to progress, allowing consumers to better determine what calls they want or don't want to receive, it might become more politically feasible to eliminate some of the elements that can potentially harm legitimate business interests, while still ensuring that consumers are not subjected to unwanted calls.

*This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.*

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