

Recent Developments in TCPA Litigation



April 5, 2013

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A hand is shown holding a smartphone and a tablet. The background is a light, neutral color. At the top of the image, there is a dark blue banner with a white downward-pointing arrow on the left side. The text "Why Pay Attention To The TCPA?" is centered in the middle of the image in a dark blue, sans-serif font.

Why Pay Attention To The TCPA?

TCPA Arithmetic: Banks

More Debtors

+

More Cell Phones

+

\$500-\$1500 Statutory Damages Per Call

=

Massive Potential Liability



TCPA Arithmetic: Plaintiffs' firms

Jurisdiction	Case	Class Size	Total Settlement	Attorneys' Fees Portion	Payment Per Class Member Before Fees Taken
W.D. Wash.	Arthur v. Sallie Mae	8M customers called	\$24.1M	\$4.8M	\$3.00
S.D. Cal.	Connor v. JP Morgan Chase	1.7M customers called	\$9M	\$3M	\$5.30
S.D. Cal.	Adams v. Alliance One	5.5.M customers called	\$9M	\$3M	\$1.63
S.D. Cal.	Malta v. Freddie Mac / Wells Fargo	5.9M customers called	\$17M	\$4.3M	\$2.88

TCPA Arithmetic: the courts

“Because plaintiffs may enforce the statute via class action and because a single advertisement is often faxed to hundreds—if not thousands—of phone numbers, suits under the Act present lucrative opportunities for plaintiffs’ firms.”

Reliable Money Order, Inc. v. McKnight Sales Co., Inc., 704 F.3d 489, 491 (7th Cir. 2013).

TCPA Arithmetic: the courts

“The conclusion is inescapable that these class actions exist for the benefit of the attorneys who are bringing them and not for the benefit of individuals who are truly aggrieved as a result of receiving the faxes.”

West Concord 5–10 –1.00 Store, Inc. v. Interstate Mat Corp., 2013 WL 988621, *6 (Mass. Super. Ct. March 5, 2013).

TCPA Arithmetic: the courts

“Anyway, the statute, with its draconian penalties for multiple faxes, is what it is.”

Creative Montessori Learning Ctrs. v. Ashford Gear LLC, 662 F.3d 913, 915 (7th Cir. 2011) (Posner, J.).

TCPA Primer



TCPA Primer: The Basic Prohibitions

The TCPA prohibits making any call

- ▶ to a **cell phone** “using any automatic telephone dialing system or an artificial or prerecorded voice” *unless* the call is made “for emergency purposes” or with the “prior express consent of the called party.”
- ▶ to a **land line** “using an artificial or prerecorded voice,” *unless* the call is made “for emergency purposes,” or with the “prior express consent of the called party,” or the call is exempted by the FCC.

47 U.S.C. § 227(b)(1)(A)(iii)

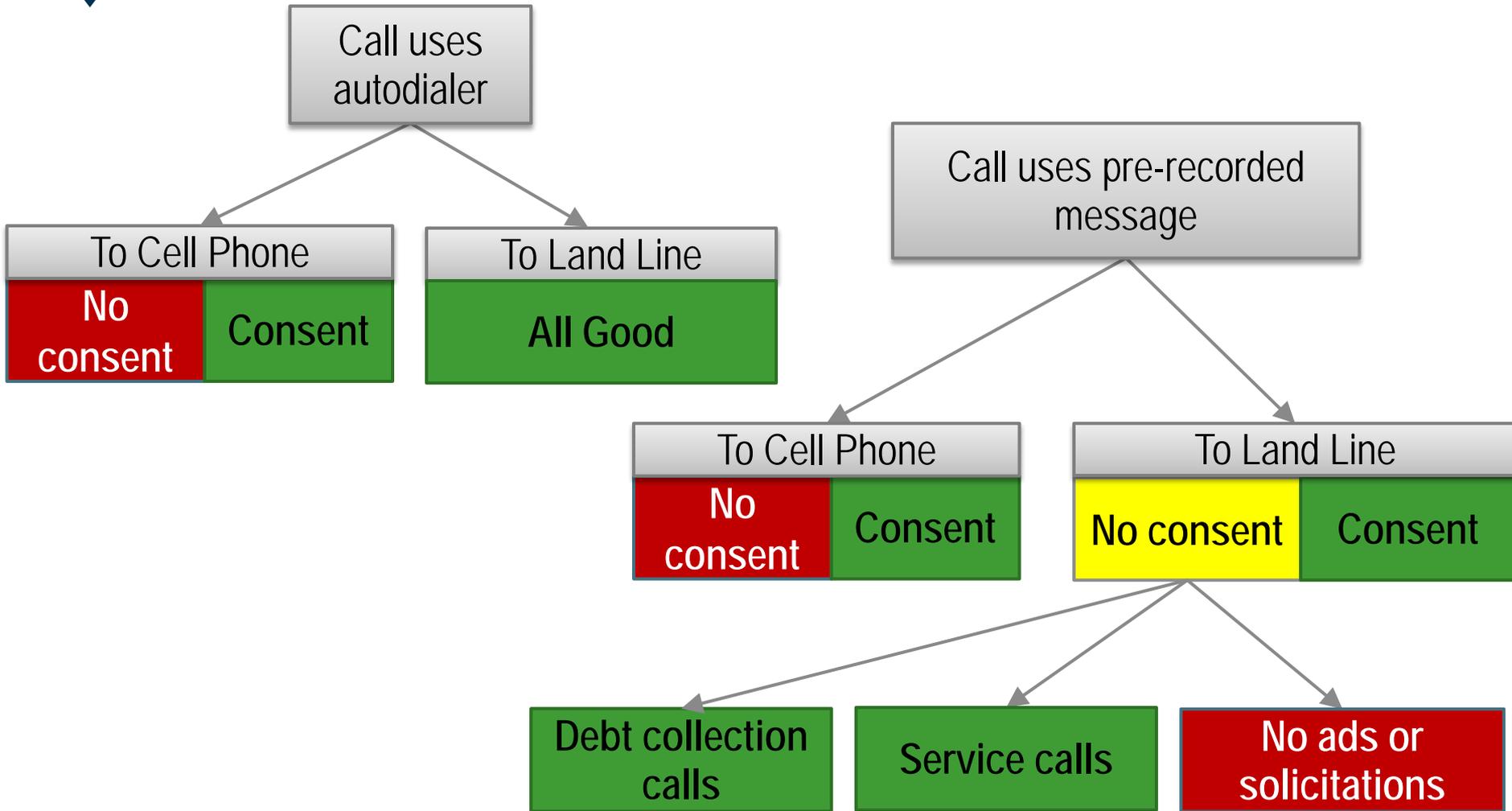


TCPA Primer: 4 factors for liability

4 Factors Affect TCPA Liability

- ▶ Type of phone line
 - ▶ cell phone or land line
- ▶ Technology
 - ▶ autodialer or manual dialing
 - ▶ prerecorded message or live human being
- ▶ Purpose of call
 - ▶ debt collection, servicing, or solicitation
- ▶ Consent

TCPA Primer: a flow chart

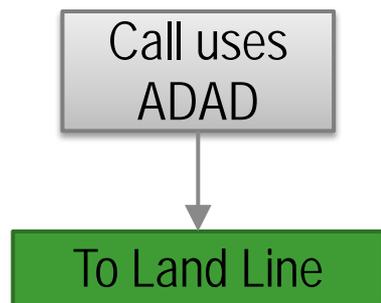


TCPA Primer: calls to land lines

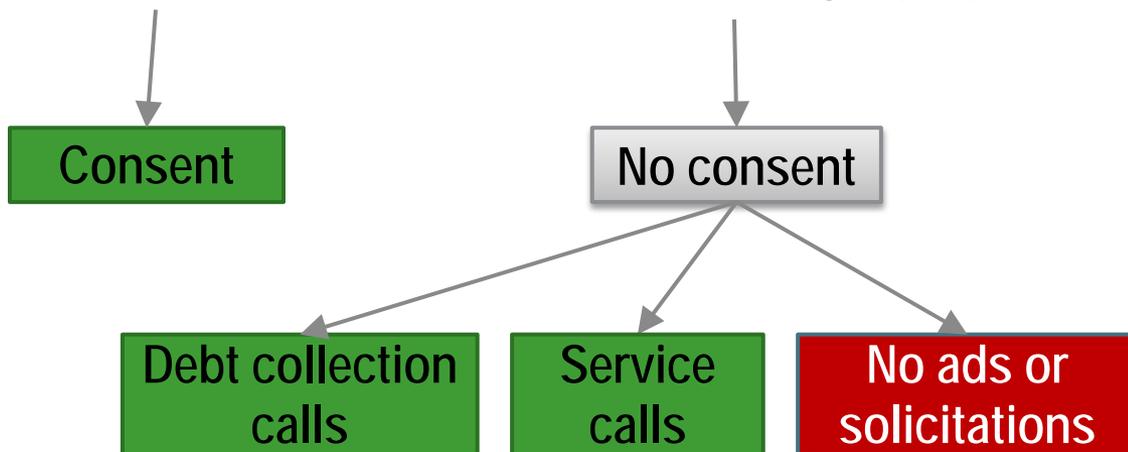
Bottom line for land lines . . .

Autodialers are fine.

So are prerecorded messages *if*

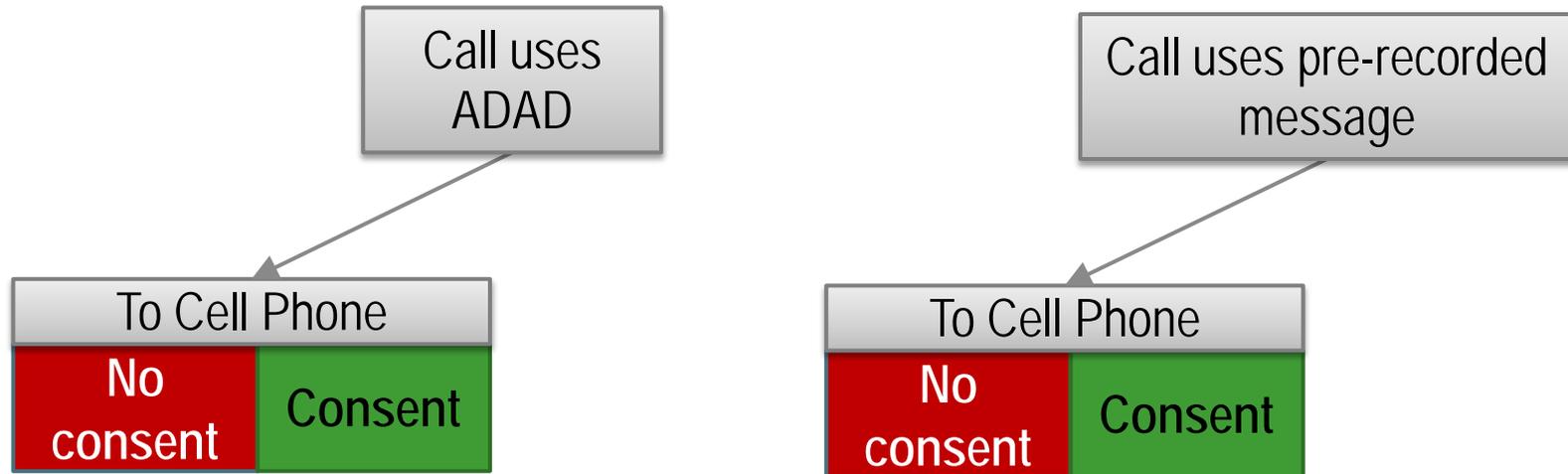


Customer consented *or* Call made for right purpose



TCPA Primer: calls to cell phones

For cell phones, it all comes down to consent.





Current Issues In TCPA Litigation

Current issues: what counts as consent?

So what counts as consent?

- ▶ Number provided by customer in application
- ▶ Contract gives company general right to call any number to collect on debt
- ▶ Number knowingly provided by customer later in any form
- ▶ Number provided for another account
- ▶ Number used to call creditor
- ▶ Number purchased by creditor

Current issues: can consent be revoked?

Can consent be revoked?

- ▶ For marketing calls, yes
- ▶ For debt collection calls, maybe
 - ▶ If customer agreement provides consent to call, argue that a customer can't unilaterally amend the terms of the agreement
 - ▶ If cell phone is only number given by customer, argue that customer can't eliminate only method of contact

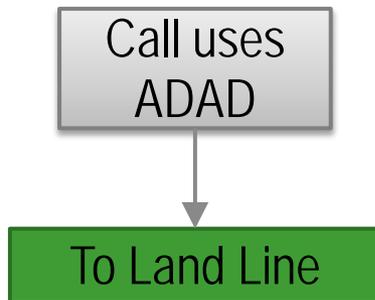
Current issues: a new consent rule for telemarketing

Effective October 16, 2013, the only consent that will count for *telemarketing* calls will be “prior express *written* consent.”

27 F.C.C.R. 1830, 1831

Current issues: a new consent rule for solicitations

Autodialers are always fine for landlines



Aren't they?

- ▶ The TCPA restricts only prerecorded messages
"It shall be unlawful for any person . . . to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice" 47 U.S.C. § 227(b)(1)(B)
- ▶ The FCC's February 15, 2012 order is ambiguous
"[I]n this order, we [] revise our rules to require prior express written consent for all autodialed or prerecorded telemarketing calls to wireless numbers and residential lines." 27 F.C.C.R. 1830, 1831
- ▶ The FCC's revised regulation follows the TCPA
"No person or entity may . . . [i]nitiate any telephone call to any residential line using an artificial or prerecorded voice" 47 CFR § 64.1200(a)(3) (effective Oct. 16, 2013)

Current issues: the wrong number problem

What happens when a creditor reaches the wrong person?
(Here's a hint: The creditor is strictly liable)

Soppet v. Enhanced Recovery Co., LLC

679 F.3d 637 (7th Cir. 2012)

- ▶ Debt collector called number provided by a consenting debtor—but the number had changed hands
- ▶ Judge Easterbrook held that the TCPA requires the consent of the called party, not the intended recipient
- ▶ The court advise callers to limit liability by:
 - ▶ Manually dialing first call to verify customer identity
 - ▶ Using reverse lookup to identify current subscriber

Current Issues: what is an autodialer?

"[E]quipment 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)

- ▶ The FCC and courts ask: Does this machine have the capacity to make automated calls?
 - ▶ Predictive dialers: computer software initiates calls based on predictions of agent availability
 - ▶ The TCPA applies
 - ▶ Preview dialers: agent initiates call via software
 - ▶ Open question, though one court recently said TCPA applies
- ▶ The FCC is currently considering a petition on what an autodialer is outside the solicitation context

What Can You Do?



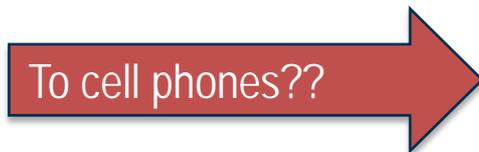
What to do: Run and hide!



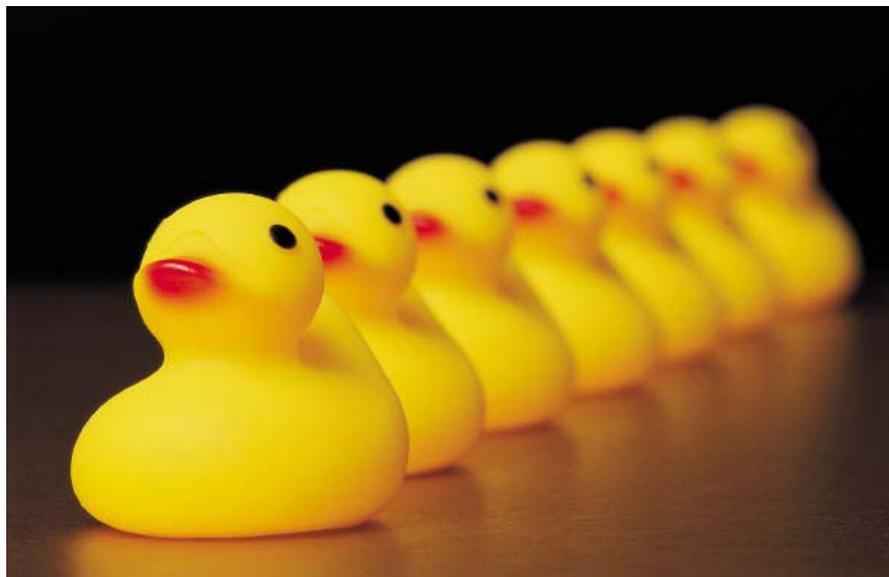
What to do: Evaluate debt collection calling practices

Do you autodial or leave prerecorded messages when collecting debt?

- ▶ Calls
- ▶ Texts
- ▶ Faxes



GET CONSENT
OR
SCRUB FOR CELL NUMBERS





What to do: Get consent

Get Consent To Call!

- ▶ Customer agreements
 - ▶ Add consent provisions
- ▶ Account applications
 - ▶ Just getting the number is enough
- ▶ Later customer interactions
 - ▶ Online consent, automated phone systems, customer service scripts
 - ▶ Law unclear on how express the consent must be

What to do: Scrub for cell numbers

Scrub for cell numbers!

- ▶ Many vendors provide cell scrubbing services that are updated daily, weekly, or monthly
- ▶ Scrubbing programs can move cell numbers to non-autodialed queues
 - ▶ Definition of “manual dialing” is unclear
 - ▶ Actually dialing the number one digit at a time is manual
 - ▶ Preview dialing (where number appears on screen and representative clicks on number) is less clear

What to do: Change the law

Change the law!

- ▶ Through the FCC
 - ▶ The FCC actively solicits participation in its declaratory rulings
- ▶ Through the courts
 - ▶ If you get sued, raise the legal issues identified in this presentation

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