



Contact Your Customers with Confidence: Recent Developments in TCPA Litigation

Sean Wieber

Bill O'Neil

Today's Presenters



Sean Wieber

Partner
Chicago

swieber@winston.com

(312) 558-5769



Bill O'Neil

Partner
Chicago

woneil@winston.com

(312) 558-5308

The TCPA is a **strict liability** statute
that allows for **class actions** and
treble uncapped damages...
making it a **MAJOR** problem



**We don't spam our
customers or use aggressive
telemarketing...the TCPA
doesn't impact me**

Well, neither did they

NFL

& NBA

Franchises

4

of the nation's

Largest

Banks

3

of the

**largest
fast food
chains**

**Leaders in
transportation
and tele-
communications**

Ripped from the Headlines...



Dish Network Hit With \$61M Treble Damages After TCPA Trial

By Daniel Siegal

**Bloomberg
BNA**

February 23, 2015

\$75M Capital One TCPA Class Deal OK'd; Attorneys' Fees Cut From \$22M to \$15M

Feb. 13 — A \$75 million Tele...



\$76M Cruise Robocall Class Settlement Gets Final Approval

By Joyce Hanson

Share us on: [Twitter](#) [Facebook](#) [LinkedIn](#) [Email](#)



American Eagle To Pay \$14.5M To End Spam Text Dispute

By Allison Grande

Share us on: [Twitter](#) [Facebook](#) [LinkedIn](#) [Email](#)

Law360, New York (December 21, 2016, 10:35 PM EST) -- American Eagle has agreed to shell out \$14.5 million to settle a spam text dispute.



Burger King Serves Up \$8.5M To Settle Junk Fax Class Action

By Daniel Siegal

Share us on: [Twitter](#) [Facebook](#) [LinkedIn](#) [Email](#)



Walgreen To Pay \$11M To End Prescription Robocall Suit

By Caroline Simson

Share us on: [Twitter](#) [Facebook](#) [LinkedIn](#) [Email](#)

Law360, New York (March 27, 2015, 1:46 PM EDT) -- Walgreen Co. has agreed to pay \$11 million to settle a prescription robocall suit.



AT&T Pays \$45M To Settle TCPA Class Action

By David Siegel

Share us on: [Twitter](#) [Facebook](#) [LinkedIn](#) [Email](#)

Law360, New York (September 30, 2014, 6:25 PM EDT) -- AT&T Mobility LLC asked a



Kaiser Permanente To Pay \$5.4M To End TCPA Class Action

By Caroline Simson

Share us on: [Twitter](#) [Facebook](#) [LinkedIn](#) [Email](#)

Law360, New York (December 5, 2014, 12:38 PM EST) -- Kaiser Permanente will pay \$5.35 million to settle a TCPA class action.

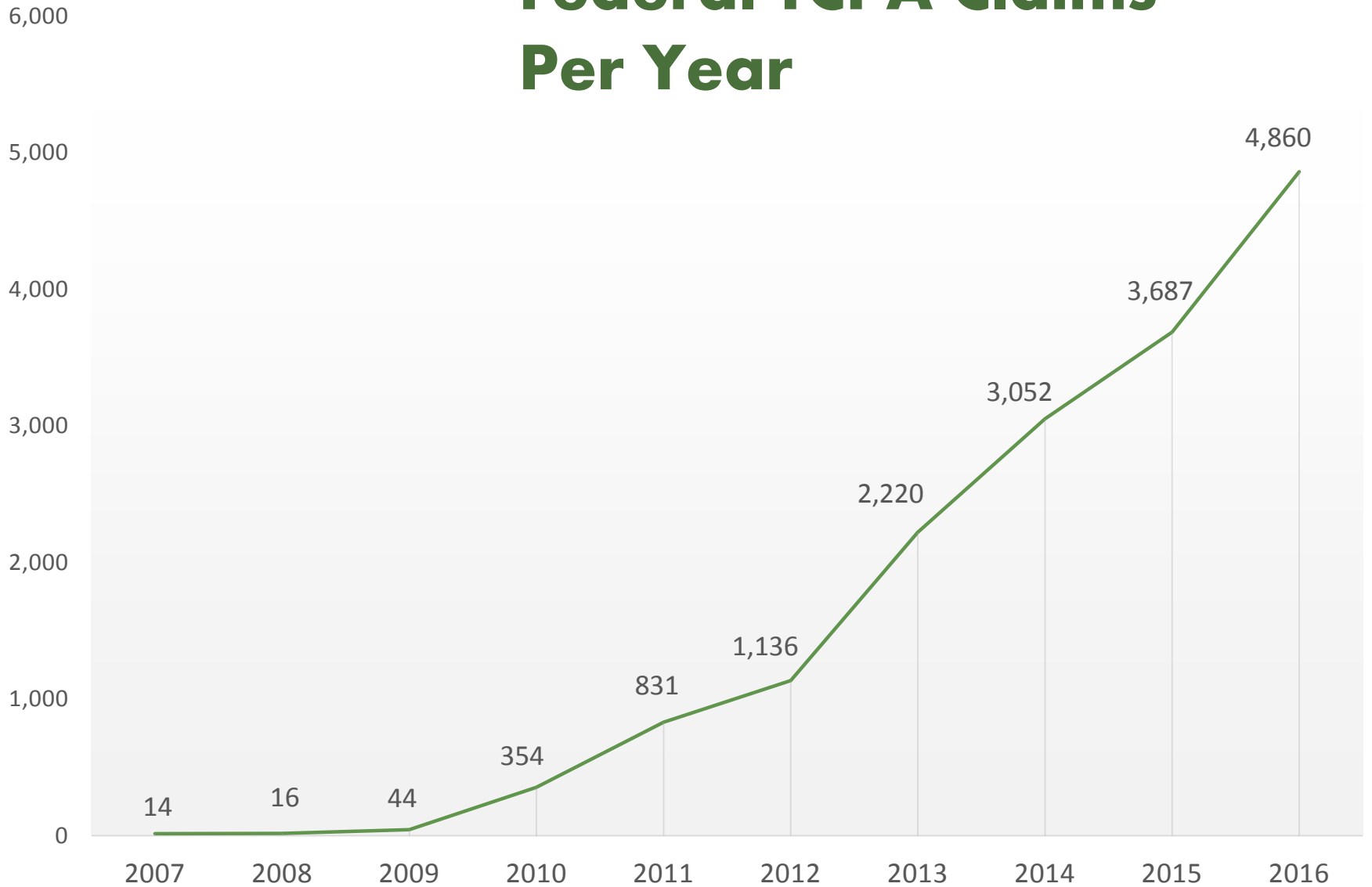
Largest TCPA Settlements through 2016

DEFENDANT	SETTLEMENT AMOUNT (\$ Million)	YEAR FILED	CASE NUMBER	COURT
Caribbean Cruise Line, Inc.	76	2012	1:12-cv-04069	N.D. III.
Capital One Bank (USA), N.A.	75	2012	1:12-cv-10064	N.D. III.
US Coachways, Inc.	49.9	2014	1:14-cv-05789	N.D. III.
AT&T Mobility, LLC	45	2013	1:13-cv-00050	D. Mont.
HSBC Bank Nevada, N.A.	40	2014	1:14-cv-00190	N.D. III.
Interline Brands, Inc.	40	2011	1:11-cv-04462	N.D. III.
Sirius XM Radio, Inc.	35	2013	4:13-cv-00003	E.D. Va.
Bank of America Corp.	32	2011	5:11-cv-02390	N.D. Cal.
Wells Fargo Bank, N.A.	30.4	2015	1:15-cv-01270	N.D. Ga.
Metropolitan Life Insurance Co.	23	2013	9:13-cv-80561	S.D. Fla.
Buccaneers Limited Partnership	19.5	2016	8:16-cv-01622	M.D. Fla.
Portfolio Recovery Assoc., LLC	18	2011	3:11-md-02295	S.D. Cal.
Papa John's International, Inc.	16.5	2010	2:10-cv-01139	W.D. Wash.
Wells Fargo Bank, N.A.	16.3	2015	1:15-cv-01156	N.D. Ga.
Life Time Fitness, Inc.	15	2014	0:14-md-02564	D. Minn.
PharMerica Corp.	15	2013	1:13-cv-23924	S.D. Fla.

Source: U.S. Chamber Institute for Legal Reform, Aug. 2017

After the FCC's **July 2015 Order**,
TCPA litigation went **up 46%**

Federal TCPA Claims Per Year



“The sprawl of the TCPA litigation illustrates the serious problem when **uncapped statutory damages** and a **technologically-outdated statute** work together to **overincentivize** litigation.”

- U.S. Chamber Institute for Legal Reform

“Plaintiff’s interests, which include purchasing cell phones with the **hope** of receiving calls from creditors for the sole purpose of ***collecting statutory damages***, are not among the sorts of interests the TCPA was specifically designed to protect.”

- **Judge Kim R. Gibson,**
Western District of Pennsylvania

“The common thread here is that in practice the TCPA has **strayed far from its original purpose**. And the FCC has the power to fix that.”

- **Ajit Pai**,
Current Commissioner of the FCC
2015 Order, *Dissent*

Overview

- I. Brief Refresher on the Fundamentals
- II. Developing Litigation Trends and Changes in Law
- III. All Too Realistic Hypotheticals
- IV. How to Better Protect Your Company Today
- V. Questions



I. A Brief Refresher on the Fundamentals

The Statute & The Code:

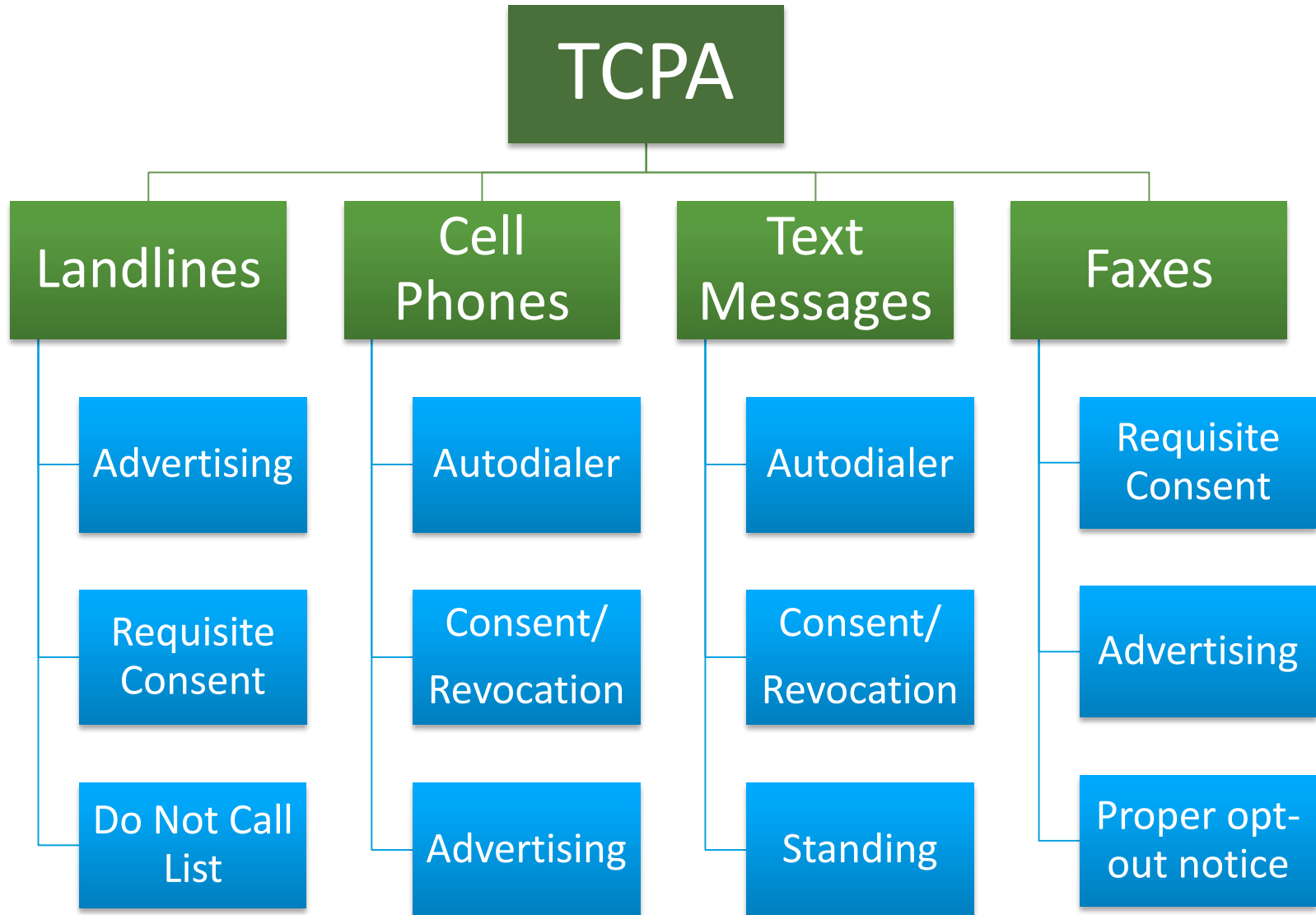
47 U.S.C § 227; 47 CFR 64.1200-1202

- Statute passed in 1991, with the purpose to

“protect residential telephone subscriber privacy rights by restricting certain commercial solicitation and advertising uses of the telephone and related telecommunications equipment.”

- Those were the good ol’ days...since, the FCC has interpreted the TCPA into continued relevancy by widening its enforcement well beyond the law’s intended purpose

The TCPA Web of Liability



Private Actions and Class Actions

- Sections 227(c)(3) and (c)(5) provide individual consumers with a private right of action without prohibiting class actions
- \$500 per violation (i.e., per call, text message, or fax)
- Treble Damages (\$1500/violation) if “willful and knowing”

...it's always willful and knowing.

Primary Affirmative Defenses

- Evidence of requisite consent
- Challenge the use of an Autodialer *aka* Automatic Telephone Dialing System (“ATDS”)
- Valid opt-out disclosures (fax)
- Communication was not an “advertisement” or constitutes “telemarketing”

Recent Changes at the FCC

- Following the 2016 election the FCC changed in leadership and composition
- **Ajit Pai** – New FCC Chairman not a fan of the TCPA
- But, nothing...yet



Bad facts and no absolute defenses...

- What do you do?
- Is there a “right” time to engage in settlement negotiations?

Rolling the dice at trial

- The house always wins...
- The Trebled Pain (M.D.N.C. 2017)
 - Court trebled jury verdict of \$20.5 million in damages to **\$61.3 million**
- Judgment, Settlement Style (7th Cir. 2016)
 - The exception—not the rule
- The Huckabee Case, yes that Huckabee
(E.D. Mo. 2017)



II. Developing Litigation Trends and Recent Changes in Law

The Waiting Game:

ACA International v. FCC

1. What is an ATDS?
2. Whether consumer consent attaches to the number or the person?
3. Revocation by “any reasonable means”

The Undelivered Promise: *Spokeo*

- *Spokeo v. Robins* (U.S. S.C. 2016): Initially thought of as a cure-all
 - Mere statutory harm not necessarily concrete enough for standing
- Impact has been uneven
 - *Susinno v. Work Out World* (3rd Cir. 2017)
 - *Franklin v. DePaul University* (N.D. Ill. 2017)
 - *Christopher Legg et al. v. PTZ Insurance Agency LTD* (N.D. Ill. 2017)

The TCPA Minefield: Consent and Revocation

- Unilateral Revocation when in Contract
- “*Call Me Maybe*” Partial Revocation
- The Wild West of Text Messaging

Good News in Fax-land

- *Bais Yaakov of Spring Valley v. FCC*
(D.C. Cir. 2017)
- Enforcement woes
- Hope on the Horizon

Class Certification – often, the saving grace

- **Ascertainability:**

- No records, no problem??

- **Typicality:**

- A plaintiff's individuality is a class killer; so, be you, and just you...*please*??



III. All Too Realistic Hypotheticals

When a simple reminder isn't so simple...

- Your company is in the consumer services business. In an effort to better serve your client, you offer a reminder text prior to their appointment.
 - Do you need consent? If so, what kind?
- Now, what if instead of a reminder, in an effort to incentivize the customer to return, you text a coupon for their next appointment?
 - What kind of consent do you need? Methods of revocation?

When “It Wasn’t Me” Isn’t Enough

- Your company does not do its marketing and soliciting of new business in-house. Your company expects these third-parties to solicit business in only the most law-abiding manner. Unfortunately, your company is mistaken and there are TCPA violations that run the gamut from unsolicited autodialed calls to cell phones to refusal to honor reasonable revocation.
- Are you liable? What are the determining factors?

No Grey when Faxing in Black and White...

- Your company sends fax advertisements. (Yes, they still exist.) You have the requisite consent from some of your clients but accidentally sent unsolicited faxes to prospective clients as well. Further, your opt-out language on the bottom of the fax is deficient.
- Is your company liable for the deficient opt-out notice to solicited recipients? Unsolicited? Why?



IV. How to Better Protect Your Company *Today*

An ounce of prevention is worth a pound of cure

- How do I communicate with my clients?
- What are the major avenues for liability under that method?
- Contact a reputable and knowledgeable firm to conduct an audit

TCPA Checklist

DO

- Obtain express written consent prior to initiating or sending telemarketing calls to consumers
- Provide one or more automated opt-out mechanisms
- Require and ensure all third-party vendors or marketing partners are TCPA compliant
- Know what type of communications you are sending to consumers
- Keep all records of consent for at least four years

DON'T

- Don't assume that past consent received is still valid
- Don't place unnecessary restrictions on the scope of consent
- Don't assume your means of communication is not an ATDS
- Don't assume you can avoid liability through use of a third-party marketer

Aggressive Plaintiff's Counsel is Still Lurking

- You can be sued for any communications from the last **4** years
- The rate of suits continues to rise
- Reach out **immediately** to counsel who can aggressively get a handle on the litigation, to mitigate—if not eliminate—your liability

Thank you



Sean Wieber

Partner
Chicago

swieber@winston.com

(312) 558-5769



Bill O'Neil

Partner
Chicago

woneil@winston.com

(312) 558-5308



V. Questions?