

TCPA Information from NCLC Federal Deception Law

The TCPA is remedial legislation that is entitled to a liberal construction. *Marguilis v. P & M Consulting, Inc.* 121 S.W.3d 246 (Mo. Ct. App. 2003); *Charvat v. Dispatch Consumer Servs.*, 769 N.E.2d 829 (Ohio 2002); *Omnibus Int'l. v. AT&T, Inc.*, 2004 Tex. LEXIS 11 (Tex. App. Jan. 12, 2004) Page 104 in NCLC

A single violation is sufficient to create liability. *Lary v. Tom Taylor Agency*, 878 So. 2d 1165 (Ala. Civ. App. 2003); *Reichenbach v. Financial Freedom Ctrs.*, 2004 WL 2634624 (Ohio Cr. App. Nov. 19 2004) (unpublished); *Grady v. Lenders Interactive Servs.*, 2004 WL 1799178 (Ohio Ct. App. Aug. 12, 2004) (unpublished); *Reichenbach v. Chung Holdings, L.L.C.*, 823 N.E.2d 29 (Ohio Ct. App. 2004) (prerecorded call) Page 105 in NCLC

Section 227© requiring FCC rules concerning subscriber privacy rights provided a private remedy when a person has received more than one telephone call within any twelve-month period by or on behalf of the same entity in violation of regulations prescribed under section 222(c).

Virtually every court has held that the general four-year statute of limitation for federal claims applies to TCPA claims under either sections 227(b) or (c). 28 U.S.C §1658: *see Benedia v. Super Fair Cellular, Inc.*, 2007 WL 2903175 (N.D. Ill. Sept. 26, 2007); *Sznyter v. Malone*, 66 Cal. Rptr. 3d 633 (Cal Ct. App. 2007) (rejecting argument that TCPA incorporates state statute of limitation); *Zelma v. Konikow*, 879 A.2d 1185 (N.J. Super. Ct. App. Div. 2005) (absent state adoption of specific, shorter statute of limitations for TCPA claims, federal four-year limitation period applies); *Stern v. Bluestone*, 850 N.Y S.2d 90 N.Y. App. Div. 2008), *rev'd on other grounds*, 911 N.E.2d 844 (N.Y. 2009); *Grady v. OTC Investor's Edge*, 2003 WL 2282294 (Ohio Ct. Com. Pl. Oct. 15, 2003); *see also Worsham v. Fairfield Resorts, Inc.*, (Md. Ct. Spec. App.; Sept. 30, 2009) (slip opinion) (holding that four-year statute of limitations under 28 U.S.C. § 1658 applies to private suit in Maryland state court). *But see Edwards v. Emperor's Garden Restaurant*, 130 P.3d 1280 (Nev. 2006) (since TCPA claim can be pursued in state court only when consistent with state laws and rules, shorter state statute of limitations applies); *David L. Smith & Assoc., L.L.P. v. Advanced Placement Team, Inc.* 169 S.W.3d 816 (Tex. App. 2005) (relying on Chair King decision before its reversal); *Chair King, Inc. v. GET Mobilnet of Houston, Inc.*, 135 S.W.3d 365 (Tex. App. 2004), *rev'd on other grounds*, 184 S.W.3d 707 (Tex. 2006). Page 105 in NCLC

There is no private cause of action to enforce the technical and procedural standards for telecommunication equipment set forth in section 227(d) including the requirement that the sender's identity and telephone number be included in a fax. Nor is there an explicit private cause of action for violation of section 227(e) that prohibits misleading or

inaccurate caller ID information although section 227(e) does provide for enforcement by the United States.

Anyone in a household to which a call was made has standing to sue for violations. *Margulis v. P & M Consulting, Inc.* 121 S.W.3d 246 (Mo. Ct. App. 2003).

Standing to bring a private right of action is recognized for the person who answers a call to their cell phone, even if the caller intended to reach a different person. *Soppet v. Enhanced Recoery Co., L.L.C.*, 679 F.3d 637 (7th Cir. 2007) (“called party” means the person subscribing to the called number at the time the call was made; *Kane V. National Action Fin. Servs., Inc.*, 2011 WL 6018403 (E.D. Mich. Nov. 7, 2011) at *7 (recognizing the “broad statutory grant of standing in § 227(b)(3)” and distinguishing “incidental” call recipients from intended and/or properly directed communications); D.G. ex rel. *Tang v. William W. Siegal & Assoc., Attorneys at Law, L.L.C.*, 791 F. Supp. 2d 622 (N.D. Ill. 2011) (plaintiff “need not be a ‘called party’ to assert a TCPA claim”).

The individual can, in addition to or instead of an injunction, recover actual monetary loss or \$500 for each violation, whichever is greater. *See First Nat’l Collection Bur., Inc. v. Walker* 348 S.W.3d 329, at *14 (Tex. App. 2011) (consumer is entitled to \$500 statutory damages, not “up to” \$500).

The court may treble the damage award if it finds that the defendant’s violation was willful or knowing. 47 U.S.C. § 227(b)(3); see *Charvat v. Ryan*, 879 N.E.2d 765, 771 (Ohio 2007) (if it is shown that violation is willful or knowing, then trial court “may, but need not,” award treble damages); *Irving v. Akron Beacon J.*, 770 N.E.2d 1105 (Ohio Cr. App. 2002) (under TCPA, the trial court has authority to award treble damages in lieu of statutory damages but not in addition to them); *Adamo v. AT&T*, 2001 Ohio App. LEXIS 4989 (Ohio Ct. App. Nov. 8, 2001) (awarding treble damages for calls made after request to be placed on do-not-call list and for failure to provide written do-not-call policy on request); *Grady v. OTC Investor’s Edge*, 2003 WL 2282294 (Ohio Ct. Com. Pl. Oct. 15, 2003) (awarding treble damages), *but cf. Kopff v. Roth*, 2007 WL 1748918 (D.D.C. June 15, 2007) (finding violations willful but exercising discretion not to treble award); *Harper v. New England Handpiece Repair, Inc.*, 2007 WL 4200602 (Ohio Ct. App. Nov. 29, 2007) (unpublished) (trial court has discretion to deny treble damages even if violation is willful or knowing).

The consumer need not prove any monetary loss or actual damages in order to recover the statutory penalty. *Lary v. America Med. Practice Servs.*, 909 So. 2d 204 (Ala. Civ. App. 2005); *Kaplan v. Democrat & Chron.*, 701 N.Y.S.2d 859 (N.Y. App. Div. 1999) (reversing dismissal of complaint of consumer who sued after receiving three telephone calls soliciting newspaper subscription in violation of the TCPA but could not show any monetary loss); *Kaplan v. First City Mortgage*, 701 N.Y.S.2d 859 (N.Y. City Ct. 1999).

Because such losses are likely to be minimal, a statutory penalty is necessary to motivate consumers to enforce the statute. *Kaplan v. Democrat & Chron.* 690 N.Y.S.2d 799, 801 (N.Y. App. Div. 1999); *cf. J.A. Weitzman, Inc. v. Lerner, Cumbo & Assoc., Inc.* 847 N.Y.S.2d 679 (N.Y. App. Div. 2007) (denying actual damages because of plaintiff's inability to show damages from junk fax with reasonable certainty).

The TCPA is a strict liability statute. *Park Univ. Enters., Inc. v. American Cas. Co.*, 314 F. Supp. 2d 1094 (D. Kansas 2004).

In calculating the \$500 per violation for purposes of section 227(c) (which allows a private right of action only after the second call), the consumer is entitled to damages for each call including the first one. *Charvat v. GVN Mich., Inc.* 561 F.3d 623, 630 (6th Cir. 2009).

Several courts have held that a TCPA statutory damages claim cannot be assigned. *U.S. Fax. Law Ctr., Inc. v. IHire*, 476 R.3d 1112 (10th Cir. 2007) (applying Colorado law: neither TCPA claim nor claim under Colorado junk fax law is assignable); *Consumer Crusade, Inc. v. Everycontractor.com*, 2008 WL 619296 (D. Colo. Mar. 4, 2008); *Consumer Crusade, Inc. v. Crevecor Mortgage, Inc.*, 2008 WL 619300 (D. Colo. Mar. 4, 2008); *Martinez v. Green*, 131 P.3d 492 (Ariz. Ct. App. 2006); *Kruse v. McKenna*, 178 P.3d 1198 (Colo. 2008) (TCPA claim is action for a penalty so is not assignable); *McKenna v. Oliver*, 159 P.3d 697 (Colo. App. 2006).

In seeking a treble damage award, the defendant's willfulness or knowledge need not be proven by clear and convincing evidence. *First Nat'l Collection Bureau, Inc. v. Walker*, 348 S.W.3d 329, at *15 (Tex. App. 2011).

The Plaintiff must prove that the violation was done willfully, or knowingly, but need not prove both. 47 U.S.C. § 227(b)(3), (c)(5)

Whether a defendant acts willfully or knowingly is relevant only to an enhanced award and is not a general prerequisite to a recovery of statutory damages. *Lary v. American Med. Practice Servs.*, 909 So. 2d 204 (Ala. Civ. App. 2005).

“Willfully” means merely that the defendant acted voluntarily and under its own free will, regardless of whether the defendant knew it was acting in violation of the statute. 47 U.S.C. § 312(f)(1) (statutory definition of willful); *Charvat v. Ryan*, 879 N.E.2d 765, 771 (Ohio 2007) (must prove that defendant consciously and deliberately committed or omitted act that violated TCPA, irrespective of any intent to violate the law); *Dubsky v. Advanced Cellular Commc'ns, Inc.* 2004 WL 503757 (Ohio Ct. Comm. Pl. Feb. 24, 2004) (unpublished) *Grady v. OTC Investor's Edge*, 2003 WL 22828294 (Ohio Ct. Com. Pl. Oct 15, 2003); *Jemiola v. XYZ Corp.*, 7802 N.E.2d 745 (Ohio Ct. Com. Pl. 2003); see also 47 U.S.C. 312(f)(1) (defining willfulness for purpose of FCC administrative sanctions); *cf. Covington & Burling v. International Mkt. & Research, Inc.*, 2003 D.C. Super LEXIS 29 (D.C. Super. Ct. Apr. 17, 2003), *as amended on reconsideration* by 2003 D.C. Super, LEXIS 28 (D.C. Super. Ct. May 17, 2003) (finding

evidence of willfulness in fax broadcaster's failure to remove numbers from the database immediately upon request). *But see Manufacturers Auto Leasing, Inc. v. Autoflex Leasing, Inc.*, 139 S.W.3d 342 (Tex. App. 2004) (TCPA is willfully or knowingly violated when defendant knows of TCPA's prohibitions, knows plaintiff has not given permission to send a fax advertisement, yet faxes the advertisement).

The Ohio Supreme Court has adopted a less demanding definition, requiring that the defendant knew of the facts that constituted the offense, not that the defendant knew that this conduct violated the law. *Charvat v. Ryan*, 879 N.E.2d 765, 770 (Ohio 2007).

The TCPA does not provide for an attorney fee award, but the consumer may be able to assert a parallel claim under the state UDAP statute and win fees under that statute or via a class action. See, e.g. *Brodsky v. HumanaDental Ins. Co.*, 2011 WL 529302 (N.D. Ill. Feb. 8, 2011) (denying motion to dismiss claim that sending junk faxes is unfair practice under UDAP statute); *Centerline Equip. Corp. v. Banner Personnel Serv., Inc.*, 545 F. Supp. 2d 768 (N.D. Ill. 2008) (denial of motion to dismiss); see also *Charvat v. Telelytics, L.L.C.*, 2006 WL 2574019 (Ohio Cr. App. Aug. 31, 2006) (state UDAP claim that did not conflict with TCPA was not preempted and could proceed); cf. *Charvat v. Ryan*, 879 N.E.2d 765, 771-72 (Ohio 2007) (to be eligible for UDAP fee award, plaintiff need only show that defendant who violated TCPA and UDAP statute by making prerecorded auto-dialed telemarketing call acted intentionally, not that it knew it was violating the law, but trial court has discretion whether to award fees).

The TCPA's substantive restrictions apply to "any person," a term that includes individuals, partnerships, associations, joint-stock companies, trusts, and corporations. *Maryland v. Universal Elections*, 787 F. Supp. 2d 408 (D. Md. 2011) (individuals can be liable even when acting on behalf of a corporation); *Accounting Outsourcing, L.L.C. v. Verizon Wireless Personal Commc'ns, L.P.*, 329 F. Supp. 2d 789, 806 (M.D. La. 2004).

In 2012 the U.S. Supreme Court held that there is federal question jurisdiction for private TCPA suits. *Mims v. Arrow Fin. Svcs., L.L.C.*, 132 S. Cr. 740 (2012).

A reasonably well pleaded complaint should withstand a motion to dismiss for failure to state a claim or for a more definite statement *Buslepp v. B&B Entm't, L.L.C.*, 2012 WL 1571410 (S. D. Fla. May 3, 2012) (failure to identify class members in complaint not fatal); *Stabile v. United Recovery Systems, L.P.*, 2011 WL 5578981 (E.D. N.Y. Nov. 16, 2011) (denying motion to dismiss and granting motion to amend complaint); *Dr. Stuart T. Zaller, L.L.C. v. Pharmawest Pharmacy, Ltd.*, 2011 WL 5508912 (D. Md. Nov. 8, 2011) (allegations against "Defendants" or "all Defendants," without specifying which defendant did or knew what, put named defendant clearly on notice); *Sparlin v. Slect Portfolio Servicing, Inc.*, 2012 WL 527486 (D. Ariz. Feb. 17, 2012) (granting motion to amend because TCPA claim is not futile, and a more carefully drafted complaint may state a proper claim); *Isterling v. Mercantile Adjustment Bureau, L.L.C.*, 2011 WL 4915813 (W.D.N.Y. Oct. 17, 2011) (denying motion for more definite

statement because alleged lack of detail does not make complaint unintelligible) **but must plead the necessary facts to support the legal claims made** *Myers v. Stoneleigh Recovery Assocs.*, 2012 WL 1356752 (E.D. Cal. Apr. 18, 2012) (pro se complaint dismissed, with leave to amend, for failing to allege any facts to support TCPA claim) **including some specificity regarding the defendant's use of an "automatic telephone dialing system," if applicable.** *Ibey v. Taco Bell Corp.*, 2011 WL 2401972 (S.D. Cal. June 18, 2012) (granting motion to dismiss, with leave to amend, because complaint's allegations that defendant used an "automatic telephone dialing system" were conclusory); *Ashland Hosp. Corp. v. Internation Botherhood of Elec. Workers Local 575*, 807 F. Supp. 2d 633 (E.D. Ky. 2011) (case dismissed for failure to state a TCPA claim for non-telemarketing calls).

The TCPA statute of limitations is four years, so discovery may seek records going back at least four years. *Jenkins v. G.C. Servs., Ltd, P'ship*, 2012 WL 1067947 (W.D.N.C. Mar. 29, 2012) (defendant ordered to identify date and time of all calls to plaintiff's number for four years and whether made by a person or an automatic telephone dialing system).

Discovery from telecommunication companies and other non-parties may be necessary due to the technical nature of automatic dialing systems, fax broadcasting, and sending text messages. *Kaffko v. Quepasa Corp.*, 2012 WL 4442654 (D. Nev. Sept. 22, 2011) (denying non-party's motion to quash production of records related to text messages).

Differing scopes of discovery was one reason a court denied consolidation of a TCPA case with an FDCPA case. *Martin v. Midland funding, L.L.C.*, 2011 WL 3876965 (N.D. Ill. Aug. 31, 2011).

Discovery of other suits alleging TCPA violations has been compelled from a defendant. *Castro v. Green Tree Servicing, L.L.C.*, 2012 WL 2428190 (S.D.N.Y. June 22, 2012) (compelling list of past suits alleging FDCPA or TCPA); *Chang v. Cavalry Portfolio Servs., L.L.C.* 2011 WL 6101952 (E.D.N.Y. Dec. 1, 2011) (same; also compelling documents related to defendant's automatic telephone dialing system).

Sanctions were awarded, against a debt collector alleged to have called a non-debtor, for not responding to discovery until after a motion to compel was filed. *Lynn v. Monarch Recovery Mgmt., Inc.* 2012 WL 244046 (D. Md. Jun. 27, 2012).

It is the placing of the call that is prohibited, even if the called party does not actually receive the call. *First Nat'l Collection Bureau, Inc. v. Walker*, 348 S.W.3d 329 (Tex. App. 2011).

The prohibition prevents any prerecorded calls to cell phones and, even if the call is live, an auto-dialer cannot be used to initiate the call to the cell phone. As a practical matter, this prohibits virtually any telemarketing to cell phones.

Auto-dialed calls to cell phones are prohibited, regardless of whether the called party is charged for the call. *Buslepp v. Improv Miami, Inc.*, 012 WL 1560408 (S.D. Fla. May 4, 2012) (plaintiff uses a cell phone and need not separately allege that he was charged for the call); *Kane v. National Action Fin. Servs., Inc.*, 2011 WL 6018403, at *8(E.D. Mich. Nov. 7, 2011) (same).

The Ninth Circuit holds that the dispositive question is not whether a particular call was placed through random or sequential generation of telephone numbers but whether the system has the capacity to generate numbers in this way. *Meyer v. Portfolio Recovery Assocs., L.L.C.*, _F.3d_2012 WL 4840814 (9th Cir. Oct. 12, 2012); *Satterfield v. Simon & Schuster*, 569 F.3d 946 (9th Cir. 2009) (reversing grant of summary judgment to advertiser; fact question whether system had capacity to generate random or sequential numbers).

There is also an exception when the call is made to a phone number that was a land line and was converted to a cell phone number within the last fifteen days, provided that the number is not on the general do-not-call list or the caller's company-specific do-not-call list. 47 C.F.R. § 64.1200(a)(1)(iv).

In contrast to certain other TCPA provisions, there is no exception for calls to the cell phone numbers of persons with whom the caller has an established business relationship. 47 C.F.R. § 64.1200(a)(1); *Zehala v. American Express*, 2011 WL 4484297 (S.D. Ohio Sept. 26, 2011) (refusing to dismiss claim that auto-dialed or artificial voice calls to cell phone for debt collection purposes violate TCPA; established business relationship exception inapplicable to calls to cell phones); *Bentley v. Bank of Am.*, 773 F. Supp. 2d 1367 (S.D. Fla. Mar. 23, 2011) (declining to hold that established business relationship exception applies to auto-dialed or artificial voice calls to cell phones for debt collection purposes).

Auto-dialed or prerecorded debt collection calls to cell phones are prohibited unless the consumer had provided express written consent to the creditor or collector.

The TCPA prohibits placing a call that uses an artificial or prerecorded voice to a residence. 47 U.S.C. § 227(b)(1)(B); 47 C.F.R. § 64.1200(a)(3) **Unlike the provision dealing with cell phones, this provision does not prohibit the use of auto-dialers to make live calls to a consumer's residence. As a result, it does not prevent telemarketing calls generally—just those using a prerecorded message.**

The signature for express consent requirement can be met by an electronic or digital signature if federal and state law allow. 47 C.F.R. § 64.1200(f)(8)(ii)

*******Obtaining consent during the call—for example, by asking the consumer to press numbers on the telephone keypad to hear a message—is insufficient.** *Margulis v. P & M Consulting, Inc.*, 121 S.W. 3d 246 (Mo. Ct. App. 2003); Report and Order, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act. Of 1991*, at ¶ 142, 18 F.C.C. Rcd. 14014 (Fed. Comm'ns Comm'n July 3, 2003); *see also Reichenbach v. Chung Holdings*,

L.L.C., 823 N.E.2d 29 (Ohio Ct. App. 2004) (call is an advertisement even though it only asked recipient to press a keypad number for more information).

The TCPA restriction on prerecorded messages sent to residential phone is found under the TCPA at 47 U.S.C. § 227(b). As a result, there is a private action for the first violation and no defense for reasonable procedures.

Note: The bold type before the case cites does not represent a quotation from the case, merely paraphrasing the point of the decision.

Note: See NCLC's book titled Federal Deception Law, First Edition. NCLC's new book can be used to supplement the above decisions. This book may be purchased at the NCLC site www.nclc.org. Along with this book are several other books you may wish to consider purchasing e.g. FDCPA, FCRA, UDAP. These book are highly recommended.