Dial up data analytics:

Using forensic techniques to evaluate class certification in TCPA class actions

TODAY'S REALITY:

- The Telephone Consumer Protection Act (TCPA) protects consumers from unsolicited calls, texts, and faxes.
- TCPA class action claims are on the rise, and penalties are skyrocketing.
- Few companies are immune to the threat of costly TCPA litigation, even companies that use a third-party telemarketing agency.
- Companies facing a class action suit can reduce exposure by using advanced data analytic forensic techniques to challenge the "class certification" of claimants.

A retailer sends local residents a prerecorded phone message publicizing a special promotion. A pharmacy uses an automated system to text customers that their prescriptions are ready. A home improvement store texts product advertisements to consumers' cell phones.

These types of automated marketing telecommunications may seem like harmless and commonplace business practices. They may even be considered essential in the fast-paced, information-intensive landscape of modern commerce.

However, each of these companies may be breaking the law by "spamming" customers with unsolicited telecommunications, thereby violating the Telephone Consumer Protection Act of 1991 (TCPA), which allows individuals to collect damages for receiving calls, texts, and faxes that are autodialed or prerecorded.

A new set of TCPA rules revisions has made compliance more challenging than ever and has caused the number and impact of TCPA class action lawsuits to surge. As privacy restrictions and consumer protections continue to evolve, seemingly commonplace mass marketing practices may actually be illegal. And consumers, and their lawyers, are taking notice. Companies should know how to reduce exposure to TCPA fines when faced with a class action suit.

Could I be affected?

Few, if any, companies are immune to the threat of costly TCPA class action litigation enforcement.

A company may be at risk if they:
- Use automated marketing technologies
- Use caller lists
- Retain third-party agencies that use automated marketing technologies or caller lists.

Recent TCPA-related complaints have targeted insurance companies, retailers, technology providers, social media platforms, hospitality vendors and franchises, marketing agencies, and financial institutions.

Why should I pay attention now?

The litigation landscape today is triggering more TCPA class action lawsuits than ever, and new rules don't favor companies.

Class action lawsuits challenging organizations' use of automated marketing technologies are now filed almost daily. This is a result of two trends.

First, we have seen an increasingly litigious atmosphere since 2007, including a 54 percent increase in TCPA class action filings between 2011 and 2012.[1]

In addition, recent regulatory developments have opened the door to more TCPA class action claims.

2013 TCPA revisions and rulings by the Federal Communications Commission (FCC):

- Require companies placing artificial or prerecorded calls to include an opt-out[2]

- Limit defendants' ability to argue that their third-party marketing agency is liable for violations, even when the agency executed the entire telemarketing program[3]
- Require companies to obtain "prior express written consent" from consumers to receive prerecorded calls or texts or to be included in phone bank systems
- Eliminate the "established business relation exception," which companies historically relied on to substantiate their rights to send unsolicited messaging through calls and texts to consumers.[4]

As the number of class actions surged, so has the magnitude of the average award. Today, violations of the TCPA can trigger multimillion-dollar settlements. For example, a historic 2013 case awarded a $32 million settlement for more than 7 million class members.[5] Another, in 2015, resulted in a $47 million settlement for 2 million class members.[6]

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[1] Telephone Consumer Protection Act Cases Are on the Rise
   Source: Bloomberg BNA, James G. Snell and Carlos P. Mino (Feb. 14, 2013)

[2] Defense Perspective On Major TCPA Developments In 2013
   Source: Law360 (Jan. 14, 2014)

[3] Implied by a contract between a company and a third-party marketing agency and/or the inclusion of a company's name in the third-party marketing agency's message.

[4] Defense Perspective On Major TCPA Developments In 2013
   Source: Law360 (Jan. 14, 2014)

[5] Telephone Consumer Protection Act Cases Are on the Rise
   Source: Bloomberg BNA, James G. Snell and Carlos P. Mino (Feb. 14, 2013)

[6] Telephone Consumer Protection Act Cases Are on the Rise
   Source: Bloomberg BNA, James G. Snell and Carlos P. Mino (Feb. 14, 2013)

How can I protect my business?

Using advanced data analytic forensic techniques, companies under threat of, or in the midst of TCPA class action litigation can reduce the impact to potentially expensive TCPA lawsuits.

Class actions allow groups of people with the same legal claim—a "class"—to obtain a settlement that benefits all class members, rather than filing individual lawsuits. However, lawsuits cannot be resolved as class actions unless they meet certain federal and state court rules. In other words, the court must "certify the class" for the lawsuit to proceed.

One way for defendants to fight class action lawsuits is for their lawyers to show the court that the claimant group does not meet the requirements of a class and prevent it from being certified as such.

To file a successful motion to deny class certification may require evidence in the form of data—physical and electronic data on communications, customers, and more, spanning months and possibly years.

For example, internal data from the company's business systems may show records of customer consent to receive automated calls. Meanwhile, external data from the local telephone company may show dissimilarities in call types or customer profiles—e.g., calls made to cell phones versus landlines or variances in call times or call geographies.

Depending on the allegations being made in the suit, this data may demonstrate that not everyone in the class has a legitimate claim or belongs in the class. In other words, it might be exactly the evidence the defendant needs to argue against class certification.

The difficulty is that this data is not often easily accessible or easily understood. It usually sits within disconnected systems, in the form of numbers and codes. And the sheer amount of it can be overwhelming.

That is why data analytics plays such a crucial role in supporting an organization's legal defense of TCPA class actions. By building and analyzing large complex databases of call records and other consumer data, companies can assess:

- The commonality, typicality, and adequacy of representation of the claims class

- "Ascertainability," or whether claimants can be reliably identified as legitimate under the law

- The need for individualized determinations of merit by the courts to accurately define a class

- Errors in damages awarded in light of negligence by a third-party marketing agency

- Potential damages and appropriate settlement amounts.

In many cases, the defendant's analysis may turn up evidence that supports a class certification challenge, essentially stopping the class action litigation in its tracks.

Data analysis is a complex undertaking that is still a struggle for many organizations. But in light of the recent TCPA litigation atmosphere, the stakes are getting higher.

Noncompliance with the TCPA is a serious issue, but data may be on your side. Consider turning to advanced data analytics to obtain the relevant facts to effectively respond to class action lawsuits.
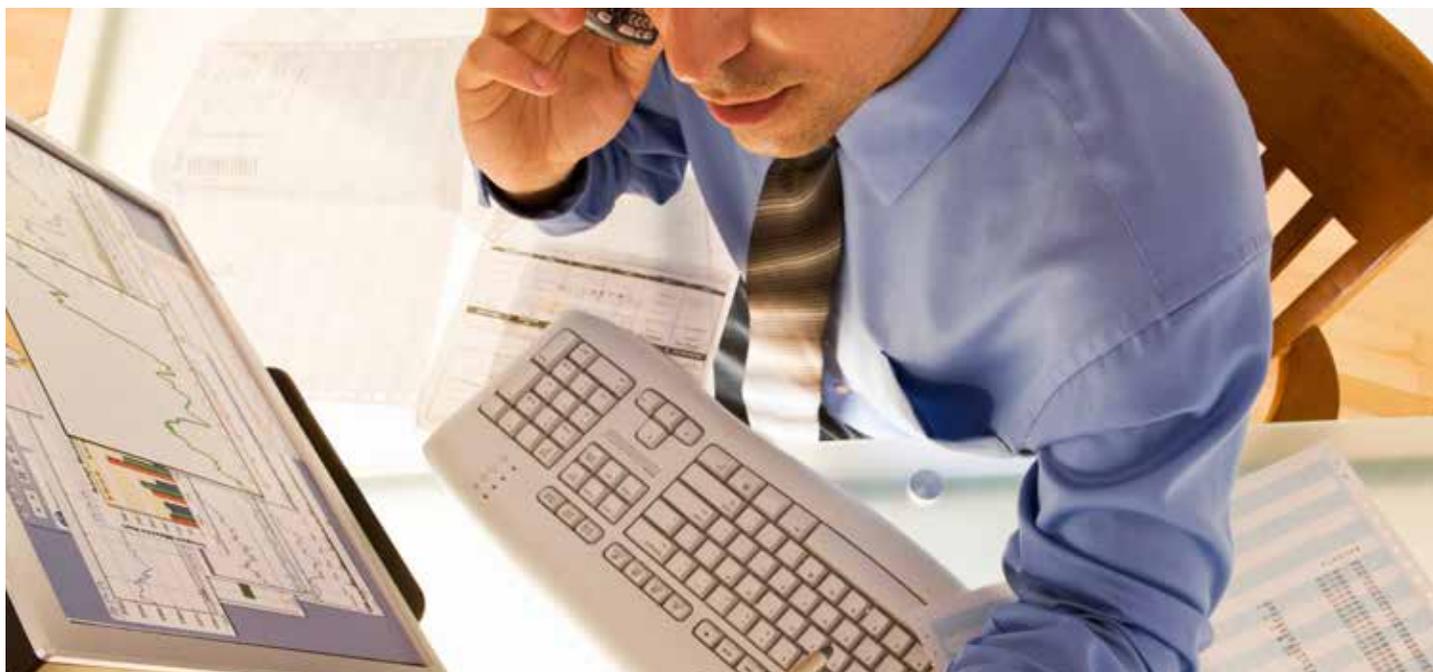
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Contact us

João C. Dos Santos	**Bryan H. Jones**	**Juan Gonzalez III**
Managing Director	**Partner**	**Principal**
Dispute Advisory Services	**Dispute Advisory Services,**	**Dispute Advisory Services**
Los Angeles, CA	**Network Leader**	San Francisco, CA
213-533-3054	Dallas, TX	415-963-7619
joaodossantos@kpmg.com	214-840-6414	juangonzalez@kpmg.com
	bhjones@kpmg.com	

www.kpmg.com/us/forensic