

## **Class Actions and the Telephone Consumer Protection Act Who Benefits? Seven Myths and Facts**

**Myth 1:** Fears of class action lawsuits under the TCPA prevent businesses from communicating valuable information to their customers.

**Fact 1:** The TCPA only prohibits autodialed calls to cell phones without consent, but emergency calls and texts to cell phones are always permitted – even without consent. So many of the notices and services that the banks and other businesses want to make available to customers through their cell numbers are not affected by the prohibition. For example, both of these situations would likely qualify as an emergency: 1) alerts that inform a consumer that her credit card has been blocked because of an immediate suspicion of fraud; and 2) information from a health care provider that a recently filled prescription may conflict with a known or suspected health condition of the patient.

Other notices and services, which do not qualify as emergencies, can be advertised by the business as they solicit updated cell phone numbers from their customers. Businesses that have ongoing relationships with their customers (like banks or health care providers) have frequent opportunities to communicate and ask their customers if a) they want to be called on their cell phones regarding products or services, and b) the current cell number on file is up-to-date. Emergency notices are already exempted from the prohibition against using autodialers to call cell phones without consent.

**Myth 2:** Class action lawsuits by trial lawyers are only helping the lawyers and hurting honest businesses trying to communicate with customers.

**Fact 2:** Actually the fear of class action lawsuits serves as an important deterrent to businesses that want to comply with the law and avoid liability. This deterrent has the effect of protecting millions of consumers from receiving unwanted – and unconsented to – calls and texts to their cell phones on a daily basis.

Only a very small number of businesses are sued under the TCPA. This is because most businesses comply with the provisions. It is only the businesses that insist on using autodialers to call and text cell phones for which they do not have up-to-date ownership information that risk liability from these lawsuits.

The ultimate beneficiaries of class actions are the general public. The threat of class actions has a prophylactic effect against violating the law. Additionally, generally defendants in the class actions all change their behavior – to prevent repeat liability.

**Myth 3:** Congress did not intend for the TCPA to be enforced by greedy trial lawyers.

**Fact 3:** Class action lawsuits are a central part of the TCPA's enforcement apparatus, contemplated by Congress as a) a mechanism to enforce the protections of the TCPA, and b) to create incentives to industry to comply with the law – so as to avoid liability. When the TCPA was passed, Congress was well aware of the potential cost to industry from class action liability – as numerous other consumer protection laws included statutory damages. Unlike the limits imposed by Congress for liability in other consumer protection laws (for

example, the Truth in Lending Act and the Fair Debt Collection Practices Act, both of which have limits of \$500,000 in statutory damages for class actions), no limit was stated in the TCPA. In fact, because there are no fee shifting provisions in the TCPA – unlike in these other consumer protection laws – class actions are often the only practical way of litigating these claims.

**Myth 4:** The only people that benefit from the TCPA class action lawsuits are the lawyers bringing the cases.

**Fact 4:** As there are no fee-shifting provisions in the TCPA, the economics of bringing litigation under the TCPA require that there be significant numbers of violations (multiples of the \$500 statutory damages) before it makes sense to initiate litigation. These cases are time consuming to litigate and they require expensive expert witnesses to prove the claims. So, yes, the lawyers who bring these cases benefit from them – but only if they successfully prove the elements of the claims under the TCPA. That is why private enforcement is an effective mechanism of enforcing a consumer protection statute.

Lawyers only receive a fraction of the ultimate payout – consumers themselves receive the larger share. The named-plaintiffs generally are compensated well. When cases settle, the unnamed class members often receive a portion of what they would have been entitled to had the case proceeded to final judgment. That is why the cases settle – so that the defendants don't have to pay as much as they might if the case was litigated through to judgment. In these settlements the unnamed members of the class are then compensated less than they would have been entitled to had the case proceeded to judgment – but these unnamed members did not suffer the time and trouble to initiate the litigation. One example of this is the case *In Re Capital One*, which is pending final approval. In that case, almost 1.4 million Americans affirmatively submitted a claim after they were notified of the case and attorney fees. That is 1 out of every 240 Americans.

Consumers who are not members of the class also benefit from large settlements – in the deterrent effect they provide against violating the TCPA, which limits the number of unwanted calls and texts to cell phones for the rest of us.

**Myth 5:** A fair middle ground to arbitrate between the extensive litigation surrounding TCPA cell phone calling and the appropriate facilitation of business calling customers would be to establish a safe harbor to allow callers some time to ascertain the owner of a cell phone number, after it began calling the number.

**Fact 5:** Providing any exemptions or safe harbors would completely eliminate the pressure on businesses to develop technologies and methodologies to prevent making wrong number calls to cell phones. With no safe harbor, industry will develop ways to ensure that they do not make wrong number calls. They can sponsor searches for technologies that have a higher accuracy rate than those currently on the market (which apparently have an 80 to 90% accuracy rate); they can combine the existing technologies with other strategies to prevent wrong number calls, such as making a manual call first, or developing a way to determine whether the person who answers is indeed the person intended to be called.

It is critical to maintain the incentives on industry to develop these strategies to avoid the wrong number calls. Safe harbors push the costs of these wrong-number calls from the industry to the innocent bystanders who are receiving the dozens to tens of thousands of wrong-number calls made within the safe harbor.

**Myth 6:** Industries making autodialed calls to cell phones have no incentives to call wrong numbers, thus they should not be punished for mistakenly calling wrong cell numbers.

**Fact 6:** The issue is not whether industries that make wrong number calls benefit from the calls, but whether they have any incentive to avoid making these calls. The marginal costs of additional calls are minuscule or non-existent, so the cost of making wrong-number calls does not create an incentive for businesses to avoid them. At the same time, there *are* costs to determining that telephone numbers are correct—the costs of subscribing to a database that identifies wrong numbers, making manually-dialed calls, re-contacting customers, or setting up a system to remove numbers from calling lists after receiving a “this number is no longer in service” message. Without the TCPA, businesses would have no incentives to take any measures to avoid wrong number calls. Consumers are undoubtedly hurt by the wrong number calls, and the privacy protections of the TCPA are intended to protect against those wrong number calls. It does not matter that industry does not benefit from the wrong number calls – it matters that industry should be incentivized to *stop* the wrong number calls.

**Myth 7:** Many of the TCPA class action lawsuits are challenging single wrong number calls – single mistaken calls to consumers, not multiple harassing calls to the same number.

**Fact 7:** Let’s look at this issue from the consumer’s perspective. Consumers who go to the trouble to complain about a single wrong-number call from one business are most likely complaining because of the multiple calls that she is receiving. If Consumer A receives 20 wrong number calls a week from 20 separate businesses, it does not matter to Consumer A if those 20 calls come from the same business or different businesses. It only matters that the consumer is getting 20 wrong number calls on her cell phone in a week. She is fed up and wants to deal with it.

There are new Apps available that may facilitate hooking up consumers who are fed up with these calls with attorneys willing to litigate these cases. But the consumers who go to the trouble of installing and using an App are doing so because they are looking for a way of dealing with the unwanted calls to their cell phones.

**Myth 8:** The TCPA class actions are interfering with relationships between businesses and consumers, by scaring businesses away from providing valuable information and services to their customers.

**Fact 8:** Again, businesses have ongoing relationships with their customers and have ample opportunity to update their customers’ a) consent to marketing pitches, and b) updated cell phone numbers. And emergencies are exempted.

But class actions are not brought against businesses by the customers of these businesses. The class actions are brought against businesses by *innocent bystanders* who have had no prior relationships with the business that is calling or texting their cell phone.

Suppose Consumer Anne opens a credit card account with Bank B. She provides her cell phone number in the application, and consents for Bank B to use the number to call her. If Consumer A does not pay her credit card account, Bank B will attempt to reach her. She has provided consent to these calls. So there is no TCPA violation from Bank B's attempts to contact her.

But suppose Bank B does not reach Consumer Anne when calling her, it reaches Consumer Robin. Consumer Robin has no relationship with Bank B, has never provided consent to being called. Yet Bank B calls Consumer Robin numerous times, and Consumer Robin can't get Bank B to stop. When she calls back to say "Stop calling me," Bank B asks for an account number – and she has no account number to provide. After receiving 80 unwanted calls, Consumer Robin finds a lawyer to help her deal with Bank B.

For further information, contact –

Margot Saunders  
Counsel  
National Consumer Law Center  
202 452 6252, extension 104  
[msaunders@nclc.org](mailto:msaunders@nclc.org)  
[www.nclc.org](http://www.nclc.org)