



## Shifting Trends: Privacy & Security Class Action Litigation

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## Shifting Trends: Privacy & Security Class Action Litigation (August 2014)

### Executive Summary

While the attention of the media and board rooms continue to focus on the large scale credit card data breaches that occurred during the first quarter of the year, data security related class action complaint filings have declined precipitously. It is too early to determine whether this is a permanent decline in complaint filings, or reflects a temporary decline as the plaintiffs' bars resources are tied up in data security cases filed during the first quarter of the year.

TCPA cases continue to predominate as the single largest category of data privacy or data security breach litigation. In terms of industries, there has been a significant uptick in complaints filed against debt collectors and a corresponding uptick in allegations that the Fair Debt Collection Practices Act has been violated.

The following are additional key findings from the period (2014-Q2):

- A total of 185 data-related class action complaints were filed.
- The great majority of complaints (97%) involved data *privacy* (i.e., collection, use, and sharing), as opposed to data *security* (i.e., safeguarding and breach) (3%), which plummeted compared to the last quarter where security-related complaints, connected to a number of high profile data breaches, were more numerous.
- Telemarketing remained the most common primary legal theory alleged (56%).<sup>1</sup>
- The United States District Court for the Central District of California (21%) remained the most popular federal forum for filing, followed by the Eastern District of New York (12%) and the Northern District of Illinois (11%).
- In terms of industries affected, debt collection received the largest number of complaints (38%).
- 71% of complaints filed in federal courts in the second quarter alleged putative national classes.
- Consumers' phone numbers were the leading type of data at issue (59%), followed by fax numbers (23%) and consumer reports (6.50%).
- Over 95 plaintiffs' firms were involved in data-related litigation. The vast majority of firms filed less than four complaints.

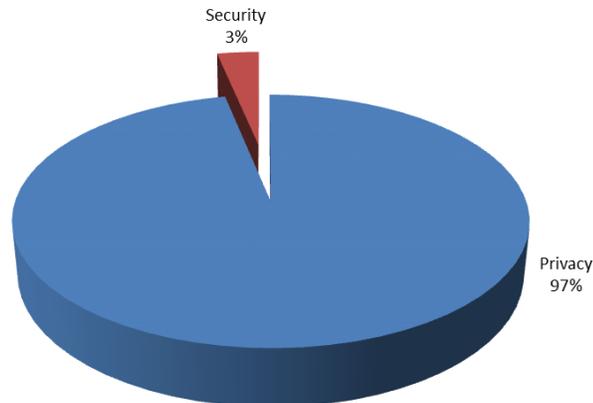
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<sup>1</sup> For an in-depth discussion of class action litigation Bryan Cave publishes a separate quarterly whitepaper on trends in telemarketing class action complaints. Please contact the authors for the most recent version of that whitepaper.

## Part 1: Primary Legal Theories

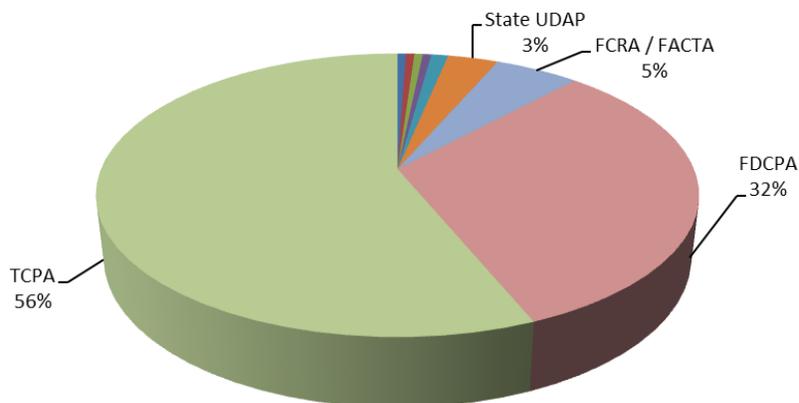
The vast majority of complaints (97%) focused on data privacy related issues – such as the propriety of a company’s collection, intentional sharing, or use of information. Data security – the protection of information from unintentional access or acquisition – was the primary focus in only 3% of complaints. The low volume of data security suits may track an ebb in the volume of high profile credit card data breaches during the quarter.

### Data Security Versus Data Privacy Litigation



The largest category of complaints continue to relate to alleged telemarketing violations under the Telephone Consumer Protection Act (“TCPA”) (56%). The next largest categories involved the Fair Debt Collection Practices Act (“FDCPA”) (32%), the Fair Credit Reporting Act (“FCRA”) (5%), and State UDAP laws (3%).

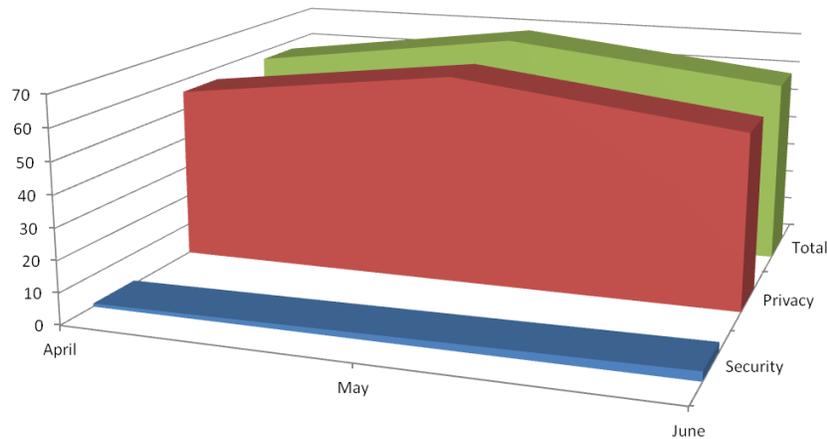
### Primary Legal Theory Alleged



## Part 2: Volume of Litigation

A total of 185 complaints were filed during the period. Privacy complaints outnumbered security complaints each month and the relative volume of complaints each month was fairly steady over the quarter.

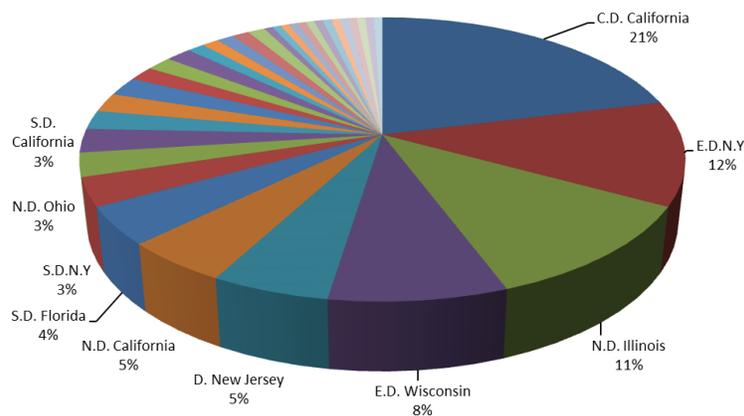
### Complaint Filings by Month & Type



## Part 3: Favored Courts<sup>2</sup>

The largest number of complaints filed this quarter were filed in the Central District of California (21%) and the Eastern District of New York (12% of complaints). The Northern District of Illinois also remained one of the favored courts (11%), and many complaints were filed in the Eastern District of Wisconsin (8%). The following chart shows the courts in which complaints were filed.

### Courts in Which Complaints Were Filed

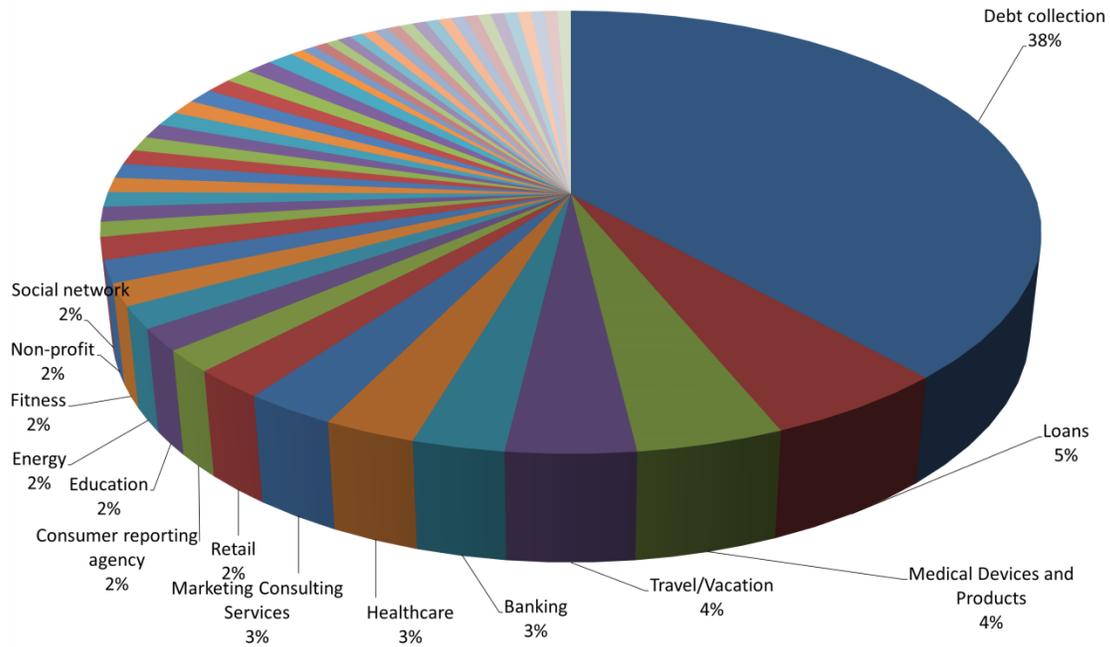


<sup>2</sup> This report does not include complaints filed in state courts. For more information, please see the Methodology section below.

## Part 4: Litigation By Industry

Aside from debt collectors, which made up 38% of the companies that were subject to a class action suit during the quarter, no industry had more than ten class action suits filed against companies within it.

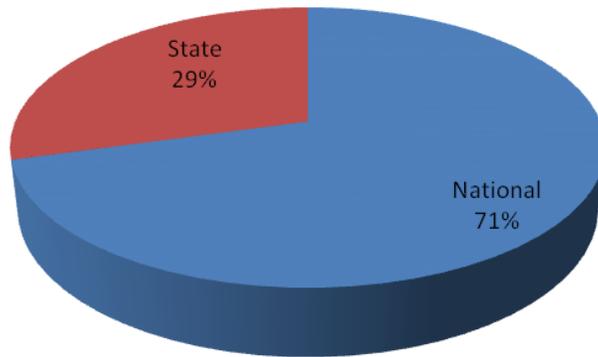
### Percentage of Complaints by Defendant Industry



### Part 5: Scope of Alleged Class (National v. State)

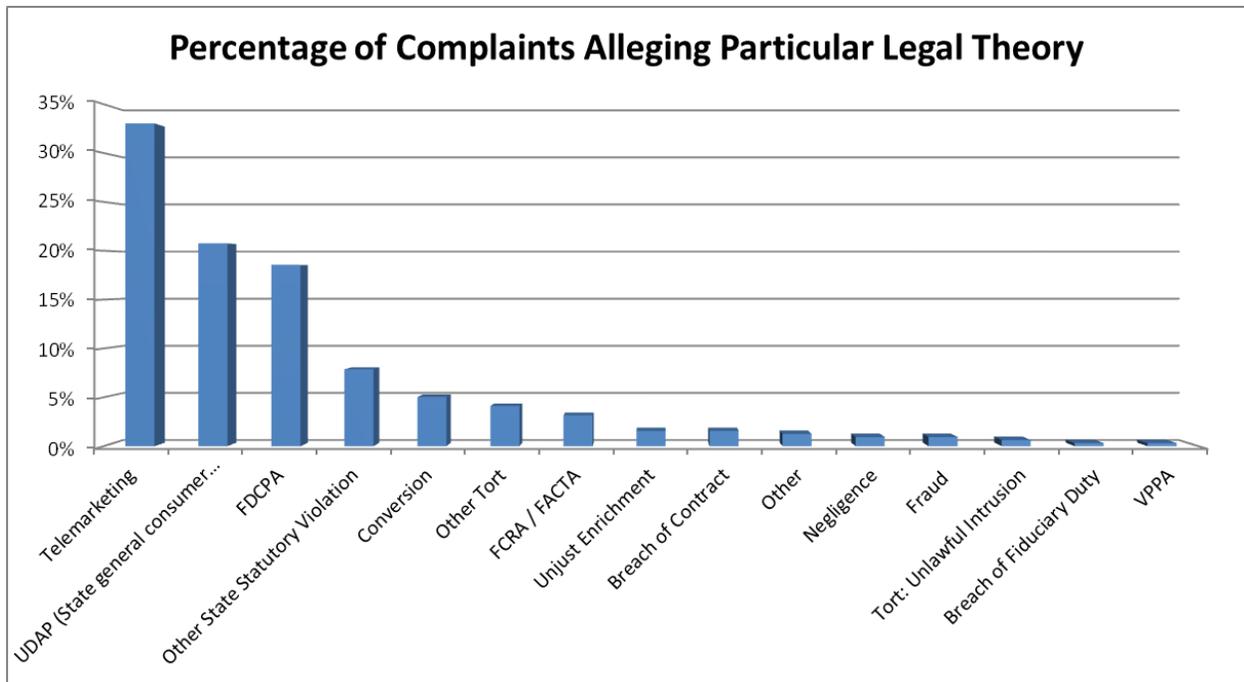
As indicated in the following chart, a majority of complaints (71%) alleged a putative class that is national in scope (even if it also alleged one or more single-state subclasses). Although national classes continue to predominate, relative to previous quarters state-only classes are on the rise.

#### Scope of Alleged Class



### Part 6: Variety of Legal Theories Alleged

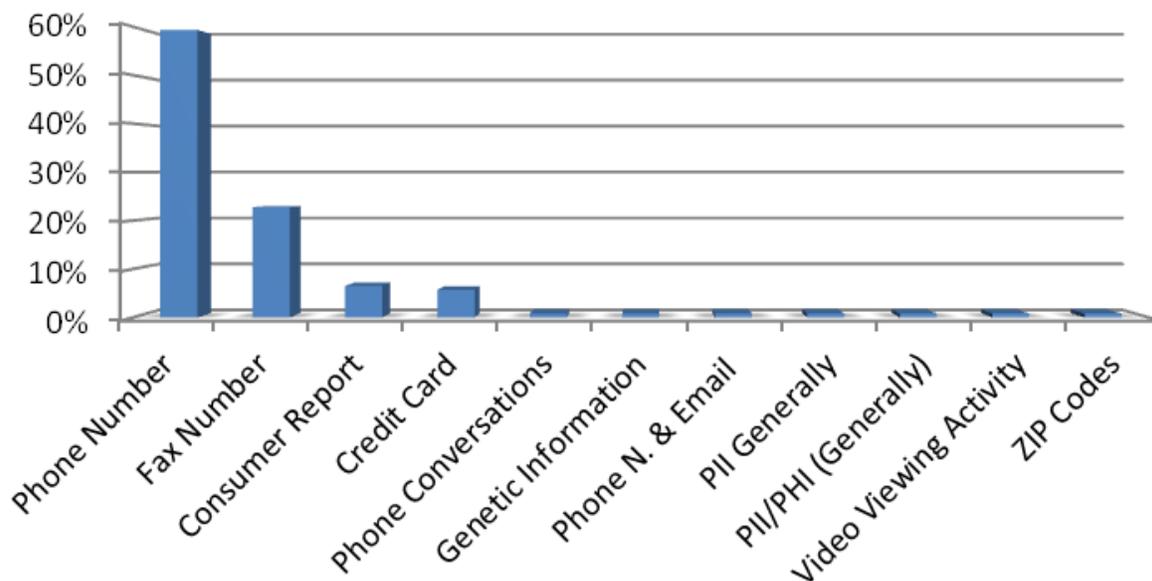
As indicated in the chart below, complaints filed during the period alleged 15 different legal theories. Compared to previous quarters there was a significant increase in FDCPA litigation.



## Part 7: Primary Type of Data At Issue

Complaints filed during the period involved approximately 10 different types of data. The most common fields at issue were consumer telephone phone numbers (59%), fax numbers (23%), and consumer reports (7%). The following chart provides a breakdown of the complaints by the primary data field at issue.

### Primary Type of Data at Issue



## Part 8: Plaintiffs' Firms

Over 95 plaintiffs' firms were involved in filing the class action complaints during the period; like previous quarters, most firms filed less than four complaints. Only five firms filed over 10 complaints.

## Part 9: Methodology

The data analyzed in this report includes complaints filed against private entities that we identified within both the Westlaw Pleadings and Dockets databases. The time frame covered is the second quarter of 2014 (April to June). Given the variety of words that can be used to describe data privacy and security incidents, multiple searches were run in order to find complaints that included – together with “class action” and equivalent phrases – the following search terms:

- “privacy,” “security,” or “breach” and phrases containing “personal,” “consumer,” or “customer” at a reasonable distance from the words “data,” “information” or its derivations, “record,” “report,” “email,” “number,” or “code,” or

- “collect” or “share” or their derivations and “zip,” “address,” “email,” or “number,” at a reasonable distance in the text from “personal,” “customer,” or “consumer,” or
- “data” at a reasonable distance from “breach.”

Additional searches were used to identify complaints that specifically referenced the Telephone Consumer Protection Act (“TCPA”), the Children’s Online Privacy Protection Act (“COPPA”), the Controlling the Assault of Non-Solicited Pornography and Marketing Act (“CAN-SPAM”), the Health Insurance Portability and Accountability Act (“HIPAA”), the Video Privacy Protection Act (“VPPA”), the Fair Credit Reporting Act (“FCRA”), the Fair and Accurate Credit Transactions Act (“FACTA”), the Fair Debt Collection Practices Act (“FDCPA”), the Electronic Communications Privacy Act (“ECPA”), and point-of-sale (“POS”) statutes, including the California Song Beverly Credit Card Act.

All the complaints identified by these searches were read and – after the exclusion of the non-relevant ones – categorized in order to identify and analyze the trends presented in this report.

As was the case in Bryan Cave’s prior whitepaper, state complaints have been excluded so as not to inadvertently over-represent or under-represent the quantity of filings in any state. Complaints which are removed from state court to federal court were included within the analysis.

## ABOUT THE AUTHORS



**Josh James** is a member of the firm's Data Privacy and Security Team and routinely assists clients in responding to data security breaches and in investigations initiated by the Federal Trade Commission.

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### Bryan Cave LLP

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In addition to providing analysis based upon years of experience, Bryan Cave analyzes data in order to identify legal trends and leading indicators of legal risk.

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