



# Managing Legal Risks: Trends in Mobile, Text Message, Fax and Telephone TCPA Class Action Litigation (Third Quarter 2013)

## Executive Summary

There was a substantial decline in the volume of TCPA class actions filed during Q3 and, of those filed, there was a preference toward cases involving fax transmission. Although it is possible the decline signals a shift by Plaintiffs attorneys away from the TCPA, the more likely hypothesis is that Plaintiffs firms may have been waiting until after the FCC's new consent requirements went into effect on October 16, 2013, to file cases.

## Background

The Telephone Consumer Protection Act ("TCPA") was enacted in 1991 for the purpose of restricting unwanted telephone calls to consumers. Today the scope of the TCPA extends well beyond the telephone-based solicitations that existed in 1991, and governs most companies that contact their customers by text message, fax, or pre-recorded message. It also imposes special requirements for communications to a consumer's mobile telephones.

As discussed in our [report](#) covering TCPA class action litigation trends in the first two quarters of 2013, the TCPA has recently received renewed attention from the plaintiffs' class action bar and the media due to a number of high profile class action settlements with prominent retail, financial, and service companies. The attention to TCPA litigation is expected to further increase following the October 16 effective date of the new requirements that prior express written consent be obtained for certain types of autodialed and prerecorded telemarketing calls.<sup>1</sup>

## Findings

This report analyzes TCPA class action complaints filed between July and September 2013 (the "period") in an effort to help companies better understand, and quantify, the risk that they will be named in a class action lawsuit. The following are key findings concerning complaint filings over this period:

- There was a substantial decline in the volume of TCPA class action complaints filed over the period. A total of 7 class action complaints were filed, less than 50% of the volume filed in Q2.
- The greatest number of complaints involved fax transmissions. A smaller number of complaints involved text message transmissions and mobile phone transmissions. No complaints involved residential (*i.e.*, non-wireless) telephone calls.

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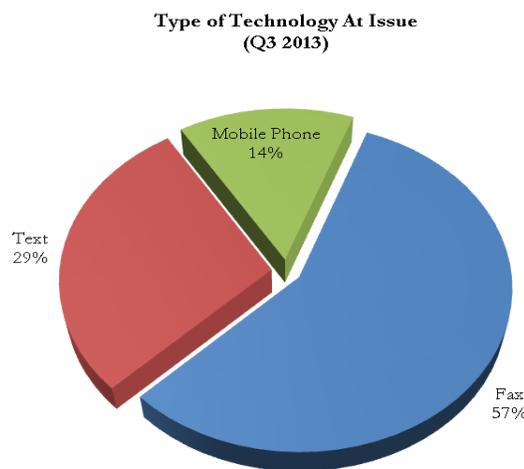
<sup>1</sup> See [New Telemarketing Rule Requires Express Written Consent \(September 26, 2013\)](#). In addition, the following webinar provides additional information concerning the new FCC requirements: [Webinar, "Ring, Ring: New TCPA Consent Requirements Take Effect on October 16, Are You Ready?" \(July 23, 2013\)](#).

- Lawsuits were concentrated in the third quarter in courts in Illinois and Florida. The choice of federal versus state courts was nearly equal, with one more case being filed in state court than in federal court.
- Complaints were filed across industry segments; no one industry had more complaints than another during the period.
- All but one complaint alleged a putative national class.
- Complaints alleging state law violations exclusively focused on the Illinois Consumer Fraud Act.
- Complaints overwhelmingly focused on an alleged failure to obtain consumers' prior consent. Relatively few cases alleged a failure to include required opt-out notices, other torts such as conversion and state statutory violations.
- 8 Plaintiffs firms were involved in filing complaints during the period.

As indicated above, there appears to have been a significant slowdown in the number of TCPA class action complaints filed over the period. The slowdown may in part be due to Plaintiffs attorneys waiting to file complaints under the new rules that took effect on October 16, 2013.

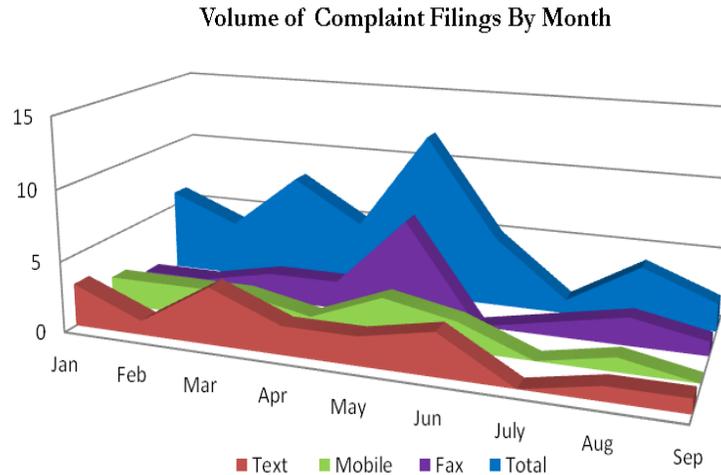
### Part 1: Type of Telemarketing (Fax, Mobile, Residential)

The majority of class action complaints filed during the period (57%) focused on the use of faxes. A smaller percentage of complaints involved the use of text messages (29%) and unsolicited mobile calls (14%). No complaints involved calls to residential telephone numbers. The following chart provides a breakdown of the media that is the focus of the class action complaints:



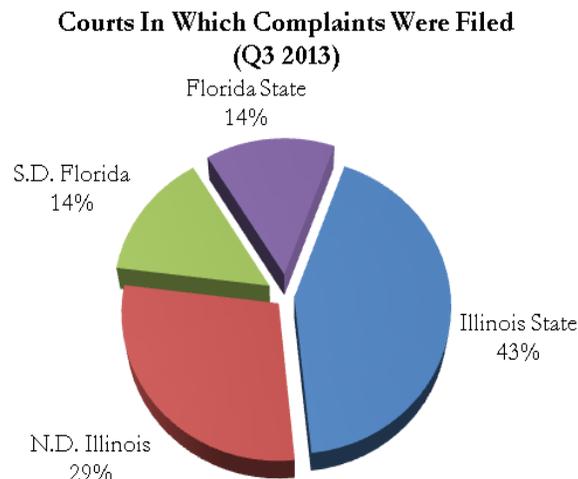
## Part 2: Volume of Litigation

A total of 7 complaints were filed during the period. The volume of complaints fluctuated by month, with one complaint being filed in July, three complaints being filed in August and two complaints being filed in September. This reflects a substantial drop in the volume of TCPA litigation in the third quarter. The following chart shows the quantity of litigation throughout the period.



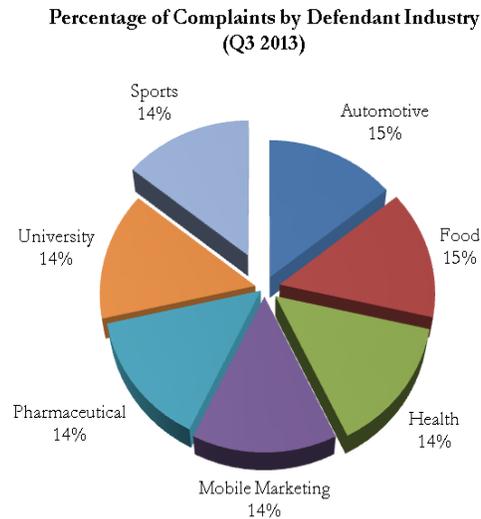
## Part 3: Favored Courts

During the period, 71% of complaints were filed in Illinois courts and 29% of complaints were filed in Florida courts. The number of complaints filed in state court and federal court were nearly equal, with four complaints being filed in state court and three complaints filed in federal court. The following provides a breakdown of complaint filings by court:



#### Part 4: Litigation By Industry

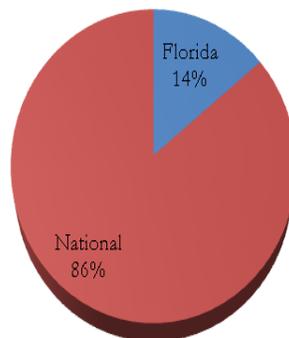
Plaintiffs appear to be targeting a broad spectrum of industries and there continues to be far less concentration by industry category than is seen among other types of consumer class action litigation.<sup>2</sup> No one type of industry was the subject of more TCPA complaints filed during the period. The following chart provides a breakdown of TCPA complaints by the industry in which the defendant operates:



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

As indicated in the following chart, the vast majority (86%) of TCPA complaints allege a putative class that is national in scope. This diagram treats cases as national in scope so long as a complaint alleges a national class even if the complaint also alleges one or more single-state subclasses. The proportion of national versus state classes is consistent with that seen during previous quarters.

**Scope of Alleged Class (National v. State)  
(Q3 2013)**



<sup>2</sup> See e.g., [Zetoon & Goldman, Trends in Advertising Class Actions: Second Quarter 2013](#).

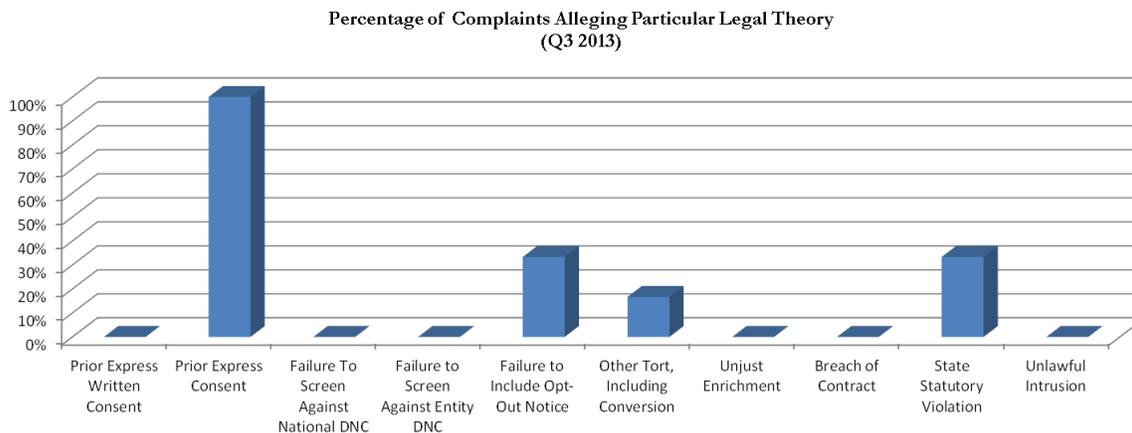
## Part 6: Primary Legal Theory Alleged

All complaints filed during the period alleged a failure to obtain prior consent as the primary legal theory. If a complaint included more than one legal theory (*e.g.*, failure to obtain consent before sending a text message and failure to include the required opt-out notice) then the complaint was categorized based on the legal theory predominantly discussed.

## Part 7: Variety of Legal Theories Alleged

The most common legal theory alleged in TCPA complaints in the third quarter of 2013 was a failure to obtain prior consent, with all complaints alleging that legal theory. The next most common legal theories alleged were a failure to include an opt-out notice (43% of complaints), violation of a state telemarketing statute (29% of complaints) and conversion (29% of complaints).

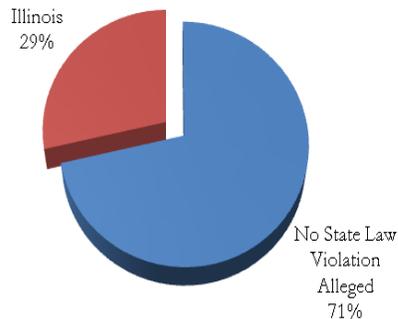
The following chart provides a breakdown of all of the grounds alleged in the complaints. The percentages collectively exceed 100% as many complaints included more than one legal theory. For example, a complaint that alleged that a company violated the TCPA by sending a fax without obtaining the express consent of the recipient and violated the TCPA by failing to include the opt-out language at the bottom of the fax would be included in both categories.



## Part 8: Preferred State Law.

A number of states have passed telemarketing legislation that is modeled after the TCPA or the related Telemarketing and Consumer Fraud and Abuse Act (the “Telemarketing Act”) and the Federal Trade Commission’s rules implementing that Act. Although the majority of TCPA litigation alleges causes of action under only the TCPA, 29% of complaints alleged violations of the Illinois Consumer Fraud Act. The Illinois Consumer Fraud Act was the only state statute alleged in TCPA complaints filed during the period.

### Preferred State Law Alleged In Complaint (Q3 2013)



### Part 9: Leading Plaintiffs Firms

Eight Plaintiffs firms were involved in the complaints filed during the period. The firm of Bock and Hatch LLC filed two TCPA complaints during the period, the most of any Plaintiffs firm.

### Part 10: Methodology

Complaints included within the data analyzed by this report were identified within the Westlaw Pleadings library as containing the phrase “class action” in conjunction with “TCPA,” “telemarketing,” “Telephone Consumer Protection Act,” 47 USC 227, 47 CFR 64.1200, “junk fax,” or “spam.” This report covers those complaints filed between July and September of 2013. Data shown in this report that reflects information for the year-to-date may differ slightly from information contained in prior reports due to efforts to de-duplicate multiple complaints filed in the same litigation.

## ABOUT THE AUTHORS



**Megan Gajewski** routinely advises clients concerning compliance with trade and consumer protection related issues including the TCPA, and the FCC's regulations enforcing the TCPA.

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