

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

Executive Summary

Complainants filed a substantial volume of TCPA class actions during Q4 of 2013. Of the 92 complaints filed during the period, there was a preference toward complaints involving transmissions to mobile phones. One explanation for the substantial number of complaints filed during the period is the October 16, 2013, effective date of the FCC's new consent requirements for certain autodialed and prerecorded telemarketing calls.

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 telephone.

As discussed in our [reports](#) covering TCPA class action litigation trends in the first [three 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. It appears from the fourth quarter results that, as expected, there was an increase in attention to TCPA litigation following the October 16 effective date of the new requirements for prior express written consent to be obtained for certain types of autodialed and prerecorded telemarketing calls.¹

Findings

This report analyzes TCPA class action complaints filed between October and December 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:

- A substantial volume of TCPA class actions were filed during Q4 of 2013. A total of 92 complaints were filed. This appears to be a substantial increase in complaints over the first three quarters of 2013.²

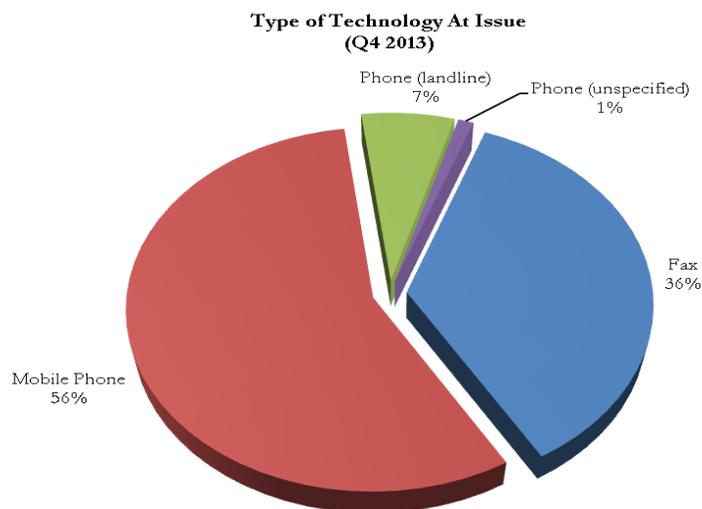
¹ See [New Telemarketing Rule Requires Express Written Consent \(September 26, 2013\)](#). In addition, the following webinar provides additional information concerning the new FCC requirements: [Webinar, "Ring, Ring: New TCPA Consent Requirements Take Effect on October 16, Are You Ready?" \(July 23,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

² The increase in the number of complaints may also reflect an expansion in the document library from which data was retrieved. Previous reports used the Westlaw Pleadings library only. In an effort to expand the number of relevant search results, we expanded the search to include the Westlaw Dockets and Westlaw Pleadings libraries for this report.

- The greatest number of complaints involved transmissions to mobile phones (56%). A smaller number of complaints involved fax transmissions (36%) and landline phone transmissions (7%).
- Lawsuits were concentrated in the fourth quarter in courts in Illinois and California. The vast majority of complaints were filed in federal court.
- Complaints were filed across industry segments, with the most concentration being in the health (22%) and debt collection (18%) industries.
- The vast majority of complaints (93%) alleged a putative national class.
- Few complaints included state law claims. The several complaints that included state law claims alleged violations of North Carolina, Washington, Illinois, and California state laws.
- A majority of complaints (68%) focused on an alleged failure to obtain consumers' prior consent. A little more than one-fourth of the cases alleged a failure to include required opt-out notices.
- One Plaintiff's firm was involved in filing almost one-third of the complaints during the period. Another 6 firms were each involved in filing more than 4 complaints during the quarter.

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

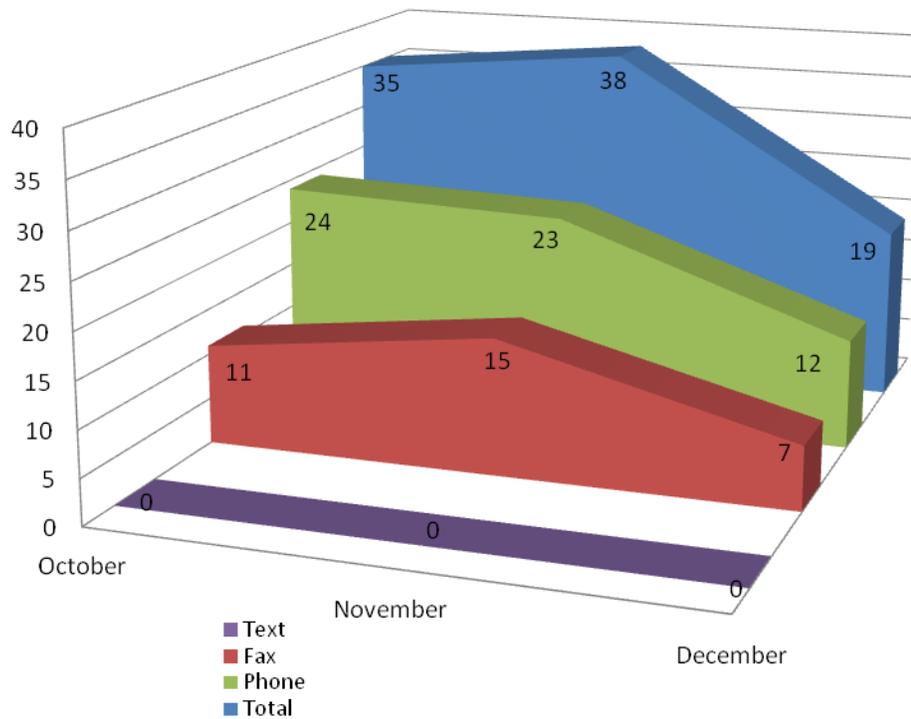
Over half of class action complaints filed during the period (56%) focused on calls to mobile phones. A substantial number of complaints also involved the use of facsimiles (36%). A smaller percentage of complaints involved calls to landline phones (7%) and calls to phones where the status of the line as residential or mobile was unspecified (1%). The following chart provides a breakdown of the media that was the focus of the class action complaints:



Part 2: Volume of Litigation

A total of 92 complaints were filed during the period. The volume of total complaints rose from 35 in October to 38 in November and dropped to 19 in December. The following chart shows the quantity of litigation throughout the period.

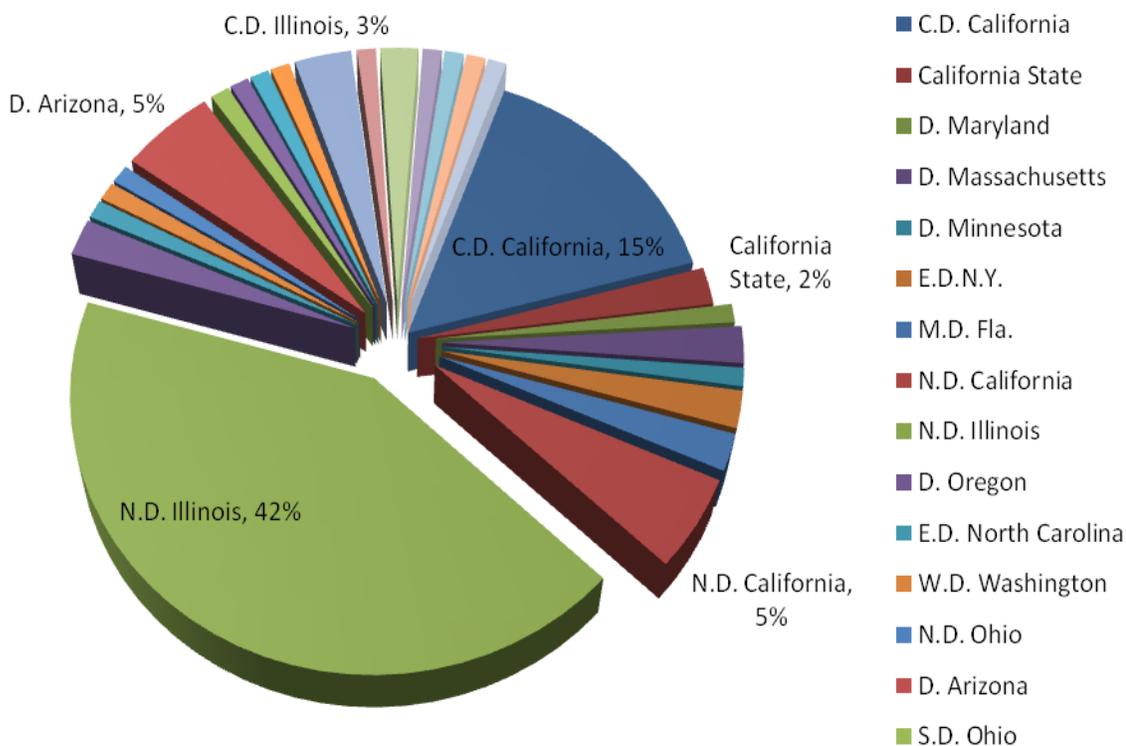
Volume of Complaint Filings By Month



Part 3: Favored Courts

During the period, the greatest percentage of complaints (42%) of complaints were filed in the Northern District of Illinois. Other popular jurisdictions included the Central District of California (15%), District of Arizona (5%), and Northern District of California (5%). All but 2 complaints were filed in Federal court. The following provides a breakdown of complaint filings by court:

Courts In Which Complaints Were Filed (Q4 2013)

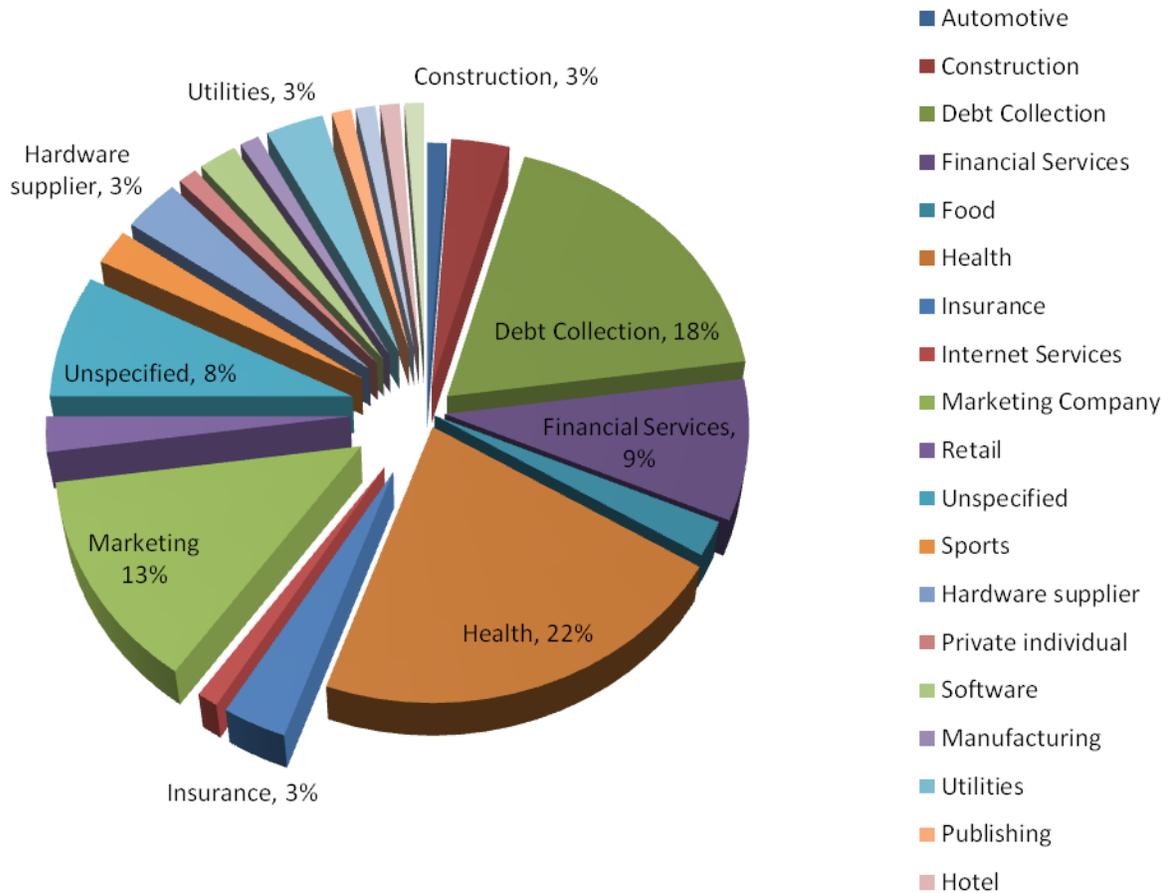


Part 4: Litigation By Industry

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.³ Some concentration was seen in complaints in the health (22%) and debt collection (18%) industries. The following chart provides a breakdown of TCPC complaints by the industry in which the defendant operates:

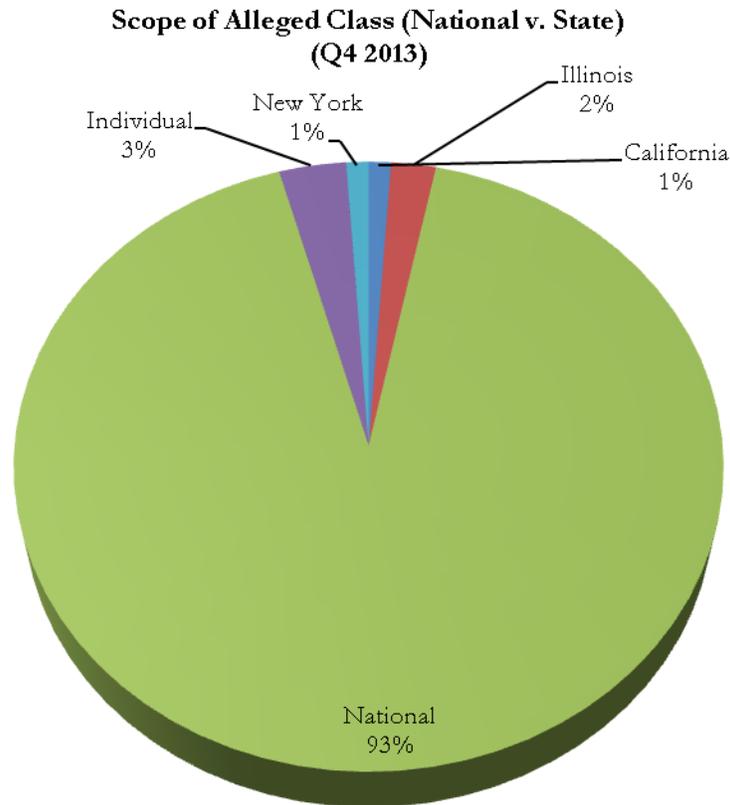
³ See e.g., [Zetoon & Goldman, Trends in Advertising Class Action Litigation 2013 Year-In-Review](#).

**Percentage of Complaints by Defendant Industry
(Q4 2013)**



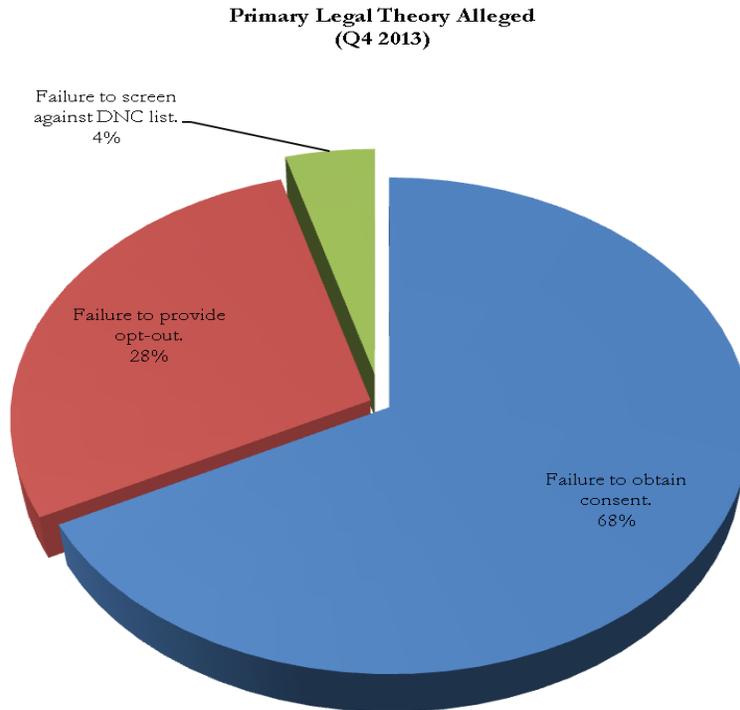
Part 5: Scope of Alleged Class (National v. State)

As indicated in the following chart, the vast majority (93%) 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.



Part 6: Primary Legal Theory Alleged

Two-thirds of the complaints filed during the period alleged a failure to obtain prior consent as the primary legal theory. Almost 30 percent of complaints filed during the period alleged the failure to provide opt-out notices. 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. The following chart identifies the primary legal theories alleged in the complaints during the period.



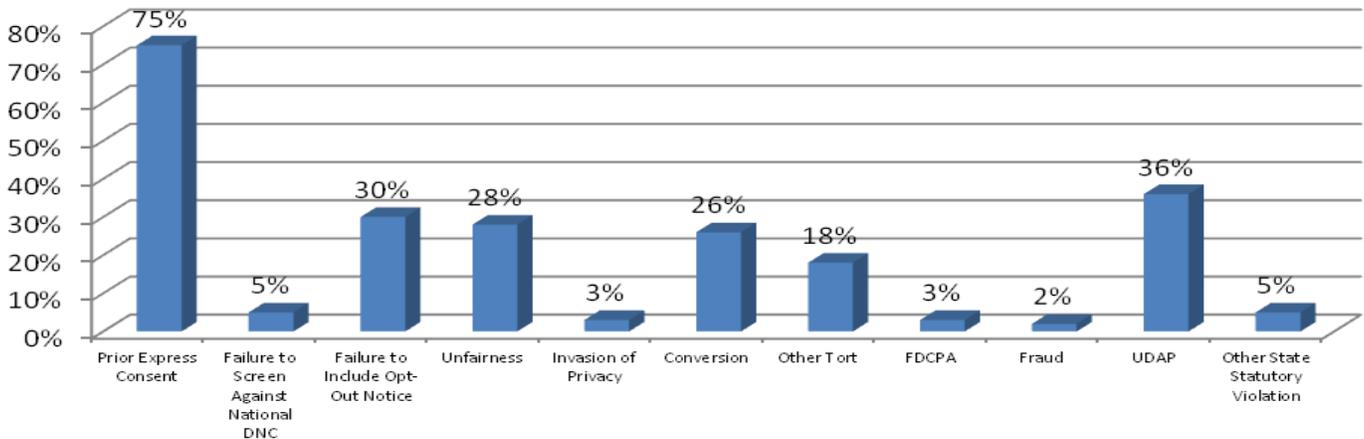
Part 7: Variety of Legal Theories Alleged

The most common legal theory alleged in TCPA complaints in the fourth quarter of 2013 was a failure to obtain prior consent, with 75% of complaints alleging that legal theory. The next most common legal theories alleged were unfair and deceptive acts and practices (36% of complaints), a failure to include an opt-out notice (30% of complaints), unfairness (28% of complaints), conversion (26% of complaints) and other torts (18% of complaints).

The following chart provides a breakdown of the grounds most commonly alleged in the complaints.⁴ 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.

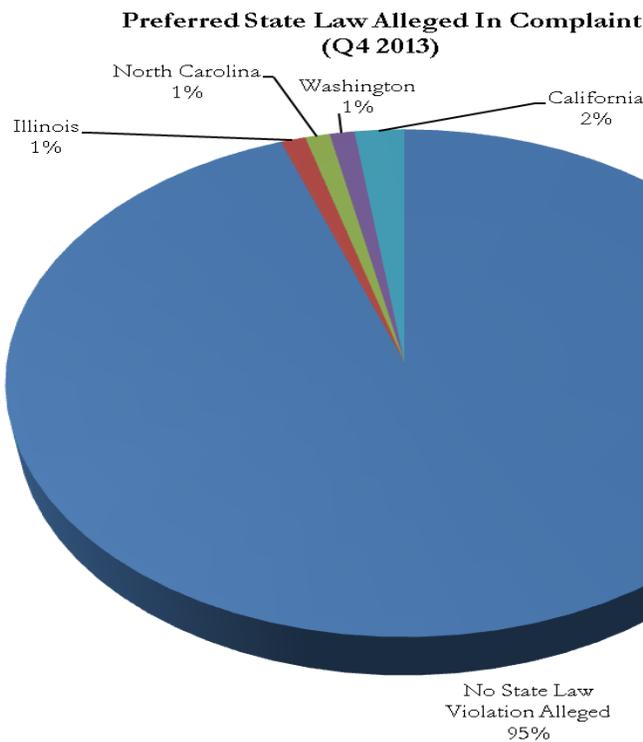
⁴ Omitted from this chart are legal theories which appeared in one percent or fewer complaints.

Percentage of Complaints Alleging Particular Legal Theory (Q4 2013)



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, several complaints alleged violations of state law, including California (2%), Washington (1%), Illinois (1%) and North Carolina (1%).



Part 9: Leading Plaintiffs Firms

Thirty-five Plaintiffs firms were involved in the complaints filed during the period. The firm of Edelman, Combs, Lattuner & Goodwin, LLC filed 29 TCPA complaints during the period, the most of any Plaintiffs firm. The following firms also filed more than 4 complaints during the period:

- Burke Law Offices LLC
- Hyde & Swigart
- Kazerouni Law Group, APC
- Spirit PC
- Todd M. Friedman
- Warner Law Firm, LLC

Part 10: Methodology

Bryan Cave's previous whitepapers analyzing TCPA class action litigation trends followed the practice cited by other researchers who have analyzed trends in data-related class action complaints of using Westlaw's "Pleadings" database. *See, e.g.,* Sasha Romanosky, et. al., *Empirical Analysis of Data Breach Litigation*, 11 J. Empirical Legal Stud. 74, at 82 (2014) (concluding that Westlaw Pleadings coverage should not create a significant selection bias). This quarter, however, we expanded the universe of cases to include those identified in either the Westlaw Pleadings database or the Westlaw Dockets database. The latter source significantly expanded the quantity of complaints identified for the quarter. In light of the additional source of complaints, comparisons of the total volume of complaints filed in Q4 with those identified in Q1-Q3 (which involved searches of only Westlaw Pleadings) may not be appropriate.

Complaints included within the data analyzed by this report were identified within the Westlaw Dockets and Pleadings libraries 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 October and December of 2013.

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