

2015 Telemarketing Litigation Report

A comprehensive analysis of class action lawsuits involving telemarketing and TCPA filed in United States District Courts.

BRYAN CAVE

Executive Summary

When it comes to data privacy and data security the legal and mainstream media focus primarily on data breaches or emerging technologies to track consumers. That focus overlooks the fact that the vast majority of data-related litigation centers around a statute enacted a quarter century ago to protect consumers' privacy when using telephones – the Telephone Consumer Protection Act (“TCPA”). As our [2015 Data Privacy Litigation Report](#) notes 65% of all privacy litigation involves claims under the TCPA.

Plaintiffs' fixation with the TCPA is easy to understand. With advances in automatic telephone dialing systems, and the use of text messages for marketing, a modern telemarketing campaign can reach millions of consumers. In addition, unlike many data security and data privacy statutes, the TCPA provides successful plaintiffs a fixed statutory damage of up to \$1,500 per violation. The size of potential classes, combined with the prospect of statutory damages, has led to TCPA settlements as high as \$75 million and plaintiff attorneys fees of \$15 million.¹

Our 2015 report covers 15 months of data from the third quarter of 2013 through the third quarter of 2014 (the “Period”). Our key findings are:

- 396% more cases involve the TCPA than involve data security breaches.
- 65% of all data privacy litigation relates to the TCPA.
- The volume of case filings is fairly stable with approximately 35 new cases filed each month (+/- 10).
- 38% of cases are filed in California's district courts. 24% of cases are filed in the Northern District of Illinois.
- 95% of cases are structured as putative national classes.
- 35% of litigation impacts the financial service industries (*i.e.*, traditional financial services, loan providers, insurance companies, credit cards, and debt collectors), although litigation crosses almost every industry sector.
- Plaintiffs overwhelmingly focus on the TCPA's requirements concerning prior express consent.
- 1% of the plaintiff's firms that are active in TCPA litigation accounted for over 50% of all complaints.

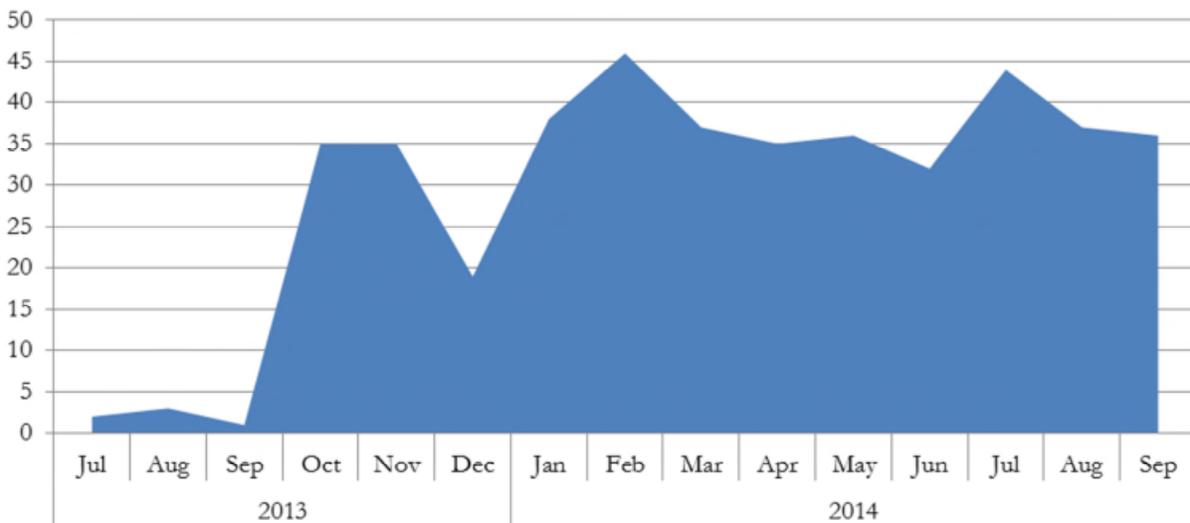
¹ Meredith C. Slawe and Brynne S. Madway, Capital One Agrees to \$75 Million Telephone Consumer Protection Act (TCPA) Settlement, *The National Law Review* (August 11, 2014) *available at* <http://www.natlawreview.com/article/capital-one-agrees-to-75-million-telephone-consumer-protection-act-tcpa-settlement> (last viewed May 11, 2015); \$75M Capital One TCPA Class Deal OK'd; Attorneys' Fees Cut From \$22M to \$15M, *Bloomberg BNA* (February 23, 2015) *available at* <http://www.bna.com/75m-capital-one-n17179923290/> (last visited May 11, 2015).

Part 1: Volume of Litigation

A total of 438 complaints involving telemarketing were filed during the Period. Although the volume of complaints filed each month increased during the first part of the Period, they remained fairly stable over the latter 12 months averaging around 35 complaints per month.

The volume of telemarketing litigation is significantly greater than the volume of any other form of data security or data privacy litigation. Indeed, there were 396% more telemarketing complaints filed during the Period than complaints involving data security breaches.²

The following provides a breakdown of class action complaints involving telemarketing filed during the Period:

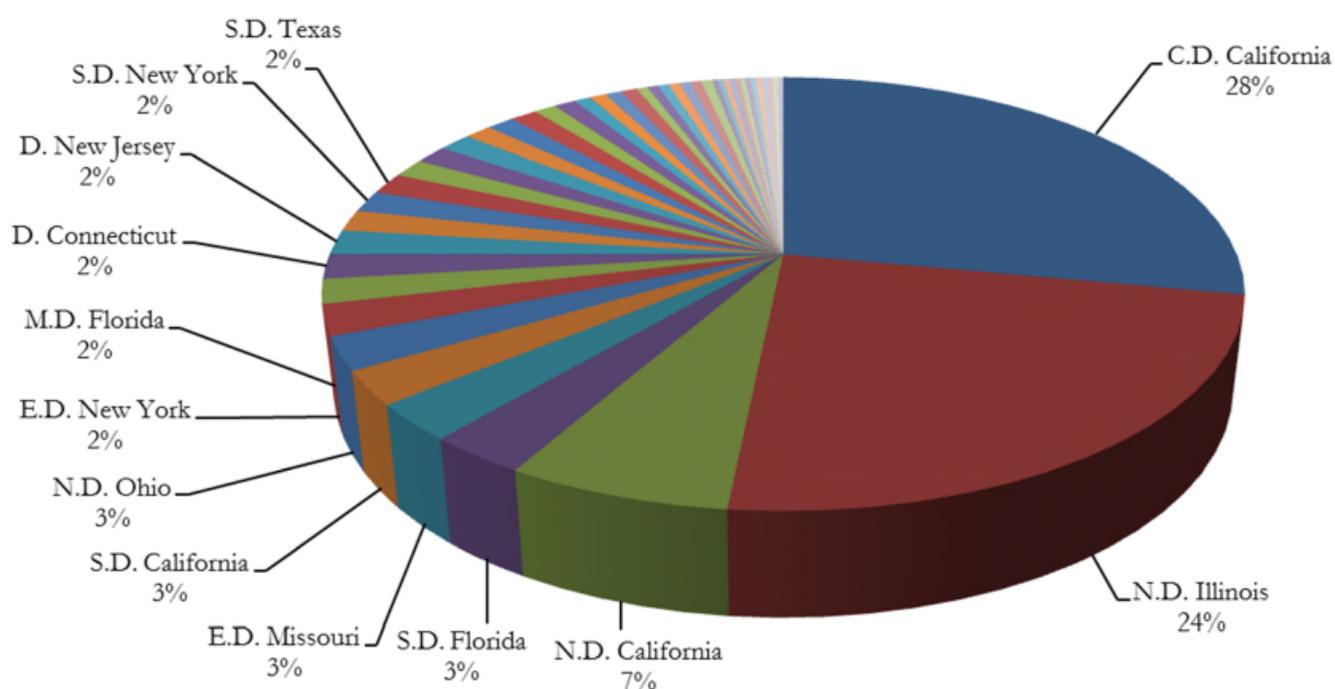


² See Bryan Cave, 2015 Data Breach Litigation Report (May 2015) available at <http://www.bryancavedatamatters.com> (the “Data Breach Litigation Report”). The Data Breach Litigation Report identified a total of 110 complaints concerning data breaches filed during the same Period.

Part 2: Favored Courts³

California remained the most popular venue in which to file federal class action telemarketing complaints – 38% of all complaints were filed in California district courts.⁴ Although it does not have a direct bearing on the forum chosen by plaintiffs, as discussed in Part 8, four plaintiff's law firms were particularly active in the filing of telemarketing related complaints. Two of those four firms are based in California. One of the other firms resides in Illinois – the second most popular forum in which complaints are filed.

The following chart provides a detailed breakdown by district of federal class action filings:⁵



³ This report does not include complaints filed in state courts. For more information, please see Part 9: Methodology below.

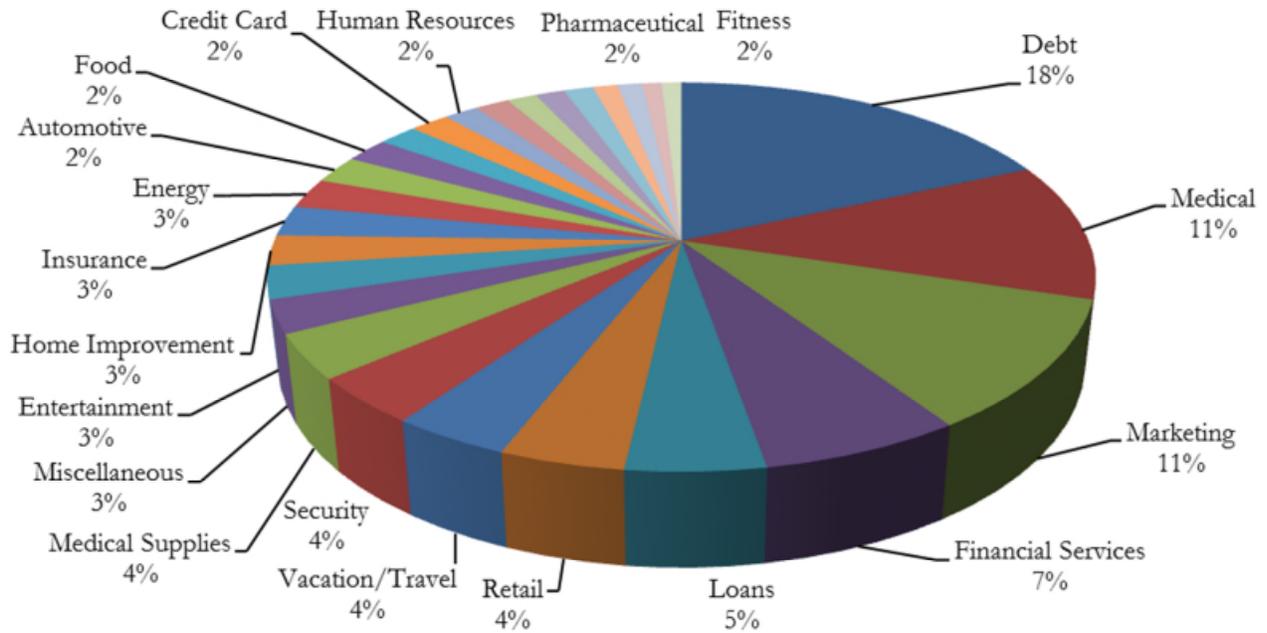
⁴ See <http://www.bryancavedatamatters.com/> for past reports containing information on telemarketing class action litigation.

⁵ Though they are not labeled in the chart, there are 33 additional courts that each represent 1% or less of the total class action filings during the Period.

Part 3: Litigation by Industry

Our prior reports identified the debt collection industry as the primary industry targeted by Plaintiffs. That trend continues with 18% of all complaints involving debt collection. The remaining complaints implicate virtually every industry sector from retailers to pharmaceuticals.

The following provides a detailed breakdown of class action complaint filings by industry sector:⁶



⁶ This chart does not include the following industries that were included in this study and represent 1% or less of affected industries: Apps; Manufacturing; Software; Education; Transportation; Social Network; and Telecommunications.

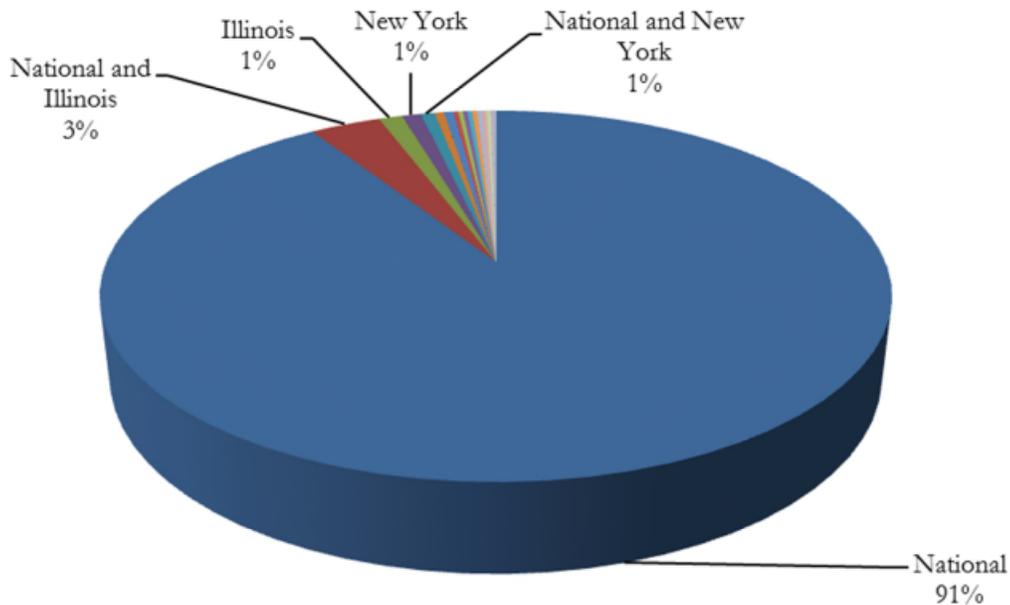
Part 4: Scope of Alleged Class (National v. State)

Access to state court class action filings differ among states, and sometimes among courts within the same state. Consequently, it is difficult, if not impossible, to identify the total quantity of class action filings in state court, and any analysis that includes state court filings would include a significant and misleading skew towards states that permit easy access to filed complaints. As a result, we purposefully do not include state court filings in our analysis and focus only on complaints filed in federal court, or complaints that were filed in state court, but were subsequently removed to federal district court under the Class Action Fairness Act (“CAFA”).

We find in our dataset a strong preference for class actions that are national in scope. This may mean that plaintiff’s attorneys prefer to allege putative national classes in an attempt to obtain a potentially greater recovery. It could also mean, however, that additional complaints have been filed in state court that allege putative classes comprised of single state groups and, as a result, are not subject to removal to federal court under CAFA.

Despite the overwhelming majority of national class actions (91%), we continue to see a minority of cases (9%) that allege subclasses tied to residents in specific states. Illinois garnered 4% of all minority cases, although that included cases that alleged both a national class and an Illinois subclass.

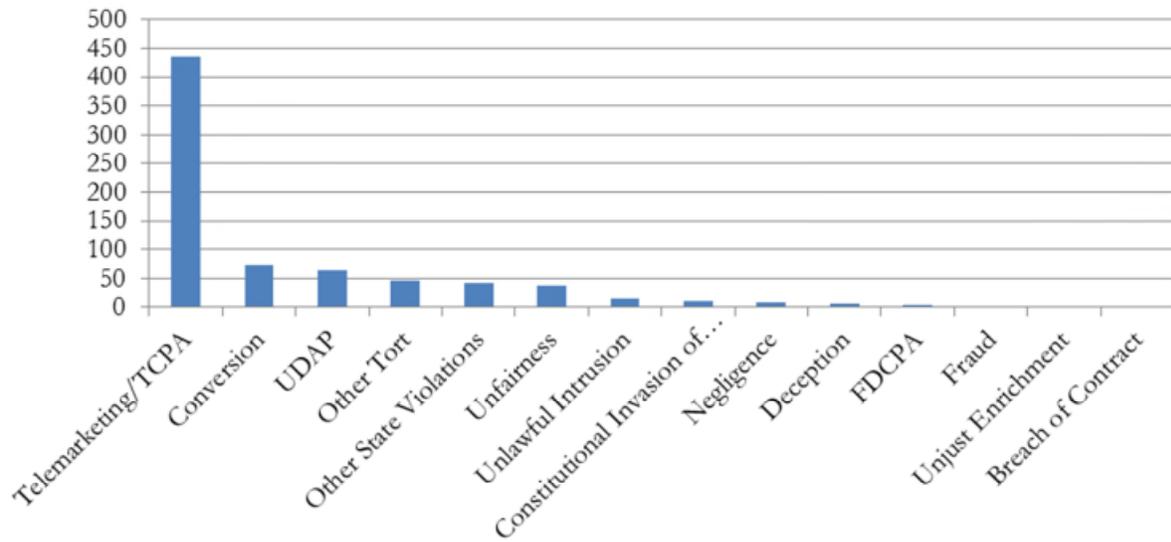
The following provides a structured analysis of the scope of putative classes:



Part 5: Variety of Legal Theories Alleged

Although the vast majority of telemarketing lawsuits allege a violation of the TCPA, some plaintiff's attorneys chose to allege more than one theory of recovery. In total, plaintiff's attorneys pursued 13 secondary theories of recovery ranging from conversion to breach of contract.

The following chart provides a breakdown of all of the theories utilized by plaintiff's attorneys during the Period:

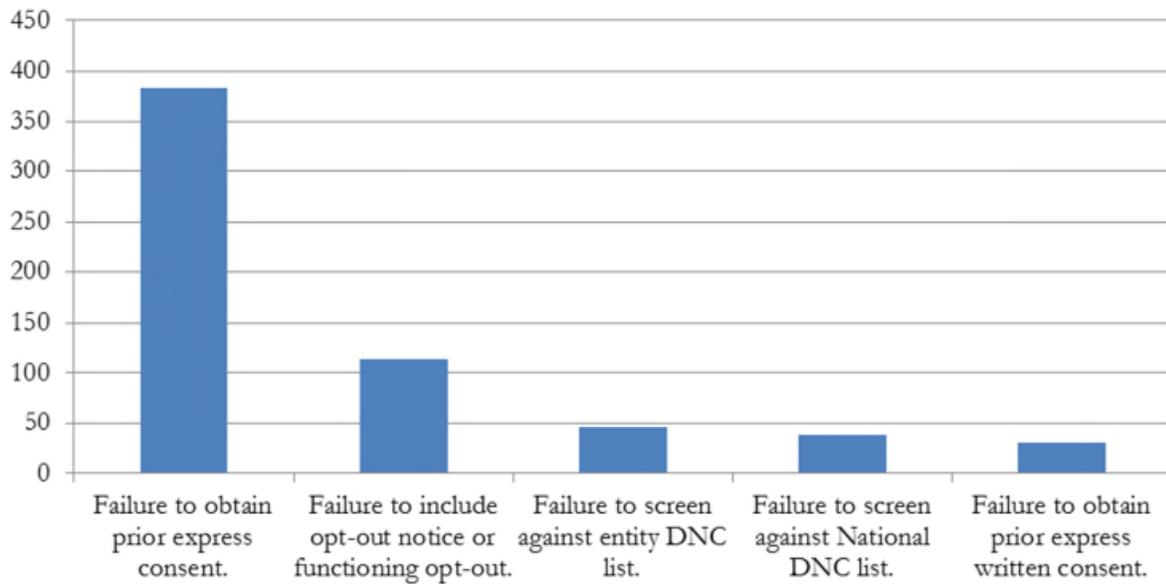


Part 6: Variety of Telemarketing Theories Alleged

The TCPA includes several restrictions on how companies may use telephones to market to consumers. Among other things, the TCPA requires that in particular circumstances companies obtain prior consent to placing a call, screen potential recipients of a call from the national Do Not Call Registry, and/or screen potential recipients of a call from a separate entity-specific list of people that have requested not be called by a particular company.

Among complaints that relate to voice or text messaging the primary factual allegation was that the defendant failed to obtain the consumer's prior express consent. Among complaints that relate to the sending of faxes the primary factual allegation was a failure to include opt-out language in the fax, or that the opt-out mechanism provided was ineffective.

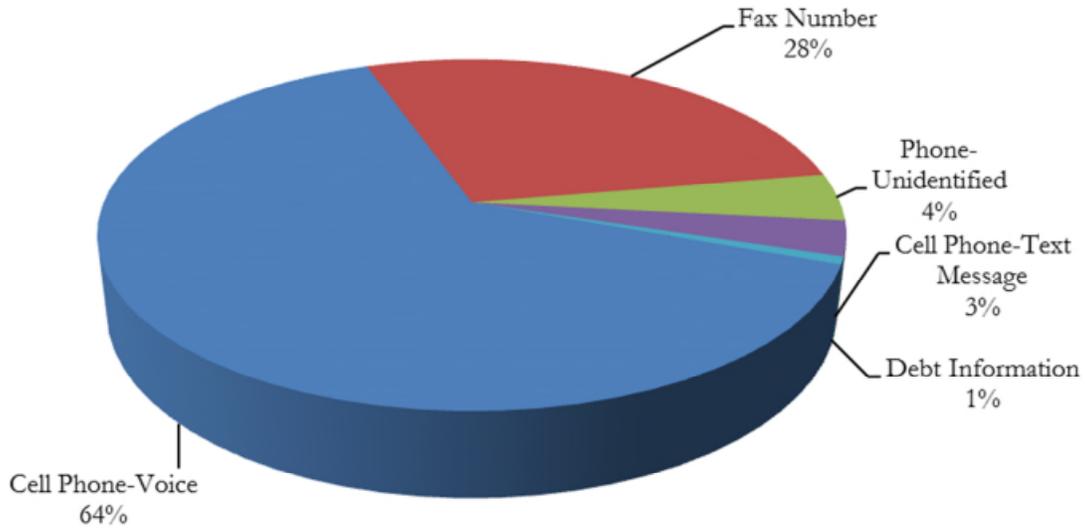
The following chart provides a detailed breakdown of all of the telemarketing theories used by plaintiff's attorneys during the Period:



Part 7: Primary Type of Information at Issue

Complaints overwhelmingly focus on companies contacting consumers on their cell phones. Although our data indicates that only 3% of the complaints relate to text message communications, the quantity of complaints involving text message may be underrepresented as many plaintiff's attorneys did not specify whether a cell phone number was used to send voice, text, or both.

The following provides a detailed breakdown of the types of information at issue:



Part 8: Plaintiffs' Firms

Over 144 plaintiffs' firms filed class action complaints relating to telemarketing. While most plaintiff's firms (77%) filed only one complaint during the Period, four firms were habitual filers. As a result, roughly 1% of the plaintiffs' firms accounted for over 50% of all telemarketing complaints.

Part 9: Methodology

The data analyzed in this report includes consumer class action complaints that were filed against private entities. Complaints filed against government agencies, or complaints that were filed on behalf of individual plaintiffs were excluded.

Data was obtained from the Westlaw Pleadings and the Westlaw Dockets databases. The sample period covered the beginning of the third quarter of 2013 through the end of the third quarter of 2014 (*i.e.*, July 1, 2013-September 30, 2014). Multiple searches were run in order to find complaints that included – together with “class action” the following search terms:

- phrases containing “personal,” “consumer,” or “customer” at a reasonable distance from the words “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.”

Additional searches were used to identify complaints that specifically referenced the Telephone Consumer Protection Act (“TCPA”).

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

As was the case in Bryan Cave's prior whitepapers, 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.

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Bryan Cave is a leading international law firm with offices in 24 cities and 12 countries. The firm routinely defends clients in private litigation and regulatory enforcement actions involving data privacy and Telephone Consumer Protection Act theories.

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