

# Consumer Finance Monitor (Season 4, Episode 11): A Look at the New Wave of Telephone Consumer Protection Act Cases Alleging Do-Not-Call Claims

Speakers: Chris Willis, Joel Tasca, Lindsay Demaree

Chris Willis:

Welcome to the Consumer Finance Monitor Podcast where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. I'm your host, Chris Willis, the co-leader of Ballard Spahr's Consumer Financial Services Practice Group and I'll be moderating today's program.

Chris Willis:

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Chris Willis:

Today, I'm joined by two of my colleagues from our Las Vegas office, Joel Tasca and Lindsay Demaree, who are two members of our Consumer Financial Services Litigation Group. We're going to be talking about a perennial topic of interest in the consumer financial services industry. And that is of course the Telephone Consumer Protection Act. And so, what we're going to talk about today is a new wave of different kinds of cases under the TCPA that Joel and Lindsay have recognized and we wanted to tell you about it on today's podcast.

Chris Willis:

So, Joel, let me start with you. We're here to talk about TCPA claims based on a plaintiff who says that he or she was on a Do Not Call list, but got a call anyway. Are we seeing more of these Do Not Call list claims and if that's happening, why do you think that may be?

Joel Tasca:

Thanks, Chris. So, Chris, I haven't seen any hard data at this point, but anecdotally, we definitely appear to be seeing more and more TCPA complaints that include, Do Not Call list claims more than we have it in the past. I think the reason for this is that the type of TCPA claim that we've seen so much of over the past several years, the one that plaintiffs have the council has made their living on, and that is a claim under Section 227(b) of the TCPA for calls made using an Automatic Telephone Dialing System or ATDS, recently has been on their siege in the courts. And at this point, I don't think it would be unfair to characterize the ATDS claim as being on the ropes, so to speak, as a legal matter.

Joel Tasca:

There are a few reasons for that. There's a chronology here and the first big blow to the ATDS claim came in 2018 with the ACA international decision by the DC Circuit Court of Appeals. And many of us are very familiar with that decision. There were a lot of holdings in that case, but for relevant purposes here, the DC Circuit determined in the ACA international case that the FCC's interpretation of the word capacity in the ATDS definition was unreasonably and impermissibly expansive. It

was so expansive that it could potentially be interpreted to include any smartphone in the world. The DC Circuit held that that was too broad and struck it down. After that, with the FCC's interpretation out of the way, courts began to apply their own narrower interpretations of the word capacity. So that was a big blow to, to the ATDS claim back then in 2018.

Joel Tasca:

A second blow to the ATVs claim came with the United States Supreme court's recent decision in Barr, the Barr case in 2020, which many of you will remember. And there, the Supreme court held that an exception in the ATDS call liability provision for government debt related calls was unconstitutional and had to be severed from the rest of the TCPA. And in subsequent lower court cases, what we're finding is that district courts are holding the entire ATDS provision unconstitutional, not just for calls made on government debt related claims, but for any calls under that provision. There's a mix of cases on that issue, but there are growing number of district courts that have held that for the period, that the government, that exception was in that provision, any calls made during that period are not subject to the TCPA because the provision was unconstitutional for that period.

Joel Tasca:

And probably, the biggest potential blow and it hasn't happened yet, but the one that really has put the ATDS claim on the ropes is the United States Supreme Court's pending decision in Facebook versus Duguid. And in Facebook, the Supreme court will potentially narrow the definition of ATDS to exclude calls made using dialing equipment that makes calls from a list of already known phone numbers. That's to be contrasted with phone numbers that are randomly or sequentially generated by the equipment. Calls to known phone numbers that were on a list that the caller had beforehand, potentially depending on how Duguid is going to be decided, may not be covered going forward.

Joel Tasca:

And so, that would significantly narrow the TCPA and exclude all of the ATDS claims based on calls to known phone numbers. An oral argument in the Duguid case took place back in December of last year and so everybody is eagerly awaiting the court's decision. A lot of people think since the court's composition is business friendly at this point, that the decision will go in favor of callers, but we shall see. Now, in the meantime, numerous district courts have stayed these ATDS claims pending the outcome of Duguid. And so, plaintiff's counsel now are finding that there's an impediment to being able to pursue their ATDS claims, depending on how Duguid has decided, they may not be able to pursue them at all.

Joel Tasca:

So all of that is to say that, the shiny new thing for plaintiff's counsel seems to be the Do Not Call list claims. Do Not Call list claims don't require the use of an ATDS. And so, those claims will not be effected by Duguid and they can be pursued by plaintiff's counsel now without any concern that they're going to be stayed or the Duguid is ultimately going to defeat them. And as Lindsay will explain in a few minutes, the Do Not Call claims are under completely different section of the TCPA. The ATDS claim is under Section 227(b) and the Do Not Call list claims are under Section 227(c).

Chris Willis:

Thanks, Joel. I get the distinction between the Do Not Call kind of claim and the use of an ATDS or autodialer type claim. And you would think that the autodialer claim is the one that will typically be applied to a consumer financial services company doing servicing type of calls, debt collection or something like that. What kind of calls are subject to a Do Not Call claim as you have just described it? And therefore, what kind of callers need to worry about this new trend in cases that you've identified?

Joel Tasca:

Thanks, Chris, that's a good question. And thankfully for callers, the Do Not Call list claims are not going to apply to collection calls. And as everyone knows, collection calls have frequently been the subject of ATDS claims in the past. Do Not

Call list claims are limited only to solicitation or telemarketing type calls. So, that is good news. However, if your business does engage in solicitation or telemarketing calls or uses third parties to make those sorts of calls for the business, all of those businesses need to be concerned about Do Not Call list claims because they are potential targets of such claims.

Joel Tasca:

And as Lindsay will explain in a few minutes, do that call this claims are potentially just as dangerous as the ATDS claims in terms of damages. They give rise to damages on a per call basis, either \$500 or \$1,500 per offending call depending on whether the conduct is negligent or willful. And as you might imagine, if there are 100 or 200 calls that issue, damages can start to rack up pretty quickly and get very large and create a large amount of exposure in these cases.

Chris Willis:

Okay, got it. So what we have to be concerned with is, sort of telemarketing or solicitation calls as I understand it. And so, the basic nature of the claim is that someone was called even though they had put their name on a Do Not Call registry. Lindsay, jump into the conversation here, what is the National Do Not Call Registry? What agency is responsible for it? How does it work?

Lindsay Demaree:

Thanks, Chris. The federal trade commission actually is responsible for the National Do Not Call Registry in conjunction with the Federal Communications Commission or the FCC. They have overlapping jurisdiction over these sort of National Do Not Call Registry claims. It's actually pretty interesting. In the TCPA, which is what we're focused on, Congress provided the FCC with authority to create a National Do Not Call Registry and said, "You have this tool available. We want you to implement regulations to protect residential telephone subscribers' privacy rights to avoid receiving these telephone solicitations." The FCC, even though it had this initial authority, decided not to go the route of creating a national list. It actually first implemented regulations that required companies to maintain their own internal Do Not Call lists.

Lindsay Demaree:

Fast forward a few years and it turns out that the internal Do Not Call list regulations weren't as effective as the FCC had hoped. So at that point, they went ahead and implemented regulations in conjunction with the FTC to create the National Do Not Call Registry. This list is essentially an opportunity for residential telephone number subscribers to add their phone number to the list to stop receiving telephone solicitations.

Lindsay Demaree:

Interestingly, the FTC also has its own telemarketing sales rules, but you don't hear about them too often in the context of litigation, and there's a couple of reasons for this. One, unlike the FCC, the FTC does not have any authority over financial institutions or common carriers like a phone company for example. And that's not necessarily a reason why you're not going to see much litigation because there are other types of industries out there. Instead, the real reason why I think we don't see much litigation under the FTC's rules is the fact that they're implementing statute. The Telemarketing Consumer Fraud and Abuse Prevention Act requires a consumer to have \$50,000 in actual damages before it can bring a private cause of action. So unsurprisingly, for this reason, you see a lot of plaintiff's attorneys turning into the TCPA and looking for violations of the FCC's regulations instead.

Chris Willis:

Lindsay, now we know all about the National Do Not Call Registry, and all of our would be TCPA plaintiffs are rushing over to the FCC's website to sign themselves up presumably right now, but while they do that, why don't you tell us what are the elements or requirements of a Do Not Call claim under the TCPA?

Lindsay Demaree:

Sure. As mentioned, the claim stems from the TCPA specifically 47 U.S.C section 227(c). There, the TCPA directs the FCC to develop rules, and I quote, "Concerning the need to protect residential telephone subscriber's privacy rights to avoid receiving telephone solicitations, to which they object". This is the implementing statute. And in response, the FCC has passed or implemented several different regulations located at 47 CFR section 64.1200. The regulations in general, mirror the statute, but there are two different variations of the claim.

Lindsay Demaree:

The first one is prohibition against calls placed to phone numbers on the National Do Not Call Registry. This first prohibition prohibits a person or entity from initiating a telephone solicitation to a residential telephone subscriber who has registered his or her telephone number on the National Do Not Call Registry maintained by the FTC. These specific terms, telephone solicitation, and residential telephone subscriber, we'll talk a little bit more about it, but keep those in mind because they become important.

Lindsay Demaree:

The second variation is a prohibition against calls placed on the company's own internal Do Not Call list. As you recall, when the FCC first passed its regulations, it first tried to just rely on companies to maintain their own list. When it created the national registry, it still maintains this prior requirement for companies to keep their own lists. So there's essentially these two different Do Not Call list violations. Interestingly though, the internal Do Not Call list violation uses a slightly different term. It doesn't actually use the word telephone solicitation, instead, it prohibits a person or entity from making a call for a telemarketing purpose. So again, we'll touch on this a little bit more, but those distinctions become important.

Lindsay Demaree:

Looking at the key elements here, the first one is obviously the phone call has to have this telephone solicitation or call for telemarketing purpose sort of slant to it. The TCPA defines a telephone solicitation as the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in property goods or services, which is transmitted to a person. So significantly, this covers dual-purpose calls. If a company places a call for customer service purpose, but also tries to maybe upsell or try to secure some sort of a transaction or purchase, whether on that actual call or sometime in the future, it's going to fall within this dual purpose call label and be covered and prohibited.

Lindsay Demaree:

If you want to think about some examples that come up commonly, you can look at mortgage brokers. Sometimes they'll call their clients to notify them of a lower interest rate, but really what they're after is trying to secure more mortgage business. So that's going to be considered a telephone solicitation.

Lindsay Demaree:

Similarly, a phone company might be trying to contact their customers about a new calling plan that's better for them or credit card companies sometimes are offering things like overdraft protection for their customers. Even though these might have benefits to the called party, ultimately, because of their goal of trying to secure a sale, they're going to be considered a telephone solicitation or a call for telemarketing purposes.

Lindsay Demaree:

Notably, the other thing is the definition of telephone solicitation explicitly includes a message. So this is consistent with other definition of calls elsewhere in the TCPA where courts and the FCC have construed it to also cover text messages. So don't think that you can avoid all of these regulations simply by texting consumers or texting people instead of actually making a phone call.

Lindsay Demaree:

This also brings us to the next requirement. You have to have a residential telephone subscriber. And I want to point out that, that's not necessarily the same thing as a landline. You might be saying, "How can I text the landline? How could I text someone's residence anyways?" Well, under this definition, it actually includes their cell phone numbers. The FCC has a presumption that wireless phones registered on the national Do Not Call list or residential telephone numbers. This is so, even if the customer also has a landline, if they have a cell phone that's I think the term that they use is supplementing their, their residential landline, it's also deemed a residential telephone number and calls will be prohibited. Now, this is just a presumption however. So if you are faced with a case where you find out that the number that you're dealing with actually belongs to a business, that is one area where you can try to escape liability as we'll find out.

Lindsay Demaree:

The other requirement is that the number actually has to be on a national Do Not Call list or a company's internal list. Now, once a customer or a person puts their number on the National Do Not Call Registry, the number remains there indefinitely. They don't have to do anything. They don't have to renew their request after a certain amount of time. It's just on there until they request for the number to be removed from the National Do Not Call Registry, which I don't know how many consumers you guys deal with, but I think that's highly unlikely that somebody is going to call and say, "No, I want to receive telemarketing calls again. Please take my number off this Do Not Call list. I'm very lonely." That's not likely to happen. Instead, sometimes the numbers can be removed, for example, if a cell phone number gets reassigned. At that point, oftentimes the numbers will fall off the Do Not Call registry.

Lindsay Demaree:

Numbers on an entity's internal Do Not Call list have a little bit of a different rule that applies to them. Numbers on an internal Do Not Call lists have to be honored for five years. So after five years, the number can fall off the list and you can start telemarketing calls again at that point.

Lindsay Demaree:

I also want to point out that in addition to the rules about the companies internal Do Not Call list, the FCC's regulations also require companies placing telemarketing calls to provide specific information such as the name of the entity that they're calling on behalf of and a contact number to a consumer. And these regulations, some courts have found that they were implemented under Section 227(c) of the TCPA. So even just a failure to mention the name of your company, or to mention the contact number could be deemed a violation of the FCC's regulations and in turn, give rise to liability under Section 227(c). That's just something else to keep in mind.

Lindsay Demaree:

And as Joel mentioned, there's something that's missing here. There's no requirement about the use of an automated telephone dialing system or prerecorded or artificial voices. SIn line with what Joel was saying, oftentimes the proof required for these claims is sometimes easier. You just have to show the list, the numbers on the list, and is it residential or cell phone number, and yeah, you can face exposure.

Chris Willis:

It sounds though like the elements of the claim are relatively complicated though, and subject to some factual disagreement, but it doesn't seem quite complicated enough to me. Lindsay, are there any exceptions or defenses under the statute that can give a window out for a defendant subject to one of these Do Not Call claims?

Lindsay Demaree:

Yes, there are a few exceptions and defenses that are critical to know if you're a telemarketer. The first are exceptions to the definition of telephone solicitation. And again, the telephone solicitation term, it gets used in connection with a call to the National Do Not Call Registry. These exceptions apply to phone calls for a number that was placed on the national Do Not

Call list. However, because that term telephone solicitation isn't used in connection with a call on a company's own internal Do Not Call list, these exceptions might not apply to a number that was placed on the company's list.

Lindsay Demaree:

The first exception is consent. As mentioned, this is found... It's specifically worded, specifically stated in the definition of telephone solicitation. It excludes "a call or message to any person with that person's prior express invitation or permission" and that's at 47 U.S.C section 227(a)(4). According to the FCC, this express invitation or permission has to actually be evidenced by assigned written agreement between the consumer and the seller. The agreement has to state that the consumer agrees to be contacted by the seller and include the telephone number to which the calls may be placed.

Lindsay Demaree:

I think the concept of consent comes up in other contexts in the TCPA, but it's not quite as rigorous as this concept of consent here. So certainly, consent is a good defense to have in your back pocket, but you need to make sure that you're getting the appropriate written consent that expressly states the telephone number.

Lindsay Demaree:

The second exception to calls that are improperly placed to a phone number on the Do Not Call lists is an established business relationship. And I should take that back. They're not going to be in proper calls if you, in fact, have an established business relationship. "An established business relationship is a prior or existing relationships formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration on the basis of either one, the subscriber's purchase or transaction with the entity within 18 months immediately preceding the date of the telephone call, or two, on the basis of the subscribers inquiry or application regarding products or services offered by the entity within three months immediately preceding the date of the call."

Lindsay Demaree:

So, basically if you have an existing business relationship with a consumer where they bought something for you, any sort of product you have a transaction, you can call them even though their numbers on the Do Not Call list within 18 months of that transaction. Similarly, if for example, somebody applied for a credit card or somebody has made an application for a mortgage, that application or inquiry by the consumer allows you to call them or contact them, even though their numbers on the national Do Not Call list for three months.

Lindsay Demaree:

Another important thing to think about with this exception is the fact that it's broadly construed. I think this is one area where you actually see like a broad construction help defendants. It covers the sale of any of the products. So if you're selling widgets and the consumer buys a widget, and then later on you have a completely different line of products that you want to market to the consumer, it doesn't matter that it's maybe something that's not a widget. The consumer can still receive your phone call.

Lindsay Demaree:

The other thing is that it doesn't necessarily require this two way communication. It's worded that way in the regulations, but the FCC and courts have construed to sort of any transaction that qualifies it's a two-way communication. You don't necessarily need to have a dialogue or a communication or discussion with a consumer beyond that actual transaction.

Lindsay Demaree:

All right. So this brings us to the fact that the term telephone solicitation is where these two exceptions arise and that's not the term used in the company's Do Not Call list claims. So again, just be aware of that. I think plaintiffs who provide their consent to receive calls are often, I think, going to have a difficult time trying to then say, "No, no, I gave you consent, but you shouldn't have called me" but it's again, an explicit exception to the call for telemarketing purpose.

Lindsay Demaree:

The other defense that's a big one in this arena is the establishment of reasonable practices and procedures to prevent violations of the telemarketing rules. This is something that I think is kind of akin to the FDCPA bonafide error defense, where if you're trying to comply, you have rules in place, you have procedures in place to avoid this sort of error, the courts and Congress and the FCC in this case are going to give you a pass here because they understand that you're trying, and at the end of the day, we're all human and things aren't perfect.

Lindsay Demaree:

However, the FCC's regulations provide some pretty specific requirements for what these reasonable procedures have to entail. There has to be written procedures. You have to have training of personnel on the procedures and an entity that actually oversees and assist with the compliance. You have to record and maintain a list of the phone numbers that the seller cannot contact. I mean, that's pretty basic one, but it's in there in writing in the regulations.

Lindsay Demaree:

And you also have to use a process to prevent calls to the Do Not Call list obtained from the FTC within 31 days of the call. So this regulation requires entities, telemarketing companies to get updated versions with the national Do Not Call lists and make sure that they're integrating that call list to try to avoid calls to people who may have been added within the last 30 days.

Lindsay Demaree:

Finally, this is a small thing, but I think it's something to keep in mind in case you get some really aggressive plaintiff's attorney out there. Liability only occurs if the called party receives more than one improper call within the year by the same entity. So, sometimes you'll see TCPA claims where really there could be one call. In this context, you get one call before they start really dinging the company for damages.

Chris Willis:

Speaking of damages Lindsay, one of the things that we've come to learn very painfully about the ATDS calls under the TCPA is the draconian recoveries that have no cap or maximum to them whatsoever, which of course makes them popular with plaintiff's lawyers and dreadful for defendants. Is the same true of these Do Not Call claims? What are the remedies like there?

Lindsay Demaree:

Yes, unfortunately the same is true in this context. As Joel alluded too, these Do Not Call violation is also subject to the same \$500 per call up to \$1,500 per call if the court deems the violation willful or knowing. In addition, plaintiffs can also seek injunctive relief too. So again, the potential damages here, especially if you have some sort of issue with the dialing system where things go awry, things can really start to rack up, class actions. Other areas where you're going to get high volumes of calls can really, really create a big damage award for a plaintiff.

Chris Willis:

And Joel, Lindsay mentioned class actions. Let me ask you about that to wrap up our discussion of this issue. How viable is it to bring a Do Not Call list claim as a class action? How common is the proof or are there individual issues that a defendant can use to try to avoid class certification on a case like that?

Joel Tasca:

Chris, the answer is that yes, Do Not Call list claims can be pursued as class actions. And plaintiffs, historically have brought Do Not Call his claims as class actions. Their success has been, I would say, mixed in getting class certification. And so, like other TCPA cases, Do Not Call lists claims are pretty much the same in terms of the best way to try to challenge class certification. It's focused on that predominance requirement, focused on the individualized issues that might arise in the case, and argue that those issues predominate over any common issues in the case.

Joel Tasca:

And there are a number of Do Not Call list liability issues on which this predominance challenge can be made. Lindsay touched on pretty much all of them. As she mentioned, consent is a defense to a Do Not Call list claim and so, it can be argued that the issue of consent is not susceptible to common proof. It's really depend on the facts. If consent is obtained from all of the putative class members in a common way, like some kind of the same terms of use web page, for example, then you may have a tough time demonstrating that it's not subject to common proof. You'll have a tough time showing that individual eyes issues will predominate. But, if consent is obtained in a variety of different ways for putative class members like through different third-party intermediaries, for example, then in that case, you might be able to successfully argue that the lack of commonality, that the individualized nature of the consent inquiry defeats class certification.

Joel Tasca:

Lindsay also mentioned the established business relationship exception. That's another issue that could present individualized questions. Is there a uniform way to determine whether putative class members engaged in the transaction with the defendant in the last 18 months? Maybe there are, maybe there are sales records, but maybe there are not. Maybe that's going to require a case by case inquiry into what happened with the consumer. So it's another possibility where you could argue individualized questions predominate.

Joel Tasca:

Lindsay also mentioned the requirement that it'd be a residential number. She also alluded the fact that in some cases, a number of may not be a residential number if it's used for business purposes. So again, depending on the facts, if you've got proof that at least some of the putative class members' phone numbers were used for business purposes, at least to some extent that, that's going to create an individualized issue in the case to determine whether that number was truly a residential line.

Joel Tasca:

And finally, if there's a internal Do Not Call list case that the consumer actually has to at some point request not to be called. And so, if it's a company or internal Do Not Call list claim, it may present an individualized question as to whether each consumer actually made the request not to be called.

Joel Tasca:

Those are just some of the issues. There are others that you might take a look at when defending against the class action alleging Do Not Call list claims to see if there are individualized questions that might help you get class certification defeated in the case.

Chris Willis:

Thanks, Joel. And thank you too, Lindsay, for educating our listeners about this emerging trend in Do Not Call TCPA cases. And to members of our audience, be sure to visit us at our website at [ballardspahr.com](http://ballardspahr.com), or you can subscribe to our show on Apple Podcasts, Google Play Spotify, or your favorite podcast platform. And don't forget to check out our blog, [consumerfinancemonitor.com](http://consumerfinancemonitor.com) for daily insights about the financial services industry.

Chris Willis:

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