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## **Views on the Telephone Consumer Protection Act From Snell & Wilmer LLP Partner Becca Wahlquist**



*The Telephone Consumer Protection Act (TCPA) has faced a lot of scrutiny recently, as the number of class actions filings has increased and companies have faced large penalties for making unsolicited phone calls.*

*Bloomberg BNA Privacy & Data Security News Senior Legal Editor George R. Lynch posed a series of questions to Becca J. Wahlquist, partner at Snell & Wilmer LLP in Los Angeles and head of the firm's TCPA practice group, on problems with the act, the possibility of reform and the impact of Spokeo v. Robbins.*

**BLOOMBERG BNA:** Which parts of the TCPA dealing with unsolicited messages or related issues are particularly outdated?

**BECCA WAHLQUIST:** The TCPA has provisions limiting the use of an “automated telephone dialing system” (ATDS)—protections that, at the time the TCPA was written in 1991, were clearly designed to apply to the harassing and invasive mechanisms used by cold-call telemarketers of that era. An ATDS was a system that reached out to persons via random/sequential dialing in

the effort to reach any consumer who might pick up the phone. Now, 25 years later, such machines are obsolete, but the TCPA plaintiffs’ bar argues that essentially all computerized systems are ATDS machines when used by businesses to contact their own customers.

Moreover, the rules regarding calls to cellular phones were drafted a long time before smart phones or text messaging existed and before persons were likely to give their cellular telephone numbers to companies as a preferred point of contact. Now American companies

reaching out in good faith to customer-provided cellular telephone numbers are facing claims with staggering amounts of statutory damages for business-related communications.

The statute needs to be reconsidered in light of modern technologies and revised to protect consumers' privacy but also to be fair to businesses that might need to communicate with their ongoing customers.

**BLOOMBERG BNA:** Of the issues that primarily fuel TCPA actions, which has been the most damaging to businesses?

**WAHLQUIST:** The issue fueling the most TCPA litigation at present is the "wrong" or "recycled" numbers dilemma faced by companies when a cellular phone number has changed without its knowledge. A company can be provided consent by a customer to place certain calls to that person's cellular number, but the customer may change his or her number down the road, or perhaps has mistakenly entered a wrong number from the start. The company places calls to the cellular number believing it is reaching its own customer, but then finds itself sued under the TCPA because the owner of the cellular number is no longer (or has never been) its actual customer.

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There is no public directory for cellular numbers and no publicly available information on recycled numbers. Businesses with rigorous programs designed to comply with the TCPA thus still find themselves dragged into court to face TCPA claims that can reach stunning amounts on individual and class-wide bases.

**BLOOMBERG BNA:** How do you think the ruling in *Spokeo v. Robins* (95 PRA, 5/17/16) regarding the concrete injury requirement for standing will impact TCPA litigation?

**WAHLQUIST:** The recent *Spokeo* decision makes clear that simply claiming statutory damages of \$500 or \$1500 per call, text or fax isn't enough to establish that a consumer has Article III standing to pursue claims. The Supreme Court confirmed that the plaintiff must be able to articulate some sort of concrete and particularized injury—something that should be impossible to do if the communication didn't go through, was never answered or never noticed by the recipient. Further, even if a putative class-wide plaintiff has his or her own actual injury to claim (i.e., answering the phone call and losing minutes from a limited-minute phone plan), that is not a claim that can be made for others absent individual inquiries. So *Spokeo* will likely have a particular impact on class action cases.

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**BLOOMBERG BNA:** What is the one reform to TCPA that would have the most far-reaching impact?

**WAHLQUIST:** There is no other statute like the TCPA, with a private right of action for consumers that has no cap on the available damages. The uncapped statutory damages (\$500 minimum per call, for violations of Section 227(b)) are over incentivizing lawsuits and creating perverse incentives for recipients of "unwanted" calls to sit back and let the calls roll in, to increase the damages claims, which can quickly skyrocket. As just one example, one text message to each of 4 million customers puts 20 million dollars in statutory damages in play. This is far out of sync with any other federal statute's provision of statutory damages to a private consumer. A damages cap would provide sufficient incentive for aggrieved persons to seek redress, but would forestall abusive litigation being brought in the hopes of a massive windfall.

Further, American companies are not the force behind the spam telemarketing that so many of us have experienced and found so invasive or annoying. Spam telemarketing calls generally are placed by fly-by-night companies rarely based in the U.S. who are not an attractive target for lawsuits. These aggressive and problematic callers would be more likely to be targeted if attorneys were not over incentivized to bring TCPA suits against American companies with deep pockets.

**BLOOMBERG BNA:** Based on what you've experienced testifying about these issues before Congress, do you think TCPA reform is likely in the near future?

**WAHLQUIST:** Now that TCPA litigations are being filed at a pace to eclipse most other types of federal court litigation, I believe the need for statutory reform has become apparent. Several senators at the Commerce, Science & Transportation Committee hearing this past May recognized that well-intentioned American businesses were facing annihilating damages under this statute in a way Congress never intended, and that the onslaught of TCPA litigation was not helpful to consumers. I believe reform is necessary and is coming; I just hope that it can come quickly.

**BLOOMBERG BNA:** What about the job of a TCPA defense attorney has changed the most since you started out in the early 2000s?

**WAHLQUIST:** Up through about 2010—so, roughly the first decade of my TCPA practice—the lawsuits I defended involved marketing calls and faxes, with claims that they violated the TCPA. But then starting around 2010, I saw more and more kinds of communications complained about in TCPA litigations, such as fraud alerts, reminder messages, texts and transactional calls.

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Suing for calls made to large numbers of customers has proven so profitable that now it is rare for me to defend a company for telemarketing calls (which few companies make these days, in any case). Moreover, now I find myself defending companies which place no calls

to consumers, but have deep pockets and are being sued on the theory that they are liable for calls placed by someone else—thus, even making no telephone calls at all cannot protect against TCPA litigation.