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5 Best Practices To Avoid TCPA Wrong-Number Claims

By **Amy Gallegos** (July 30, 2019, 12:46 PM EDT)


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On July 10, the U.S. District Court for the Northern District of Illinois preliminarily approved a settlement in which Wells Fargo agreed to pay $17.85 million to settle a nationwide class action alleging violations of the Telephone Consumer Protection Act. The complaint alleged that Wells Fargo had sent automated calls and texts that were intended for account holders to "wrong parties" — i.e., consumers who were not actually the account holders Wells Fargo was attempting to reach.

The settlement class encompasses individuals who received calls from Wells Fargo in connection with collecting or servicing of loans or accounts, or fraud alert notifications, via "any automated dialing technology or artificial or prerecorded voice technology."[1] Notably, the settlement class only includes people who were not customers of Wells Fargo at the time of the call.[2]

Wrong-party calls are a thorn in the side of even the most scrupulous TCPA compliance programs. Reassigned numbers are a significant problem: According to the Federal Communications Commission, approximately 35 million numbers are disconnected and made available for reassignment to new consumers each year.

Yet, historically, there has been no comprehensive and timely way for callers to determine whether a number has been reassigned. Wrong number calls can be the result of innocent mistakes — a consumer accidentally types the wrong number into an online form, or forgets to update all of his accounts when he changes numbers. Consumers with delinquent debts may change their numbers to dodge creditors, sticking the new owners of those numbers with their debt-collection calls. Professional plaintiffs have developed strategies to draw wrong-number calls, in hopes of collecting the $500 to $1,500 per call penalties available under the TCPA.

Maintaining accurate records of wrong numbers can be challenging as well. In the debt collection context, for example, it is not unusual for the debtor to falsely tell the caller that he has the wrong number. Many consumers do not answer calls from numbers they do not recognize and do not bother to opt out of text messages they did not request, meaning that businesses can accidentally send multiple calls or texts to the wrong party without ever having a reason to suspect that the number being dialed is incorrect.

The FCC has stepped in to address this problem — but help is still a ways away. In December 2018, the FCC issued an order creating a single, comprehensive database that will contain reassigned number information from providers in North America. The order also created a safe harbor for callers who relied upon the database.

Once the database becomes operational, callers who wish to avail themselves of the safe harbor must demonstrate that they appropriately checked the most recent update of the database and the database reported "no" when given either the date they contacted that consumer or the date on which the caller could be confident that the consumer could still be reached at that number. The safe harbor would then shield the caller from liability should the database return an inaccurate result. The database is in the process of being implemented and there is no established completion date.

For a long time, the conventional wisdom among TCPA practitioners was that protection against wrong-party TCPA class actions was best found in Rule 23. A "wrong-number" class could not be certified, the reasoning went, because there would be no feasible way to identify the class members — i.e., the people on the other end of the line of a business' wrong-number calls. Individual inquiries would be required to identify wrong number calls and determine who received them, running afoul of Rule 23's predominance requirement and/or some circuits' requirements that a class be "ascertainable."

However, although most courts still refuse to certify wrong-party classes, over the past few years, a few courts have become more receptive, blessing complex schemes to identify class members that involve hunting down call recipients using the caller's phone records, subpoenas to cellular and wireless carriers, reverse lookup services, and class member affidavits. Moreover, as more and more companies have shored up their consent regimes, securing and documenting consent from their customers and account holders to receive autodialed calls and texts, wrong-party calls are likely now perceived to be more lucrative by the plaintiffs bar since most wrong parties will not have provided consent.

As the Wells Fargo settlement illustrates, it is now more important than ever for businesses to ensure that their TCPA compliance programs include measures to avoid wrong-number calls. So what steps should businesses consider taking to accomplish this seemingly impossible task?

1. Implement procedures for logging and deactivating wrong numbers.

Repeat calls to wrong numbers create terrible optics in TCPA litigation. Courts are less likely to certify a wrong-party class if the evidence shows that the caller took reasonable steps to avoid wrong-party calls, and stopped dialing numbers they knew or had reason to know were wrong. It is critical for companies to implement record-keeping systems that allow for the logging and automatic deactivation of wrong numbers.

Of course, there is no way to guarantee that a person who answers the phone and informs the caller he has the wrong number is telling the truth. However, given the high cost of TCPA exposure it will in most cases make sense to take the consumer at his word.

2. Require customers to provide a verified phone number as a condition of opening an account or accessing services, and build number verification into multiple customer contact points.

Businesses can ensure that customers provide accurate telephone numbers by requiring a verified telephone number as a condition of opening an account or accessing a service. Many lenders, banks and other service providers are already requiring a verified phone number due to the rise of two-factor authentication. Companies can then maximize their ability to capture updated data by confirming contact information whenever they communicate with the customer.

For example, businesses that interact with customers via call centers could instruct representatives to confirm or update the customer's contact information on every call. Businesses like financial institutions or retailers that offer services online should consider asking that customers confirm or update their contact information upon login. Email can be used to confirm customers' contact information and request updates. Reminding customers to keep their contact information up to date will reduce the risk that consumers will forget to update their contact information when they change phone numbers.

3. Incorporate easy opt-out options for calls and texts.

Make it easy for recipients of wrong-party calls to opt out of future communications. Businesses that send texts to consumers should include in each message a notification that the recipient can opt out of future clicks by responding "STOP." Businesses that deliver prerecorded messages to consumers — for example, pharmacies informing consumers about prescription status or service providers warning consumers about late payments — should consider incorporating an option allowing call recipients to opt out of future calls via an IVR system.

4. Use a service to update contact information and scrub for reassigned numbers.

A number of vendors such as LexisNexis and TransUnion offer services to update and verify consumer data. Some vendors offer reassigned number scrubbing, though it is unclear how effective these tools are in practice. Of course, there is always a risk that third party-provided data may be inaccurate that has to be weighed against the risk that the consumer-provided numbers have been reassigned or are otherwise inaccurate.

5. Consider manually calling hard-to-reach consumers.

If practicable, in cases where the same number has been called numerous times without achieving the right party contact, consider dialing the number manually. Manual dial will allow the agent to listen to the voicemail to see if the name in the voicemail matches the consumer the company is trying to reach.

All of these options will not work for every business. However, as the Wells Fargo settlement illustrates, the risk of TCPA liability for wrong-party call is real, and substantial. The best way to mitigate that risk is with a strong TCPA compliance program.

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[1] Dunn et al. v. Wells Fargo Bank, N.A., N.D. Ill. No. 1:17-cv-00481, Order Preliminarily Approving Class Action Settlement Agreement, Directing Notice of Proposed Class Settlement, and Scheduling a Final Approval Hearing (ECF 84, July 10, 2019)

[2] Id.