

DOES THE TELEPHONE CONSUMER PROTECTION ACT VIOLATE DUE PROCESS AS APPLIED?

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The Telephone Consumer Protection Act (TCPA) of 1991 subjects a telemarketer's use of autodialed telephone calls, automated text messages, and faxes to statutory damages of \$500 per violation or up to \$1,500 per willful violation. Depending on the circumstances of the violating communication, the TCPA's penalties can exceed by orders of magnitude any plausible economic estimate of the recipient's actual harm, such that the TCPA, as applied, violates the Due Process Clause of the Fifth Amendment.

The Telephone Consumer Protection Act (TCPA) of 1991 regulates a telemarketer's use of autodialed telephone calls, automated text messages, and faxes.¹ The recipient of a violating communication may sue the telemarketer "to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater."² If the telemarketer "willfully or knowingly violated" the TCPA, the court may increase the damage award to as much as \$1,500 per violation.³ Moreover, a firm can be vicariously liable for the violating communications of a third party to whom the firm has contracted out its telemarketing activities.⁴ When the recipient of a violating communication files a class action and thereby adds claim aggregation to the TCPA's concatenation of statutory damages and vicarious liability, the telemarketer's potential liability can be staggering. For example, in *Smith v. State Farm Mutual Automobile Insurance Co.*, filed in 2013, the plaintiff class seeks statutory damages for 46 million calls allegedly made on State Farm's behalf, or \$23 billion.⁵ Treble damages of \$69 billion would nearly equal State Farm's net worth.⁶

Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit has said that the TCPA "imposes potentially very heavy penalties on its violators—many of whom . . . have never heard of this obscure statute."⁷ In *Creative Montessori Learning Centers v. Ashford Gear LLC*, he explained, "class certification . . . turn[ed] a dispute of at most \$3,000 (the maximum statutory penalty for the two unsolicited fax advertisements allegedly . . . received by the plaintiff) into an \$11.11 million suit (assuming no trebling)—an almost four-thousand-fold increase—against a home-furnishings wholesaler in California that has three employees and annual sales of half a million dollars."⁸ "Anyway," wrote Judge Posner, "the statute, with its draconian

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1. Pub. L. 102-243, 105 Stat. 2393, *codified at* 47 U.S.C. § 227.

2. 47 U.S.C. § 227(b)(3)(B).

3. *Id.* § 227(b)(3).

4. *See, e.g.*, *Chapman v. Wagener Equities*, No. 09-cv-97229, 2014 WL 540250 (N.D. Ill. Feb. 13, 2015); *Holtzman v. Turza*, No. 08-cv-2014, 2010 WL 4177150 (N.D. Ill. Oct. 19, 2010).

5. State Farm's Reply in Support of Its Motion to Strike Class Allegations and to Dismiss the Individual Claims of Plaintiffs Friedman and Clark at 11, *Smith v. State Farm Mut. Auto. Ins. Co.*, No. 1:13-cv-02018 (N.D. Ill. Nov. 13, 2014), ECF No. 174. For another example of multibillion-dollar damage exposure, see *Rose v. Bank of Am. Corp.*, Nos. 5:11-cv-02390-EJD, 5:12-cv-04009-EJD, 2014 WL 4273358, at *5 (N.D. Cal. Aug. 29, 2014).

6. *See State Farm Insurance Co.*, FORTUNE 500 (Jan. 2015), <http://fortune.com/fortune500/state-farm-insurance-cos-41/>.

7. *Creative Montessori Learning Centers v. Ashford Gear LLC*, 662 F.3d 913, 915–16 (7th Cir. 2011).

8. *Id.* at 915.

penalties for multiple [violating communications], is what it is.”⁹ It forbids any person from

mak[ing] any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, [or] . . . initiat[ing] any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party.¹⁰

The TCPA applies to text messages¹¹ and also prohibits the use of “any [fax] machine, computer, or other device to send . . . an unsolicited advertisement to a telephone facsimile machine” unless the sender has an established business relationship with the recipient or the recipient has agreed to receive the fax.¹²

The TCPA’s scope of liability is vague. In 2015, following the proposal of Chairman Thomas Wheeler, the Federal Communications Commission (FCC) issued several declaratory rulings intended to clarify how it will enforce the TCPA.¹³ For example, the FCC defines an automatic telephone dialing system (ATDS) to include any machine capable of dialing random or sequential numbers.¹⁴ However, virtually any telephone or computer can function as an ATDS.¹⁵ This “clarification” is so unhelpful that the Third Circuit promptly criticized it as “hardly a model of clarity.”¹⁶ Dissenting FCC commissioners worry that the FCC’s declaratory rulings have “further increased liability for good actors”¹⁷ and will “target useful communications between legitimate businesses and their customers.”¹⁸

To determine the portion of the TCPA’s statutory damages that is punitive rather than compensatory, one can subtract from the statutory damages the recipient’s actual harm, which I estimate generally to be between 6.8 cents 70.7 cents per violating

9. *Id.*

10. 47 U.S.C. § 227(b)(1)(A)–(B); *see also* Campbell-Ewald Co. v. Gomez, No. 14-cv-00857, 2016 WL 228345, at *3 (Jan. 20, 2016) (citing 47 U.S.C. § 227(b)(1)(A)(iii)).

11. *See, e.g.*, Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 952 (9th Cir. 2009); *Campbell-Ewald*, 2016 WL 228345, at *3 (citing Gomez v. Campbell-Ewald Co., 768 F.3d 871, 874 (9th Cir. 2014)).

12. 47 U.S.C. § 227(b)(1)(C).

13. *See* Declaratory Ruling and Order, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Dkt. No. 02-278 (F.C.C. June 18, 2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-72A1.pdf [hereinafter Declaratory Ruling and Order]; *see also* Press Release, Federal Communications Commission, FCC Strengthens Consumer Protections Against Unwanted Calls and Texts (June 18, 2015), http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0527/DOC-333676A1.pdf [hereinafter FCC Press Release].

14. FCC Press Release, *supra* note 13.

15. Smartphones, which more than 65 percent of American adults own, are powerful miniature computers capable of automatically dialing random phone numbers. *See, e.g.*, AARON SMITH, U.S. SMARTPHONE USE IN 2015, at 2 (Pew Research Center 2015), http://www.pewinternet.org/files/2015/03/PI_Smartphones_0401151.pdf; CALLFIRE, <https://www.callfire.com/>.

16. *Dominguez v. Yahoo, Inc.*, No. 14-cv-01751, 2015 WL 6405811, at *2 (3d Cir. Oct. 23, 2015).

17. Statement of Commissioner Michael O’Rielly Dissenting in Part and Approving in Part, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, at 15, CG Dkt. No. 02-278 (F.C.C. June 18, 2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-72A6.pdf.

18. Dissenting Statement of Commissioner Ajit Pai, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Dkt. No. 02-278 (F.C.C. June 18, 2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-72A5.pdf. The FCC’s omnibus ruling is currently on appeal. *See* ACA Int’l v. Fed. Comm’ns Comm’n, No. 15-1211 (D.C. Cir.).

communication, although some kinds of violating communications can be far more harmful.¹⁹ Consequently, the implicitly punitive component of the TCPA's statutory damages is generally between 706 and 22,058 times its implicitly compensatory component. Depending on the specific circumstances of the violating communication, the TCPA's penalties can exceed by orders of magnitude the recipient's actual harm, such that the TCPA's statutory damages, as applied, violate the Due Process Clause of the Fifth Amendment.²⁰

I. COMPENSATORY AND PUNITIVE COMPONENTS OF STATUTORY DAMAGES

A statutory penalty violates due process when it “is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.”²¹ The Supreme Court has said that excessive punitive damages can “enter the zone of arbitrariness” that violates due process,²² and that “[s]ingle-digit multipliers” for punitive damages “are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in the range of 500 to 1.”²³ Thus, for the punitive component of the TCPA’s statutory damages to comply with the Court’s reasoning in *State Farm*, the actual harm from a single TCPA violation must be at least \$50—which, as my economic analysis reveals, is unlikely. Given the large implicitly punitive component of the TCPA’s statutory damages, it is understandable that two district courts have not dismissed out of hand the possibility that statutory damages in a TCPA class action might violate due process as applied.²⁴

The TCPA “take[s] into account the difficult to quantify business interruption costs imposed upon recipients of unsolicited fax advertisements [and] effectively deter[s] the unscrupulous practice of shifting these costs to unwitting recipients of ‘junk faxes.’”²⁵ Until 1991, telemarketers used autodialers that could each place 1,500 calls per day and

19. Courts disagree over whether the TCPA’s statutory damages have a punitive component or whether they are entirely compensatory. *Compare* *Penzer v. Transp. Ins. Co.*, 545 F.3d 1303, 1311 (11th Cir. 1980) (inferring that “the statutory damages were not designed to be punitive damages”) *with* *Kaplain v. Democrat & Chron.*, 698 N.Y.S.2d 799, 800–01 (N.Y. App. Div. 1999) (holding that TCPA damages are punitive).

20. U.S. Const. amend. V. The economic analysis presented here is also potentially relevant to whether, under Federal Rules of Civil Procedure 54 and 68, a court should enter judgment upon the same terms proposed in an unaccepted settlement offer, if the damages proposed exceed the maximum amount that the plaintiff could recover in statutory damages if she prevailed at trial. *See* FED. R. CIV. P. 54, 68; Notice of Motion, *Leyse v. Lifetime Entm’t Servs., LLC*, No. 1:13-cv-05794 (S.D.N.Y. Jan. 27, 2016), ECF No. 118. The TCPA permits the recipient of a violating communication to recover the higher of either actual harm or statutory damages, which amount the court then may treble. *See* 47 U.S.C. § 227(b)(3). The argument in favor of compelling settlement rests on the implicit assumption that a \$1503 settlement offer per violating communication (that is, 3 x [\$500 + \$1]) unambiguously exceeds the actual harm that the violating communication caused the recipient. The defendant might assert, rather than proffer evidence, that the plaintiff’s statutory damages unambiguously exceed her actual harm (particularly if the statutory damages are trebled), but economic analysis can significantly clarify the extent to which that assumption is plausible in particular factual settings.

21. *St. Louis, Iron Mt. & S. Ry. Co. v. Williams*, 251 U.S. 63, 73 (1919).

22. *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996).

23. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (citing *Gore*, 517 U.S. at 582).

24. *Pasco v. Protus IP Solutions, Inc.*, 826 F. Supp. 2d 825, 835 (D. Md. 2011); *Green v. Clark Int’l Ins. Brokers, Ltd.* No. 09-cv-01541, 2009 WL 2515594, at *6 (N.D. Ill. Aug. 17, 2009). In contrast, district courts have consistently rejected arguments that the TCPA is facially unconstitutional. *See Green*, 2009 WL 2515594, at *5 (Fifth Amendment); *Centerline Equip. Corp. v. Banner Personnel Serv.*, 545 F. Supp. 2d 768, 777 (N.D. Ill. 2008) (Eighth Amendment); *Accounting Outsourcing, LLC v. Verizon Wireless Pers. Commc’ns, L.P.*, 329 F. Supp. 2d 789, 808–09 (M.D. La. 2004) (Fourteenth Amendment); *Texas v. Am. Blastfax, Inc.*, 121 F. Supp. 2d 1085, 1091 (W.D. Tex. 2000) (First and Fifth Amendments).

25. *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1166 (S.D. Ind. 1997).

dial every active phone number in a given area code at random.²⁶ Junk faxes imposed on the recipient the costs of paper, ink, and incremental wear-and-tear of her fax machine, as well as the nuisance of having her fax machine unavailable to use while junk faxes were arriving. Furthermore, the TCPA also accounts for wasted time that a violation causes. Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit has said that “[e]ven a recipient who gets [a] fax on a computer and deletes it without printing suffers *some* loss: the value of the time necessary to realize that the inbox has been cluttered by junk.”²⁷

The “difficult to quantify” costs of receiving and printing a violating communication have fallen since Congress enacted the TCPA in 1991. File attachments to email have largely replaced faxes. Similarly, mobile phone service is far cheaper today than in 1991. Postpaid service plans, used by more than 76 million U.S. consumers,²⁸ typically offer unlimited minutes and text messages,²⁹ such that many consumers face a zero marginal transmission cost of receiving a violating cell phone call or text message. Consequently, the punitive portion of the TCPA’s statutory damages has increased since 1991, all other factors remaining the same.

Whether the TCPA today violates due process as applied depends on the specific circumstances surrounding the violating communication. One consequence of the ubiquity of mobile phones is that the interruption and distraction of a violating communication now can follow the recipient, including when the person is driving a car. Thus, a violating communication might cause or aggravate driver distraction and thus increase the likelihood of an accident, whose actual harm could easily equal or even exceed the amount of the TCPA’s statutory damages. (Of course, whether a communication violating the TCPA is the proximate cause of such an accident would be a separate question of tort law, since even a cellphone call or text message that the driver wished to receive while driving could distract her and thus increase the likelihood of an accident.) The pervasiveness and easy portability of mobile phones make it difficult to predict the setting in which a person will receive a violating communication, such that a TCPA violation could cause harm in ways that Congress never expected in 1991.

II. CALCULATING A VIOLATING COMMUNICATION’S ACTUAL HARM

I calculate here the average harm that a violating communication imposes on its recipient.³⁰ I analyze the actual harm from a violation for each communication channel through which such a violation can occur—a mobile phone call, a landline phone call, a text message, and a fax. The actual harm from a violating communication equals the sum of (1) the cost of the transmission of the advertisement (for example, the cost (if any) that the recipient incrementally pays to her mobile network operator to receive a text message) and (2) the opportunity cost of the time that the recipient spends receiving and

26. See Edmund L. Andrews, *Curbing the Telephone Robots*, N.Y. TIMES (Oct. 30, 1991), <http://www.nytimes.com/1991/10/30/business/curbing-the-telephone-robots.html?pagewanted=all>.

27. Holtzman, C.P.A. v. Turza, 728 F.3d 682, 683 (7th Cir. 2013) (emphasis in original).

28. ITU WORLD TELECOMMUNICATION/ICT INDICATORS (2015).

29. See, e.g., *One Plan. Pick a Size. Simple.*, VERIZON (2016), <http://www.verizonwireless.com/landingpages/verizon-plan/>; *Simple Choice Plan*, T-MOBILE (2016), <http://www.t-mobile.com/cell-phone-plans.html>.

30. For a similar, though less detailed, estimation, see Hal Varian, Fredrik Wallenber & Glenn Woroch, *The Demographics of the Do-Not-Call List 6* (Nov. 5, 2014) (unpublished manuscript) (estimating that the national do-not-call registry provides somewhere between \$60 million and \$3.6 billion of value to consumers annually), <http://eml.berkeley.edu/~woroch/demographics.pdf>.

terminating the violating communication.³¹ A person's opportunity cost is the value of her time—it is “the anticipated value of that which might be” if she were to spend her time differently.³²

Using data from the International Telecommunication Union (ITU), I calculate the respective transmission costs in the United States of receiving a violating communication as a mobile phone call, a landline phone call, and a text message. The mobile phone call data and text message data that I use are for prepaid mobile service plans. Of course, many U.S. consumers use postpaid service plans that offer unlimited mobile phone calls and text messages. For those consumers, the marginal transmission cost of receiving a violating communication is zero, such that my method exaggerates the cost of receiving a violating mobile phone call or text message. I use data available from newspapers to estimate an upper bound on the recipient's cost of receiving a fax communication, such that I likely overestimate the actual cost of receiving a violating fax advertisement.

Next, to calculate the opportunity cost of the time required to receive a violating communication, I use the average U.S. hourly wage to estimate the opportunity cost of a recipient's time. Economists commonly use the wage rate as a proxy for the opportunity cost of a person's time when calculating the value of delay, nuisance, or wasted time—for example, when analyzing the optimal level of traffic congestion for purposes of assessing the net societal benefit from a proposed freeway or subway.³³ A consumer's wage rate is the opportunity cost of her time because the time that she spends answering a telemarketing call she could instead spend working and earning a wage. For example, if a consumer's hourly wage is \$15, then one can estimate that the consumer values her time at \$15 per hour, because, in theory, a person works until the value of an hour worked is equal to the value gained from not working (that is, value from instead consuming leisure). To estimate the recipient's opportunity cost of receiving a violating communication, I analyze the income that an average American would have earned in the amount of time during which she took (and terminated) the violating call. As a factual matter, the actual harm that a TCPA violation imposes on its recipient will vary from case to case and from person to person.

In December 2014, the average U.S. hourly wage was \$24.62.³⁴ For simplicity, I assume that the average violating call to a mobile phone or landline takes ten seconds, that it takes ten seconds to read and delete an unwanted marketing text message, and that it takes ten seconds to identify, ignore, and discard an unwanted fax advertisement. Thus, the opportunity cost of receiving a violating mobile phone call, a violating landline call, a

31. For simplicity, my calculation of harm assumes that a violating communication has zero offsetting benefit. Whether or not a violating call results in any benefit for the called party, and what the magnitude of that benefit is, are both factual questions that will vary from person to person. Any benefit that the called party derives from a violating call would reduce the total harm to the called party and therefore produce a greater punitive damages multiplier.

32. James M. Buchanan, *Opportunity Cost*, in 3 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 718 (John Eatwell, Murry Milgate & Peter Newman eds., Macmillan Press Ltd. 1987) (internal quotation marks omitted).

33. See, e.g., PATRICK S. MCCARTHY, TRANSPORTATION ECONOMICS 453 (Blackwell Pub. 2001) (assuming, on the basis of the wage rate and for purposes of calculating the cost of traffic delay, that travelers value their time at \$4.50 per hour); Austan Goolsbee & Peter J. Klenow, *Valuing Consumer Products by the Time Spent Using Them: An Application to the Internet*, 96 AM. ECON. ASS'N PAPERS & PROC. 108, 108–10 (2006) (using the wage rate to estimate the value of a consumer's time); MICHAEL L. KATZ & HARVEY S. ROSEN, MICROECONOMICS 200–01 (McGraw-Hill 3d ed. 1998).

34. *Average Hourly and Weekly Earnings of All Employees on Private Nonfarm Payrolls by Industry Sector, Seasonally Adjusted*, BUREAU OF LABOR STATISTICS (2015), <http://www.bls.gov/news.release/empsit.t19.htm>. For ease of exposition, I use an average wage rate in my calculation of harm. However, determining the actual wage rate of the called party is a fact-based inquiry that will vary from case to case and from person to person and which will affect that individual's opportunity cost.

violating text message, and a violating fax is 6.8 cents.³⁵ In certain cases, the TCPA also imposes liability for callers even if the call’s intended recipient does not answer the phone.³⁶ For simplicity, I assume that the harm that such a call imposes—in other words, the opportunity cost of the time it takes to notice a missed call, or to listen to a voicemail—is equal to the harm imposed by a call answered by its intended recipient. However, whether that assumption holds true is a fact-based inquiry that might vary from case to case and from person to person. Table 1 below summarizes my calculation to determine the total actual harm that different kinds of TCPA violations impose on their recipients.

Table 1. Total Actual Harm from Different Kinds of TCPA Violations

	Transmission Cost	Opportunity Cost	Total Harm from Violating Communication	Implied Damage Multiple
	[1]	[2]	[1] + [2]	(Range)
Mobile call	\$0.045	\$0.068	\$0.113	4,423–13,273
Landline call	\$0.00	\$0.068	\$0.068	7,352–22,058
Text message	\$0.22	\$0.068	\$0.288	1,735–5,207
Fax	\$0.639	\$0.068	\$0.707	706–2,120

Sources: ITU WORLD TELECOMMUNICATION/ICT INDICATORS (2015); Robert E. Calem, *Beyond the Solitary Fax Machine: An Electronic Mailbox*, N.Y. TIMES (Oct. 4, 1992), <http://www.nytimes.com/1992/10/04/business/technology-beyond-the-solitary-fax-machine-an-electronic-mailbox.html> (estimating that it costs, at most, 10 cents per page to receive a fax); *Producer Price Indexes*, BUREAU OF LABOR STATISTICS (2016), <http://www.bls.gov/ppi/#tables>.

Note: I assume that the average fax advertisement is four pages long, which is likely an exaggeration. I use the Producer Price Index (PPI) to adjust the estimated cost of \$0.10 per fax page from October 1992 USD to December 2014 USD. I treat the transmission cost for a landline phone call as zero, because providers of landline phone service in the United States do not charge subscriber for incoming calls. To determine the damages range, I subtract the total harm from the violating communication from the least (\$500) and greatest (\$1,500) statutory damages amounts. I then divide those differences by the total actual harm from the violating communication to determine the least and greatest damages multiple for that violation.

The actual harm that a violating communication imposes on its recipient varies significantly, depending on the method of communication. Thus, when analyzing whether the TCPA violates due process as applied, it is essential to consider all the facts of the violating communications, so as to measure accurately the actual harm that those communications cause.

In sum, a violating communication causes actual harm of between 6.8 cents and 70.7 cents per violating communication, depending on the communication channel used. The remainder of the TCPA’s statutory damages is purely punitive. Thus, the punitive component of the TCPA’s statutory damages is between 706 and 22,058 times the actual harm that a violating communication imposes on the recipient.³⁷

35. Because there are 360 ten-second intervals per hour, $\$24.62/360 = \0.068 . That calculation assumes, for simplicity, that the opportunity cost of an individual’s time is constant throughout the year.

36. See Declaratory Ruling and Order, *supra* note 13, ¶¶ 76–78, at 8001–02.

37. Settlement agreements over TCPA class actions have resulted in payouts as great as 182 times the actual harm from a violating communication. See, e.g., Settlement Agreement and Release at 10, *Douglas v. W. Union Co.*, No. 1:14-cv-01741 (N.D. Ill. Oct. 28, 2015), ECF No. 52-1. Under the settlement, Western Union agreed to pay \$8,500,000 to an 823,472-member class of consumers that received unsolicited text messages from Western Union, resulting in damages of \$10.32 per class member. See Steven Trader, *Western Union to Pay \$8.5M to End TCPA Class Action*, LAW360 (Oct. 29, 2015, 10:11 PM), <http://www.law360.com/articles/720929/western-union-to-pay-8-5m-to-end-tcpa-class-action>.

III. CONCLUSION

The punitive component of the TCPA's statutory damages is between 706 and 22,058 times the total actual damages that a violating communication imposes. That multiplier can vary significantly according to the specific circumstances of the violating communication. Given the Supreme Court's jurisprudence on punitive damages, lower courts must take seriously the possibility that the TCPA's statutory damages violate the Due Process Clause of the Fifth Amendment as applied.

TCPA Punitive Damages v046
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