
The Consumer Finance Podcast — TCPA Trends: 2024 Year-in-Review and 2025 Predictions**Host: Chris Willis****Guests: Virginia Flynn and Chad Fuller****Date Aired: January 23, 2025****Chris Willis:**

Welcome to *The Consumer Finance Podcast*. I'm Chris Willis, the co-leader of the Troutman Pepper Locke's Consumer Financial Services Regulatory Practice. Today is the first installment of our 2024 year-in review and 2025 look-ahead series. In this episode, we're going to be talking about the Telephone Consumer Protection Act.

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Now, as I said today, we're going to be taking a look back at what happened in 2024, and more importantly, a look ahead to what we think will happen in 2025 under the always important area of the Telephone Consumer Protection Act. To do that, I'm joined by two of my partners in our Consumer Financial Services Group, Chad Fuller and Virginia Flynn. Chad, Virginia, thanks very much for being on the podcast today.

Chad Fuller:

Thank you. Thanks for having us.

Virginia Flynn:

Yes, thanks for having us.

Chris Willis:

It's great to have you both here, and this is an area that you both practice in so much that you have so much insight to share, and I'm really looking forward to hearing what you're going to share with our audience. But let's just start off with kind of the most important question probably to the audience, which is, in the TCPA world, what can we expect in 2025?

Chad Fuller:

Well, there's going to be a number of changes, I think. One of them certainly is this one-to-one consent rule that's going to come out very shortly. Virginia, what's your thoughts on that one-to-one consent rule and the compliance strategies that are going to need to be implemented to deal with it?

Virginia Flynn:

Yes. I mean, I think, big picture, no question. That's what everyone sort of has been planning for and preparing for. I imagine most listening have already gotten some compliance pulled together, because the deadline for when that goes into effect is January 27th of this year, so it's right around the corner. It's been something that companies have been grappling with for a while. I think, big picture, that's, that's it. You've also got the McLaughlin Chiropractic case oral arguments on January 21st, which may have already occurred by the time you listen to this. That will certainly affect, I think broadly, how courts are required to interpret, or adopt, or are bound by FCC orders or legislative rules. So, really excited to actually fall along with that case.

But talking about the one-to-one consent rules, ultimately, to me, if you're listening to this podcast, this session, this is what you care about. How can you help the company that you're working for or even as outside counsel make sure they're compliant? Because we know, the plaintiffs' lawyers, we've got good friends in that space and they are excited. TCPA filings have been down, which has been great. It does make the cases that are filed more difficult to resolve or find a positive outcome for businesses. But the one-to-one consent rules in general was really meant to be helpful. It was the lead generator loophole as it's sort of probably negatively called in a way.

The new, soon-to-be chairman, Brendan Carr, who soon-to-be President Trump has nominated. He actually was in favor of them, he proved them, he voted for them. So, ultimately, the idea was to fix – we've all seen those big consent disclosures where they're pages long, and you may have consented to receive calls from Jesus and Santa Claus. You're just not really sure. I mean, you get it. Right, Chad? But we've seen a lot of litigation about it. The goal was to fix that, but it's actually, as usual, come around to larger companies that have, and even smaller businesses, that are struggling to figure out how to deal with the different names within a company. And how are you going to get that specific consent for that specific company? Right, Chad?

Chad Fuller:

That's right. It looked like the fix, which was intended for this – to stop these telemarketers from adding 400 – you've consented to 400 companies calling you, or 60, or 70 companies, how this affects legitimate businesses that have subsidiaries, and they have different aspects of their company that may be named, or part of the company, but for branding purposes are different? So, there's going to be a lot of challenges there. What we've seen last year in addition, without the one-to-one, is the typical kind of plea of TCPA litigation. It hasn't gone away, and it will continue notwithstanding the fact that the Facebook decision on what the definition of an ATDS is. So, we're still seeing it. We're seen a lot in prerecorded messages, Virginia. I think, in 2025,

we're going to see prerecorded messages continue. Then, obviously, this one-to-one, that's going to be a big sea change hitting January 27th.

Virginia Flynn:

Yes. As a reminder, the revocation rules in April, April 11th is the date by which the FCC is now going to, they say it's sort of a new thing. Revocation by any reasonable method. The reality is, if you've been around the TCPA as long as Chad and I have, which now makes me feel a little bit old, there were petitions filed over a decade ago by actually those in the financial services space, and auto finance industry actually, asking the FCC to approve, and that companies could delineate the method by which somebody revokes consent.

A few as a company say, "We've got a 1-800 number and this is the number you need to call to revoke consent, that's how we can accept it." The FCC, over 10 years ago said no to that then. I'm not sure that the April 11th rule is a huge difference, but I certainly know that plaintiffs' lawyers are very savvy, very smart, and they are looking forward to that going into effect, and being able to use that in their litigation, Chad.

Chad Fuller:

I agree. We're also seeing guys, the typical TCPA class actions on reassigned numbers, wrong numbers. It's a reminder, we tell our folks all the time, we tell the clients we work with, scrub against DNC, making sure that you've got that. But we're still seeing those cases, they have not gone away. Compliance around them, I think, is a lot better. Would you agree with that, Virginia? I think, most of the companies we work with have got their compliance act pretty well squared away.

Virginia Flynn:

Yes. I think on the reassigned numbers, if you want to use the database, it's extraordinarily expensive.

Chad Fuller:

Sure is.

Virginia Flynn:

They actually are not a lot of companies that can afford to use it, depending upon the volume of phone numbers they have. So, there are third-party vendors that say they can do it for cheaper, and we've seen it. But I think that it's a largely untested space, as whether how effective it is. I do think it's been effective for our clients that do use it. We've been able to sort get rid of cases early on showing that we've used it. But I agree with you.

Chad Fuller:

There's another little nitpicky issue, guys, that I want you to be aware of, because it just came out a couple of days ago. It's a case called Bernard vs. Mixtiles. I think they were probably using

a vendor, I don't know, it was just filed in the Central District of California. But basically, Mixtiles is located on the East Coast. They're sending text messages about their products to the West Coast.

Virginia Flynn:

Telemarketing text messages, right?

Chad Fuller:

Yeah, that's right. Telemarketing text messages about – how great these products are. So, the TCPA does have time restrictions, 8am to 9pm. So, if they're sending, let's say, these text messages at nine o'clock Eastern time, they're hitting California or West Coast time at six. So, that's the claim. Really, I think it's receipt. Virginia, I think you probably agree with me. We saw this in the recording statutes as well. It's the receipt, where the person was that received the text message or the call. Some would be thinking about, especially if you're dealing with your vendors on that.

Chris Willis:

Makes sense.

Virginia Flynn:

A lot to look forward to, Chris.

Chris Willis:

Well, let me ask you about yet another thing I want to get your input on. How do you two think the Supreme Court's decision in the *McLaughlin v. McKesson* appeal will affect the way district and appellate courts will interpret and apply the TCPA?

Virginia Flynn:

Yes. Really, everyone's very excited about the case. Not every company wants to go all the way to the Supreme Court to have a decision heard. It's not surprising that a fair number of TCPA cases have gone all the way up, because I think the statute can be difficult at times. Certainly, when you've got the FCC coming out with decisions, that maybe don't make a lot of common sense. So, the *McLaughlin* case has been around since 2013. It's been around for a long time.

The reality is, the Fourth Circuit, the Second, the Third, and the Eighth currently state that FCC orders interpreting the TCPA fall outside of the Hobbs Act and they're not bound by it. The Seventh Circuit says, we're not bound by either an order or an interpretation. The Ninth Circuit says we're bound by both, a legislative rule and an FCC order. So really, in terms of a split, you've got one, it's not huge. The Fourth, Second, Third, and Eighth have said, we don't have to follow it anyway.

In many ways, it could have a huge impact depending upon where your case is filed. I won't say that the Ninth Circuit won't necessarily follow it anyway. The reality is, because we're not bound by it, it doesn't mean it's not highly persuasive to them. I think that no matter what the supreme court decides, and you've got Kavanaugh, and you've got Chevron, and you've got Gorsuch. We probably know where they'll come out, I imagine. I'm not a supreme court expert, but I think those in this space have a pretty good idea.

I think, ultimately, as usual with the TCPA, you have to know where your case is filed, what that jurisdiction follows, who your judge is. It deeply matters to the outcome of your case. Hire lawyers that know the courts you're in. It deeply matters. The Fourth Circuit, it's not been an issue. The Ninth Circuit it has been. In many ways, what I think the plaintiffs' lawyers are very excited about is, if in fact, FCC orders are not binding, that opens up a lot of space for litigation. That is what they are very excited about and what they can start pulling apart, picking at, going back on. That creates chaos, and for a plaintiff's lawyer, there's nothing better. For a defense lawyer, you've got out of a compliance system and a program. The ones we built are, they're conservative enough to survive most really attacks or changes to the statute. I do think that's really what people are concerned about, Chad.

Chad Fuller:

Yes. I mean, listen, I agree with you, Virginia. If the FCC, I think they're paying for the sins of Christmas pass, really, because they've come out with some orders and some directions that, frankly, have run contrary to the statute. When those were looked at, the supreme court, it's almost as if they laughed at them, like, "Are you guys kidding me? This is how your definition of an ADDS? Would it be nice to have a single source of truth?" Yes, it really would, and for precisely, the reasons, Virginia, that you say. I mean, look, without it, everybody can freewheel, and make up arguments, and we're going to get continued splits, and we're going to get continued disagreements among different courts about what something means.

I think the FCC, historically, they've been very liberal with their approach and their rules. So, when challenged, and it actually looked at, some of these decisions and some of these rules that the FCC has come out with cannot pass any sort of scrutiny when looked at the statute. You agree with that, Virginia?

Virginia Flynn:

Yes. The funny thing is, that in the McLaughlin case, the FCC actually came out with a common-sense approach.

Chad Fuller:

I know.

Virginia Flynn:

Fact is right. It's like, they did it here, and then, somehow, don't worry. So, I'm with you. It'll be an interesting case. Oral arguments are January 21st, we'll be listening. It will be super

fascinating. We're very interested to see what Kavanaugh and Gorsuch, what their questions are.

Chris Willis:

Okay. Shifting gears on now for something else. Do you expect additional courts to join the Central District of California in finding that employment-related recruitment messages are not solicitations under the TCPA?

Chad Fuller:

Yes, I don't think they are solicitations. I think the devil is in the details, because when we're just looking for employment, we're looking for somebody to join our company or join our organization, we're not selling anything. We're trying to hire somebody. It seems like a different analytical framework. I think, sometimes, if there's mixed messages, that's where the mischief can occur. Virginia?

Virginia Flynn:

Yes. I mean, we had a case in Florida. Florida has historically been pretty good, I think, on TCPA, so much so that really, the filings have gone down. A lot of our plaintiffs' friends in Florida have gone and taken the California bar. We had a case exactly that where we had a client that it was part of a lead generation. They were a non-health care life insurance company, and great company, did great work, people loved working for it. They would send out recruitment texts, and we found an early motion to dismiss because it's not sales. The court said, "I don't know if I agree with you. In fact, I don't think I agree with you, but I won't go so far to say that they aren't sales." So, it beats a 12(b)(6) motion, which was not necessarily surprising. But man, you love a judge that said, "There's no way." We always kill for that.

Do I love seeing that the Central District of California is the one actually? Having some common sense, I love it. They've got some great judges out there, and that was a great decision. Do I think others will depends on how many cases plaintiffs' lawyers bring? I always think that there's a groundswell. When you get enough, companies that decide they're not going to put up with it anymore and they're going to fight it and they're willing to go through discovery, I think that the tides will shift and the decision in the Central District of California will be followed.

But I think in general, these cases have gotten really hard to resolve early and they're expensive. We get it, right? So, a lot of companies are like, "Just figure it out." So, I do think if you get enough companies that say they're not going to just roll over, you'll get a lot of courts that follow it. It's a great decision. It makes a lot of sense.

Chad Fuller:

Yes, agree.

Chris Willis:

Okay. Turning back to the topic of the FCC, how would you two think that sort of the new wave of FCC regulations and guidance under the TCPA might affect litigation in 2025?

Chad Fuller:

Look, I mean, I'll say this, I still think any guidance or regulation from the FCC is going to be persuasive. I think it's something that courts and litigants, plaintiffs and defendants are all going to look at and use. But given where we are and the sort of the flux, based on, do you have to follow it? I think it's going to be open for interpretation. Virginia?

Virginia Flynn:

You know, I would love. So, we have filed probably between 10 and 15 comments and petitions on behalf of clients. And we used to do a lot more probably four or five years ago. What we ended up seeing, of course, is that those petitions and/or those comments still haven't been answered. We've got one we filed back in 2013, I think, that still hasn't been responded to. My children will be in college by the time maybe the FCC responds.

Chad Fuller:

And it was still a good question. Still a good question.

Virginia Flynn:

They're still great. So, the FCC, if they really wanted to make a difference, could actually pick up the mail and really respond. And they don't need to write 25, 30 pages. They can just give a really good FAQ or something on some of this stuff, right? That would be really helpful, I think, for companies. But man, I've become such a believer in going to Congress and seeing what we can get done. I don't know if anything will get done. I'm a daughter of a plaintiff's lawyer, and after trying to make a bunch of changes in courtrooms and not affecting it, I've seen my father actually go to Congress, and implement, and make changes in the law.

If that's one way to do it, man, it can be expensive. But if you can get your trade associations, there's some really good ones here for financial services, especially in health care and other places. I think some real smart changes can be made that can protect people. I think many people believe that the TCPA was a good idea. Nobody liked getting that telephone call at dinner time on their landline while they're eating dinner, but – and no one likes those text messages. Do y'all know that I'm trying to – I mean, Troutman is going to lose me, guys. People are trying to hire me left and right. There are jobs currently out there. I don't know if y'all get these text messages, and there's spam. I'm going to get hired for \$12 an hour guys, they're going to hire me.

Chad Fuller:

Yes, you're going to be a product evaluator.

Virginia Flynn:

Yes, I'm going to review products. Goodbye Troutman, right?

Chad Fuller:

Good for you.

Virginia Flynn:

Everybody gets them. I don't know how I got on the list, but I'm on it, and I'm sure y'all are on it too. So, there's value in the statute, but it's harming the really good companies that are trying to get it right. We talked about the one-to-one consent rules. I'm going to go back to that. How do you address it? What do you do? Most companies that were trying to be sort of high-level holistic, "Hey, this is what we're planning to do and then everybody else follow along" are now having to decentralize. Because if you have a holding company and it's a different name from the 12 other companies underneath you, you have to get consent for the named entity but for which is going to communicate with you. So, now your compliance is decentralized. And that may be a good thing, I don't know, it depends on your company, right?

But in general, that's what's happening, is that you have to say, "Your group is now in charge of the consent." You're now are going to be in charge of the revocation." But sharing consents and revocations across the board is not a good idea. I'm sure a plaintiff would argue, sharing revocations across the board is a good idea. But from a company perspective, you still need to communicate with your customers, and your clients, and your subscribers. So, to me, Chad, I think that's probably one of the bigger issues.

Chad Fuller:

Yes. The other thing is, be careful what you wish for, because if they come out and change the statute, and we don't like it. Let's say, it's friendly for businesses or gives us more ability to make calls, or interact with our customers, then we've seen these state analog TCPA cases. Virginia and I have a couple of class acts where the state laws have come in and they go, "Well, we don't like it, so we're going to just do our own." Some of them have that \$10,000 [inaudible 0:17:08]. That's ridiculous.

Virginia Flynn:

Or the attorney's fees, and that's the tail wagging the dog, right? Which is the worst. I mean, TCPA was actually – since 1991, it's never had an attorney's fees provision. It's been a good thing because let's get to what the harm is, and let's figure out something. When you've got a statute attached, we've seen these, Chris, you know this. You play in the space. That statute has an attorney's fee provision. That ends up being what the case is about when it's really not. So, couldn't agree more, Chad.

Chris Willis:

Okay. So, let's wrap things up by getting both of your insight into what companies should be doing in preparation for the various changes that you've talked about, especially those that are going into effect, for example, in April. What advice would you give our clients about those things?

Chad Fuller:

Well, I would definitely be paying attention to this one-to-one consent rule to the extent that I had. As Virginia and I were talking, subsidiaries of our company, or other sort of add-ons that roll up under the company, I would take a definite look at my compliance strategies. Certainly, my other little piece of advice is, I would check my vendors, make sure that my vendor checklists are right. It's 2025, it dusts them off, take a look who's actually making our outbound calls on behalf of our companies. Virginia?

Virginia Flynn:

Yes, I mean, almost every class action we've had, there's been a vendor involved and there have been issues. So, I couldn't agree with Chad more, 100%. My piece of advice is, our complaints. Who is your complaints SME? How do you define complaint? Because that's where you're going to find the problems before they get too big. You're going to have problems, it's okay. You're going to have implementation problems. You're going to have customer complaints, that people calling in, they're feeling frustrated. You need your vendors to be responding back to you within, whether it's 24 hours on revocations or as soon as they can.

Get a once-a-week report from your vendors. What are the complaints you're seeing? What are the text responses we're seeing? Get that rundown because that's the canary in the coal mine, where you go, "You know what? We've got a problem here with this change we made. We're seeing people complaining over here." That is where you will fix a lot of the problems. If your compliance at a company in-house and you want to be able to show your value to me, who is your complaints SME, volunteer to be it, get those reports run, and let's find where there's a glitch because something's going to happen. If you have any questions or any issues, call up Chris, call up us, happy to chat. Obviously, free of charge, and just walk through some of this stuff. We know it so well, it's pretty easy. So, happy to help.

Chris Willis:

Well, thank you, both, Virginia and Chad for being on the program today and sharing all of this knowledge and insight that you just have. I'm sure the audience appreciates it, and I certainly appreciate you being on too. Of course, thank you to our audience for listening to today's episode as well. Don't forget to visit and subscribe to our blogs, [TroutmanFinancialServices.com](https://www.TroutmanFinancialServices.com), and [ConsumerFinancialServicesLawMonitor.com](https://www.ConsumerFinancialServicesLawMonitor.com). While you're at it, why not visit us on the web at [Troutman.com](https://www.Troutman.com) and add yourself to our consumer financial services email list. That way, we can send you copies of the alerts and advisories that we send out from time to time, as well as invitations to our industry-only webinars that we occasionally hold. Of course, stay tuned for a great new episode of this podcast every Thursday afternoon. Thank you all for listening.

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