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## DEFEATING CLASS CERTIFICATION IN TELEPHONE CONSUMER PROTECTION ACT CASES

*The principal grounds for denying class certification in TCPA cases have been: predominance of individualized issues; lack of adequacy and typicality of proposed class representatives; ascertainability of the class; and, in a few cases, findings that a class action would not be superior to alternative methods of adjudication. After an overview of the TCPA and the requirements for a class action, the authors discuss the cases dealing with these issues.*

By Neal Marder, Andrew Jick, and Kelly Handschumacher \*

In 1991, Congress enacted the Telephone Consumer Protection Act (“TCPA”) to ban certain types of unsolicited phone calls, text messages, and faxes. The law provides a private right of action for statutory damages of \$500 per violation, or as much as \$1,500 per violation if the conduct was “willful.” Despite the legislative history suggesting that the statute was intended to permit consumers to seek a modest remedy on an individual basis, the plaintiff’s bar has seized on the TCPA as a mechanism for aggregating the claims of large numbers of people with potentially enormous claims for statutory damages. As a result of the potentially crushing liability exposure these actions can impose, some TCPA class actions have settled for tens

of millions of dollars.<sup>1</sup> And the pace of TCPA class action filings is only increasing. Between 2010 and 2016, the number of filings increased by more than 1,200%; and from 2015 to 2016, the filings jumped by almost a third, going from nearly 3,700 filings in 2015 to over 4,800 the next year.<sup>2</sup>

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<sup>1</sup> See, e.g., *In re Capital One Telephone Consumer Protection Act*, 80 F. Supp. 3d 781, 787 (N.D. Ill. 2015) (\$75.5 million settlement); *Rose v. Bank of America Corp.*, 2015 WL 1969094, at \*1 (N.D. Cal. May 1, 2015) (\$32 million settlement); *Arthur v. Sallie Mae, Inc.*, 2012 WL 90101, at \*3 (W.D. Wash. Jan. 10, 2012) (\$24 million settlement), *settlement approved*, 2012 WL 4075238 (W.D. Wash. Sept. 17, 2012).

<sup>2</sup> WebRecon. 2017. 2016 Year in Review: FDCPA Down, FCRA & TCPA Up. January 24, 2017.

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