

***The Consumer Finance Podcast*** – TCPA Risk Reloaded: Why DNC and Consent Issues Are Fueling the Next Wave of Litigation

**Host:** Chris Willis

**Guests:** Chad Fuller, Virginia Flynn

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**Chris Willis (00:05):**

Welcome to [The Consumer Finance Podcast](#). I'm Chris Willis, the co-leader of Troutman Pepper Locke's Consumer Financial Services Regulatory Practice. And today's episode is another in our series of Year in Review and Look Ahead episodes, this time talking about litigation under the Telephone Consumer Protection Act. But before we jump into that topic, let me remind you to visit and subscribe to our blogs, [TroutmanFinancialServices.com](#) and [ConsumerFinancialServicesLawMonitor.com](#). And don't forget to give a listen to all of our other podcasts: the [FCRA Focus](#), [The Crypto Exchange](#), [Payments Pros](#), and of course, [Moving the Metal](#). Those are all available on all popular podcast platforms. And speaking of those platforms, if you like this podcast, let us know. Leave us a review on your platform of choice and tell us how we're doing. Now, as I said, today we're going to be recapping the year 2025 and looking ahead to 2026 for litigation under the TCPA, which remains one of the most active areas of litigation in the federal court system. Joining me to talk about that today are my two partners, Chad Fuller and Virginia Flynn. They're partners in our Consumer Financial Services Litigation Group. They specialize in defending class actions and also have a heavy practice in the intersection of healthcare and TCPA, which is what makes them so qualified to talk about this topic today. Virginia, Chad, thanks a lot for being on the podcast today.

**Virginia Flynn (01:19):**

Thanks for having us. We're really excited to be here. Right, Chad?

**Chad Fuller (01:21):**

Yeah, thanks a lot. We're really looking forward to this and appreciate the opportunity.

**Chris Willis (01:26):**

Well, I'm really looking forward to hearing about what happened in the TCPA last year. So let's just start off with a really important question, which is what do you guys think is the biggest single TCPA development from last year that companies need to know about?

**Chad Fuller (01:38):**

I think anybody that's practicing in this field would say it's McLaughlin, and it's a United States Supreme Court decision. Basically, it did away with the Chevron deference. And so what used to happen was you would look to how an agency interpreted a statute as the guidance. And so

there was a lot of deference that the agency's interpretation would give, and that's significant in the TCPA.

**Virginia Flynn (02:02):**

Yeah. I think what's really important to remember, and to Chad's point on that deference, is the FCC, which is or was the authority, certainly is tasked with understanding the statute. It really, it got a little crazy, to be honest. Right? It got a little wild sometimes. And we've always struggled as, certainly as defense lawyers, but just as lawyers, with the way that the FCC at times interpreted the statute. It took plain language, and it added to it where none existed within it. And so I think the Supreme Court got it right, no question, just on its face, right? And it's up to the legislature or whoever wants to revise or if they want to correct or amend the TCPA, that's how the process is supposed to work. So the FCC, in all of its wisdom, when it decided to add language to the statute, it made it increasingly difficult for companies to comply and to understand what was coming next. That was really the challenge. So the McLaughlin decision was huge. I mean, it has to be. If Facebook was the big decision a few years back, McLaughlin is certainly the pinnacle, I think, for TCPA for, I wouldn't say clarity, because what it's led us to now is actually a lack of clarity. And we can talk about that. So you'll hear a lot of defense lawyers, actually, they weren't thrilled with the decision because there's comfort in knowing what the rules are, right? And that sort of shifted, which we can get into. But certainly McLaughlin, everyone knows it. And if you don't, I think you've probably been hibernating for a while.

**Chris Willis (03:23):**

Well, it sounds like it's very significant. So from a practical standpoint, what does this mean that courts are no longer going to be deferring to the various interpretations of the FCC under the Telephone Consumer Protection Act?

**Chad Fuller (03:35):**

Well, certainly it's going to mean that you're going to get decisions from one circuit that go one way and decisions from circuits that go another way. You're going to have a lot of, from a compliance standpoint, it could be very problematic, right? In trying to have a unified TCPA compliance program where you've got different circuits, different courts coming out on the exact same question in a different way. That's what Chevron deference was supposed to ameliorate, so you'd have a single government agency interpreting and have a unified meaning. Going back to Marbury versus Madison, though, it's the province and duty of the judicial department to say what the law is. So I think what McLaughlin does is sort of strike a middle ground. It doesn't do away completely with looking at the interpretation that an agency gives. It's just not bound by it. But it is going to create a lot of uncertainty. Virginia?

**Virginia Flynn (04:29):**

In reality, we almost fully expected to see certain courts sort of stick with it. For example, the Ninth Circuit, we really thought we'd see, we didn't expect to see the courts all of a sudden changing their minds on decisions that they had made previously. But we've seen more of it than we expected. And we've seen it where the statute doesn't support the language that exists in an FCC declaratory ruling. And so I think it's been wonderful. I think it's been wonderful. I

think it's not just even being creative. It's allowing the judges to make the decisions based upon what they actually think the statute says and means, not necessarily an agency that may be sort of politically motivated at times. And so we've seen a lot more shift than we expected. And then in other parts, like on pre-recorded message chat with text messages, we can talk about that. Anything that's a little too creative, even the more conservative courts have not really fallen in line and changed the law on it. So I think there are still many courts that defer to the FCC declaratory rulings, but then there are others that have not. So certainly a shift, but courts are still free to defer to it and feel like they're bound by it. And while they don't say that they are, they certainly track it.

**Chad Fuller (05:40):**

Yeah, I agree. And what's interesting about it, folks, is that the reason that we have this is because the statute itself, which was enacted in 1991, doesn't really fit the analytical framework of 2026 technology and the way that messages are delivered, either from consumer-facing companies or from folks that are marketing their goods and products or services. And so when you look at it, one doesn't fit the other. Because in 1991, I was in college, and nobody really had a cell phone. The technology wasn't anywhere near what it is today. And so you're using the language of somewhat of an outdated statute. And I think that's what gives rise to a lot of these, "Oh, you know what? They probably mean this," or, "They probably mean that." And that's certainly what the FCC did for many years.

**Virginia Flynn (06:27):**

I bet Chris had a bag phone from RadioShack in 1991. That's what we had. That was the jam if you had that bag phone from RadioShack.

**Chad Fuller (06:34):**

Oh yeah.

**Virginia Flynn (06:36):**

The DNC. I know, Chris, we've talked about this and that might be something that we shift to. But the federal DNC, what it meant and what it means today, is very different. You used to sit down at dinner and as a family, which I hope we all try to still do, and you sit down and the phone would ring, your landline. And people got rid of their landline because there were so many telemarketing calls happening and interrupting and it just got crazy. So how the federal DNC has been interpreted, whether it's a cell phone or a landline, the statute doesn't say cell phone, but the FCC said and other courts have said, "Well, it should cover it." But if we're going to follow what the statute says, it actually doesn't. And so you've seen a lot of shift in decisions. I think it's helpful for resolving cases early. Let's talk litigation for a second. That uncertainty does create early resolution strategies, right, Chad?

**Chad Fuller (07:26):**

Yeah, it sure does. And I know that we're going to talk a little bit about the national Do Not Call registry and its impact.

**Chris Willis (07:32):**

I was actually just about to ask you that, Chad.

**Chad Fuller (07:34):**

Yeah.

**Chris Willis (07:35):**

Because it's an issue that you highlight in our Year in Review and Look Ahead publication in the TCPA section about whether or not the Do Not Call rules cover cell phones. Virginia was just talking about landlines, but what about cell phones? How's that issue playing out now, and what should companies do about it?

**Virginia Flynn (07:49):**

Yeah. So y'all know this, you've heard it before and you'll hear it from other lawyers. How we talk litigation and how we talk compliance are two different things. That is the reality. The fun, actually, is in the litigation because you get to be creative and let's be aggressive and let's go out there and fight. From a compliance, it's a little bit of a different personality because you want to call us hopefully one time, let us help you with your compliance program, which we can do and we do all the time for companies. And then I think you hope you probably never talk to us again if we do our jobs. I mean, that's not the way the TCPA works generally, but we tend to be more conservative with our compliance advice. Right, Chad?

**Chad Fuller (08:23):**

That's right. Especially if the implementation of it creates sort of a uniform system in your enterprise that makes it easier to manage. I'll give you an analogy. We have the call recording statutes in the United States. We have one-party consent states and two-party. And if it's a one-party consent state, that means that you can record, and you don't have to tell the other person that it's being recorded. And so if you're going to implement that, do you really got to go to every single state and figure out? Just make the announcement at the beginning. Okay? And it's the same thing that we're doing with these Do Not Call registries and the like, right? Just assume that you're dealing with a cell phone. Just assume that it applies and then you don't have to worry about it.

**Virginia Flynn (09:09):**

I think that's right. Assume that it applies because I think, number one, as a company, you care about your customers, you care about your clients, you care about your members, whatever it

is. And we like to reduce consumer abrasion, right? So if they don't want to hear from us, generally, we don't want to call them. Now, it's not as easy as that. I mean, we believe they want to hear from us or we think they also should if it's a healthcare issue or something really important. We can talk about emergency purpose sort of separately. But I think you want to, until we get better clarity either from Congress or even from the FCC in some ways, which is still going to be something to look at, right? But I think you want to be conservative on your approach. There's surprisingly weak DNC compliance, though, I will say. What we've seen out of TCA litigation, that is the trend, is DNC because technology doesn't matter in the litigation, right? You need more than one call, which seems to trip some people up. You have to have at least two calls for there to be a DNC violation. But assume that cell phones apply just like landlines because let's just get our good DNC compliance up to snuff. A lot of companies, if there's one thing that comes out of this podcast today, if you're an in-ho is super focused right now. Because it's really inexpensive for plaintiffs' lawyers to bring these types of lawsuits. There's no technology to prove. It makes a big difference.

**Chad Fuller (10:29):**

It sure does. And so there's really two. It's the DNC is where plaintiffs are headed and pre-recorded calls. Because pre-recorded messages, also, the technology used to deliver that pre-recorded message doesn't matter. So we're not looking at whether something is an automatic telephone dialing system or an ATDS in the DNC and pre-recorded message world. So plaintiffs have seized on that because, to Virginia's point, proving that something, that a message was delivered with an ATDS is expensive and it's hard to do. Frankly, it doesn't fit the analytical framework of what the statute was, which was a random and sequential number generator.

**Virginia Flynn (11:09):**

I think DNC, and I'm sure we're going to touch on some consent issues. Those are the two things to really think about this year that we saw 2025 were big-ticket items for litigation.

**Chris Willis (11:19):**

Well, Virginia, you read my mind because I was going to ask you all about consent next. And I really am interested in hearing about how the McLaughlin decision has affected the debate in litigation over prior express written consent as a concept under the TCPA versus simple prior express consent, which is the type of consent you need in other situations. What's happened there?

**Virginia Flynn (11:39):**

Prior express written consent has been the bane of existence for most companies. It's exceedingly difficult to obtain. There have been some strange decisions, frankly, out of the Fourth Circuit relating to E-Sign. And E-Sign was always sort of the baseline for understanding what prior written consent was because it's not actually in the statute. You won't find that phrase in the statute. And so we spent years trying to basically create compliance programs that keep you safe. But that is what business folks get the most frustrated about, is that they say we can't make this happen. So then you go into risk mitigation mode sort of. What McLaughlin has let courts do, and the courts have actually had really good decisions out of courts. I mean, the Fifth

Circuit just came out with a really great one. But prior express written consent is not in the statute. That doesn't mean you're going to stop your compliance and stop trying to obtain written consent for now because we don't know where this is going to land. But prior express consent is provision of a phone number. There's no special language.

**Virginia Flynn (12:35):**

There's no promise to provide your firstborn child along with your affirmation and a checkbox. Prior express written consent is a super difficult action only concept, but concept to obtain. And so there's relief out there now a little bit more for companies where somebody gave me the phone number, but maybe I don't have the ticky-tacky exact language. Right, Chad?

**Chad Fuller (12:55):**

Yeah, that's right. And just think about it, folks. Think from a compliance standpoint how much more, and everybody that's listening to this that's in-house counsel knows and defense lawyers, how hard it is to maintain those records. The provision of a phone number, you've got an application, somebody gives you the telephone number, you either text them back or call them back on the number that they gave you. And that's Virginia's point. That's prior express consent. That's what the statute says. But the FCC wrote in for telemarketing it has to be prior express written consent. So now we got to have some kind of writing, like a signature, E-Sign, and all of that has to be maintained by an organization so that if they get sued and the claim is that you're sending me telemarketing messages or sending a plaintiff, that they can prove that they have prior express written consent. Very, very challenging to do for any organization.

**Virginia Flynn (13:43):**

I think what McLaughlin has done, Chris, is that it's brought some common sense back into the TCPA. And it's sort of the, we had a former partner, Alan Wingfield. If you're out there, Alan, we miss you. We love you, buddy. He's the best. One of the first things he would say when he walked into a room we were doing TCPA compliance work for companies is, "Leave your common sense at the door. What we're going to tell you doesn't make sense." Yes, you may think that your customers, your clients, your potential whatever have asked for a call, but if it doesn't meet the standard of prior express written consent, you can't use it. It was so frustrating. And so I think these courts are really getting a little bit tired of the arguments that some plaintiffs' lawyers have been making. And we talk to some plaintiffs' lawyers and they too get frustrated when they feel like their fellow brethren bring bad cases that create bad case law for them. So it goes both ways.

**Chris Willis (14:28):**

Yeah. Well, that's really good to hear because we love a good bit of common sense here on The Consumer Finance Podcast. I think that's one of the things we should pride ourselves on. Let's go to another issue that you all talk about in the Year in Review publication, which is the use of third-party vendors. When a company uses a third-party vendor to make calls on the company's behalf, who is the one who's considered to make or initiate the calls under those situations?

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**Chad Fuller (17:00):**

What companies have typically tried to do is just sort of outsource that risk to a third-party vendor. And if you're a plaintiffs' lawyer, you say, "Well, what you're doing is you're outsourcing this TCPA risk to some third-party vendor that's probably insolvent, but you're getting the lift, you're getting the benefit of their illegal activity." So my analogy of that is if you had an oil field and you had to drill in that properly and you didn't want to do it, you just hire some rogue person to go drill and you get the oil. And they don't follow any of the rules, but you're the one getting the oil and you directed them, "Hey, go drill over there. I'm not going to do it. You do it." If you're a plaintiffs' lawyer, that's what you say. And so a lot of big companies that we've represented have not been able to avoid exposure just by using a vendor.

**Virginia Flynn (17:35):**

Yeah. I think on the vendor situation, it's a little less change than some would like. I mean, the reality is good companies are working with good vendors and there's oversight. They've accepted that if you're a vendor and you have a contract, that you're acting on their behalf. And there's pretty good case law outside of TCPA that that's the way life works. I think it's that rogue situation or maybe the compliance isn't up to snuff, or we haven't really dug around the drawers to really see what they're doing. I think where this will make a difference is with lead generation. That's really been a lot of litigation around lead generation. So you've got different types of companies that are selling leads. A middle guy, maybe a broker, buys the leads, and then perhaps that broker is selling something that is the company that you represent or you work for. So there's this really long chain to get there. And for a long time, I think plaintiffs' lawyers have argued or have been arguing that that lead generator is making calls on your behalf. They are initiating calls. There have been a fair amount of cases that have gone to summary judgment or whatnot, but it's been a real battle because it's expensive. And so companies don't really want to spend the money to fight that fight. I think you have a better argument nowadays on the lead generation piece, which is great. But I think on vendor issues in general, it's still the same. You still need to do a good job with your compliance. That is your biggest risk from a class action. Right, Chad?

**Chad Fuller (17:53):**

It sure is. And we have developed, Virginia and I, and used many times, vendor checklists that we help companies in both creating and managing their compliance programs. And these checklists can be very helpful. The other thing, I know this is going to be a big surprise to those listening, sometimes the vendors don't tell you the truth. Virginia and I have gone on-site to vendors around the country who say they're doing X, Y, and Z, and then we actually go there and tour the facility and they're actually not doing it. But it is helpful, I think, if you get a vendor checklist and you're managing your vendors in an appropriate way.

**Chris Willis (18:18):**

Okay. Well, let's keep the hits coming and talk about yet another issue, which I know has been a big battleground and you also mention in the publication, which is whether text messages constitute calls under Section 227(c) of the TCPA. Where are the courts on that issue, and what practical difference does it make in litigation?

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**Chad Fuller (19:31):**

Yeah, it's huge. I mean, if a text message is a call under Section 227(c), then every time we send a text message, the TCPA is invoked. And text messages are such a ubiquitous part of both marketing and communications with customers that it really opens up a huge area of TCPA exposure. Virginia?

**Virginia Flynn (19:51):**

Yeah, this is what you were referencing earlier, Chad, on the technology. I mean, this is a statute from 1991. We're in 2026. Text messages are frankly my preferred method of communication. I actually think the younger generations, they prefer to text versus call, and we're always encouraging our associates, "Pick up the phone, place a telephone call." I think the reality is most people, if you had a case before a jury about whether a call is a text message, I actually think a lot of jurors would say, "It seems like it probably is." But if you've got a judge or a court, and we've got several cases, Northern District of Illinois actually has some really good cases, that say, "But the statute doesn't say it." And if you're a strict interpretist, and you're reading the plain meaning, it doesn't have that language. Where it's really helpful is early resolution. I think it's really helpful from class action, all different kinds of things. I think we'll see some firming up of that, right? Or if the plaintiffs' lawyers decide they don't really want to rock that boat, they'll deal with it in different ways. But I think from a common sense perspective, we might see some shift either in some language or FCC or whatnot. We haven't seen too many courts grab a hold of that, but we've seen a couple. And if you're in those circuits, it makes a difference in resolving a case. And by the way, filing an early motion to dismiss on it doesn't hurt, or 12(c). There's value in it, certainly for your clients. So be aggressive there.

**Chris Willis (20:31):**

One of the things that I had thought I had observed over the past few years was the impact of some Supreme Court decisions was making TCPA filings go down. But you note in the Year in Review and Look Ahead publication that they're actually surging, including class actions. What's driving that phenomenon? Why are they back? And what kind of exposure are defendants facing in this new wave of cases?

**Chad Fuller (21:46):**

This is so near and dear to both of our hearts because when you look at these plaintiffs' lawyers and you actually get to know them and know what they're all about, they have spent 15 years doing TCPA litigation. It's put their kids through college, it's bought their boats, it's paid off their mortgages. They're not walking away from this statute because the way we interact with our consumers, the way big companies interact with their consumers, is typically via phone. Whether it's a cell phone and it's a text or it's a call, that's the way consumer-facing companies interact. The exposure is still there in the statute, and they'll just get more creative.

**Virginia Flynn (22:31):**

Yeah. So I think there's two reasons. One, I think that there's been a real big shift and focus on the DNC portion of the statute. In 2012, when they combined the TSR, the Telemarketing Sales Rule, with the TCPA, and it was actually an FCC declaratory ruling that was, I remember when it came out Chad, we really spent a lot of time going through it, but it combined it. And so now you've got this federal sort of DNC. And so there's been a lot more focus on it. There was a little more creativity, I think, with some of those arguments. The reality, though, when you talk to plaintiffs' lawyers, they say is that it's been 15 years maybe since some of these companies have really looked at their TCPA compliance and they're starting to fail. And so we're seeing what they argue is a plethora of calls again and more rapid increase in that. And so while some companies became conservative after these massive settlements, in early, I think it was 2012, 2013, we were seeing \$40, \$50 million in TCPA class settlements. Their plaintiffs' lawyers will tell us, "We think the compliance for companies has actually gotten a little weaker. The programs they have aren't really being followed. You've got new business units, you've got people that want to get more aggressive, they want to make more money. And so we're seeing more phone calls and that's why we're filing lawsuits again and we're increasing those numbers. It's the companies, it's not us." I'm not sure if that's right in terms of if that's quite accurate, but it's a pretty compelling argument by the plaintiffs' lawyers, at least.

**Chad Fuller (22:51):**

Yeah. And I do think that the digital marketing teams at a lot of these companies, these are closer out of college. They've got all of these ways to communicate. They're all creative. It's all social media. There's a lot of texting. There's a lot of interactive ways that they use telephones to interact with their customers. And so as these companies start to develop and there's more of them, there's this huge middle market that we're seeing where the settlements, to Virginia's point, aren't \$40, \$50 million. They're in that middle range, but it's a huge field. It's a huge market of those \$150,000, \$200,000 settlements that will go in the plaintiff's pocket after all is said and done. And that's still a good day. And they have a whole portfolio of those.

**Chris Willis (23:47):**

Moving to another issue that I feel like has been a perennial hot one in this area, we talked about getting consent a few minutes ago, but then there's also revoking consent or opting out. And in that regard, the FCC has spoken to this. Could you let the audience know what some of the most important recent FCC changes are around that topic of revoking or opting out of consent?

**Virginia Flynn (24:12):**

A lot of companies were really worried about this, and it's really, really hard to manage this revoke-all rule. Back in the early days, Chad, during big TCPA litigation, there were a fair amount of petitions filed with the FCC that said, "Hey, can we dictate how we can receive opt-outs, revocation, DNCs? Can people send us a letter to this address, or can they call this phone number?" And the FCC has said, "No, you don't get to dictate the way that you want to receive it," which was challenging in some ways, difficult for companies to manage this because sometimes you get letters being sent to the Philippines and it's got to come back. So it can be

challenging. That sort of shifted. There was this real big, though, revoke-all, that one text for or one stop request for one call would apply to every single thing a company does. You can imagine for certain types of companies that have a lot of different branches and arms that do a lot of things for their customers, that could be challenging. It was supposed to go into effect in 2025, then it was delayed to 2026.

**Virginia Flynn (25:11):**

It's currently now delayed until January 2027. Big lobbying efforts, I think, by big companies, but I think actually really shook some common sense, hopefully, into the FCC because it was impractical, it was fairly unusable, and was going to certainly create a mass of litigation, overwhelming companies trying hard to honor DNC requests or opt-outs, but being sort of a little bit whack-a-mole with those opt-outs. Right, Chad?

**Chad Fuller (26:12):**

100%. And think about it practically. Think about a big company. Take a managed healthcare company. There's a number of reasons that a managed healthcare company might want to reach out to you and communicate with you, either by phone or by text. Let's say it's an update about a new screening. I opt out. I don't want any more updates about breast cancer screening or whatever, colon screening. So now, does that mean you've opted out of everything? There may be a really legitimate reason that a managed healthcare company needs to get a hold of you. It might be really important in terms of issues of coverage, in terms of issues of whether something is approved, some procedure. And so have you opted out of everything? Think of, there's a lot of implications of just this single opt-out of everything. And so I think a more elegant way to do it is to opt out of the thing that you don't want. But to Virginia's point, it's tougher to manage, but I think it's overall beneficial. Do you agree with that, Virginia?

**Virginia Flynn (26:28):**

Yeah. And I think we'll probably round this out with telling you what you really need to worry about, what you need to care about. We like sort of line-level, issue-level consent and revocation, but that doesn't mean it works for your company. If you're a credit card company or you're a bank, you have a lot of different arms, and you could have a customer that has several credit cards and a checking account and a money market account. And there may be different types of communications. Your business folks, I'm sure, would prefer that you get consent and revocation, or at least revocation, per business line. I don't know if your system can manage that. And that's what we've been learning about certain types of companies. So at the end of the day, from a compliance perspective, you want to honor stop requests, revocations, DNCs. You want to honor it. That is your biggest risk if you decide, "Well, they didn't really mean it," or, "They didn't really mean it for this type of thing." So reconfirming consent is a huge part of this process because every time somebody says stop or they reach back out to get calls or have questions, you can reconfirm that consent, which is just simple prior express consent.

**Virginia Flynn (26:45):**

Chris, as you were saying earlier, provision of a phone number, reconfirming that phone number is a good number to reach you. And then you put that in your system as another check. "I got

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consent again on March 26th," or whatever. Those are really important steps in just basic good TCPA health of your company.

**Chris Willis (27:15):**

And I think that's a great segue, Virginia, into one of the wrap-up questions that I wanted to ask the two of you, which is given all the developments that you've just finished telling the audience about, what do you think, in addition to everything you just said, Virginia, are the top practical steps that you'd recommend for companies to manage their TCPA risk in 2026?

**Virginia Flynn (28:12):**

Top to bottom, you need clarity, you need great documentation, and you need consistent procedures. It'll start from the consent, from clear disclosures, from really good privacy policy terms and conditions, even that kind of stuff. It all needs to be holistic, the health of a company, because it'll affect things like call recording, Chad, like you said, not just TCPA, but having good compliance. And Chris, you know this, you talk about it all the time on this podcast, but consent and revocation requirements are huge and continue to be really, really important. Chad, what else do you think?

**Chad Fuller (29:15):**

You're right. You're 100% right. I don't think in terms of compliance, now we're talking about compliance, I think that a well-implemented compliance program of two or three years ago, I would just stay with it. If you're out chasing these new cases and, "Well, I don't have to do this, I don't have to do that. New case said that a text message isn't a call," you're going to be chasing your tail and your compliance program is going to be a mess. To Virginia's point, if you get it squared away, you get it holistic and manage it, your organization will be in much better shape. The other thing that we see from time to time and, again, it's a compliance issue, is this date and time, time of calls, where somebody's given their number in California and it's nice o'clock in California, for instance, and it's noon on the East Coast, and so they'll call somebody five o'clock California time and it's eight o'clock at night because the person happens to be in New York or whatever. So there's a lot of vendors in management of date and time restrictions.

**Virginia Flynn (30:08):**

I also really believe you don't have to have a separate individual that only does this, but you need a TCPA, telecommunications, TSRs, state issue, you've got to have it. And I'm sure you're going to have a hundred people raising their hand at your company volunteering for this role. And we have a great blog that we put out regularly, blogs on all kinds of case law that comes out and different perspectives. And we're always, of course, y'all send us an email and we'll answer any question you have. But you need someone at your company that is a SME that is tracking along and saying, "Wait a second, I just saw something about this." And we have a ton of in-house lawyers that email us all the time, and go, "I just saw this case. Do I need to be changing anything, doing anything?" And we have yes, no, maybe so, and that's the fun part of compliance. But ultimately, you've got to have somebody internally that's sort of your expert. And it's not a full-time job depending upon the size of your company. For some companies, it's a full-time job. But that's really important to make sure you're on and up. But I agree with you,

Chad. I think if you're trying to be aggressive and you're thinking, "This doesn't apply because some new case out of the Third Circuit came out, so I feel good," you want to be a little cautious there, I think.

**Chad Fuller (30:28):**

Yeah. And you'll always be chasing. You'll always just be chasing the last case, and your compliance is going to be a mess. And so until they do away with the TCPA as we know it and rewrite a brand new statute, I think the sound compliance advice that we have been giving companies for years continues even in the face of McKesson and even in light of the fact that courts are more willing to make their own determinations. For those of you that do not live by acronyms like we do, SME is subject matter expert. Thought I'd throw it out there. But to Virginia's point, most of the sophisticated companies and the companies that want to avoid it do have a subject matter expert or SME in the TCPA outbound communications area, and they track all of this stuff. So it would be call recordings, date and time, everything related to outbound calls for consumers. Virginia?

**Virginia Flynn (30:49):**

Like I said, we've been doing this for a long time. And so send us an email, pick up the phone, call us. We can probably get you an answer pretty quickly if we don't already know the answer to it. We've been doing it for so long. It's something that's, I'm not saying it's easy to get right, but if you're on top of it, you can stay ahead of it. And I think if you are not worried about it, you should be.

**Chris Willis (31:19):**

Okay. Now we've come to one of the funnest parts of the podcast, which is where the two of you get to get out your crystal ball and make some predictions for the future. Because it's not just a year in review, it's also a look ahead. So I'd really like to hear both of your thoughts, and I'm sure the audience would too, on what should in-house counsel and compliance teams be watching most closely on the TCPA front in the future?

**Chad Fuller (32:07):**

What I'm going to be looking at, what I think is going to be a future hotspot, is the DNC and the way the DNC is managed and the way that how the folks get on the DNC and access to it in terms of liability under the TCPA. I think that's going to continue to be a big hot button. And I do think this issue, whether a text is a telephone call or not, is going to be something that we're going to be keenly focused on. I think it is. I think it will continue to be, but others disagree.

**Virginia Flynn (32:07):**

Yeah, if we're picking a horse, like we're in the Kentucky Derby, the one that's not just going to win by a nose, it's going to win by a mile, is prior express written consent. Now, I'm not saying, Chad, you picked the guy in the back, the horse that went lame and all of a sudden had to pull out. I think you're right. I think those are major issues as well. To me, prior express written

consent will be the issue that you're going to see more case law on. You're going to see a lot more aggressive companies defending themselves. I think that also means you're going to see a lot more lobbying effort, and CLC is going to come out and try and make that shift. They're going to want to see change in the statute. So I think that to me is, now, that's still your toughest compliance program. So does that mean that you step back a little bit, you wait? It's a decision that you as a company have to decide. It's a business risk, and you have to decide your appetite for risk. But that will be 2026's hot button is prior express written consent.

**Chris Willis (32:07):**

Okay. Well, thank you both for that very informative discussion. I know I got a lot out of it, and I'm sure that our audience did too. So Virginia, Chad, thanks for being on, and thanks to our audience for listening as well. Don't forget to visit and subscribe to our blogs, [TroutmanFinancialServices.com](https://TroutmanFinancialServices.com) and [ConsumerFinancialServicesLawMonitor.com](https://ConsumerFinancialServicesLawMonitor.com). And while you're at it, why not visit us on the web at [Troutman.com](https://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 generate, as well as invitations to our occasional industry-only webinars. And of course, stay tuned for a great new episode of this podcast hitting your feed every Thursday afternoon. Thank you all for listening.

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