The Effect of Claim-Trimming on Class Certification in TCPA Cases

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I. Introduction

In their desire to create Article III standing after *Spokeo, Inc. v. Robins*,[1] class-action plaintiffs suing under the Telephone Consumer Protection Act[2] have manufactured a host of incalculable and nominal "actual damages" such as lost battery life, lost voicemail space, lost telephone minutes,[3] and, in junk-fax cases, lost ink toner, lost paper, or lost fax-machine time.[4] Once TCPA plaintiffs opened the door to having incurred such nominal damages in order to create Article III standing, they couldn't leave well enough alone, also pointing to more substantial damages such as the emotional devastation and humiliation suffered at the privacy invasion, lost wages or income[5] and break-time at work, and other economic and non-economic losses caused by receipt of violative calls, texts, voicemails and faxes. Class representatives' efforts

1. Spokeo, Inc. v. Robins, 136 S.Ct. 1540 (2016).

2. "No person or entity may initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system…(iii) 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." 47 CFR § 64.1200(a)(1).

3. *E.g.*, Mey v Got Warranty, Inc., *et. al.*, 193 F. Supp.3d 641, 647 (N.D. W.V. 2016) ("A number of courts have held that temporary electronic intrusion upon another person's computerized electronic equipment constitutes trespass to chattels….Courts have applied this tort theory to the very actions alleged here – unwanted telephone calls").

4. *See e.g.*, Palm Beach Golf Center–Boca, Inc. v John G. Sarris 781 F.3d 1245 (11th Cir. (Fla.) 2015) (plaintiff "suffered a concrete and personalized injury in the form of the occupation of its fax machine for the period of time required for the electronic transmission of the data (which, in this case was one minute)").

5. *E.g.* Sartin v. EKF Diagnostics, Inc., Civ. No. 16-1816, 2016 WL 3598297 * 5 (E.D. La. July 5, 2016) ("Dr. Sartin argues in his opposition memorandum that he "wasted valuable time in reviewing the fax, time that was taken away from his medical practice and time that he could have otherwise spent performing billable medical procedures").

to plead damages to meet *Spokeo's* standing requirements and to recover for other losses on behalf of themselves or on behalf of the putative class create serious certification problems.

Therein lies the rub, and the conflict created between the class representative and the class itself.[6] The TCPA permits an action to recover actual damages,[7] but damages are available only as an alternative to statutory damages -- a plaintiff may recover the larger of the two but not both.[8] For Article III standing purposes, the class representative must allege actual damages that were caused by the dialer-aspect of the TCPA.[9] But, the greater the actual damages suffered by the class representative or each putative classmember, the greater the chance that a class cannot be certified due to typicality, manageability, and superiority concerns.

This leads to "claim trimming."[10] In order to render the class representative's claims and those of the putative class uniform for certification purposes, the TCPA class representative might waive certain categories of his/her own actual damages, *i.e*. "trim" them. For example, a TCPA class-representative might attempt to waive or split non-economic loss claims and pursue the TCPA's penalty only, since non-economic loss claims are virtually impossible to certify.[11] Claim-trimming should render the named plaintiffs inadequate class representatives because, in an effort to satisfy other Rule 23 requirements, the class representative sacrifices class members' potentially valuable claims and remedies for actual damages. Or, with respect to the TCPA, class trimming by the class representative requires putative class members to limit their claims to the TCPA's statutory penalty despite the fact their "actual damage" claim may be larger.[12]

Claim trimming harms members of the putative class because, if the class is certified, a judgment operates as *res judicata*,[13] forever barring class members from recovering on the abandoned claims or obtaining the forms of relief left behind in the rush to certify a class -- whatever the outcome of the suit on the remaining class claims or class relief.[14] "[R]epresentatives who 'tailored the class claims in an effort to improve the possibility of demonstrating commonality' obtained this 'essentially cosmetic' benefit only by 'presenting putative class members with significant risks of being told later that they had impermissibly split a single cause of action.'"[15] Therefore, "[a] class representative is not an adequate representative when the class representative abandons particular remedies to the detriment of the class."[16]

Some courts have avoided the class representative's conflicts and jeopardizing their fiduciary duty by simply saying that if putative class members don't like it, they can opt out.[17] But, that puts the cart-before the horse and does not hold the class representative to their legal duties. Certification must first be

6. 1 McLaughlin on Class Actions § 4:30 (13th ed. 2016) ("In the context of statutory claims that provide for statutory damages and actual damages, plaintiffs sometimes decline to pursue actual damages claims in order to simplify the factual showing needed to recover."); Lee Anderson, *Preserving Adequacy of Representation When Dropping Claims in Class Actions*, 74 UMKC L. Rev. 105 (2005); Edward F. Sherman, *"Abandoned Claims" in Class Actions: Implications for Preclusion and Adequacy of Counsel*, 79 Geo. Wash. L. Rev. 483 (2011).

7. 47 U.S.C. § 227(b)(3)(B) ("an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater").

8. Hashw v. Department Stores National Bank, *et al*., 182 F. Supp.3d 935, 944 (D. Minn. 2016) ("TCPA also provides for statutory damages of $500 per violation, in the alternative to actual damages…").

9. Romero v. Department Stores National Bank, 199 F. Supp.3d 1256, 1265 (S.D. Cal. 2016) ("Moreover, the specific facts of this case reveal that any harm suffered by Plaintiff is unconnected to the alleged TCPA violations. Defendants here were creditors of Plaintiff and were attempting to collect a debt. They were calling Plaintiff's cell phone because that was the only telephone number she provided them. Although these calls seeking to collect debts may have been stressful, aggravating, and occupied Plaintiff's time, that injury is completely unrelated to Defendants' use of an ATDS to dial her number. Plaintiff would have been no better off had Defendants dialed her telephone number manually.").

10. Others refer to the concept as "claim abandonment" or "claim dropping." Sherman, *"Abandoned Claims" in Class Actions: Implications for Preclusion and Adequacy of Counsel*, 79 Geo. Wash. L. Rev. 483 (2011); Anderson, *Preserving Adequacy of Representation When Dropping Claims in Class Actions*, 74 UMKC L. Rev. 105, 124 (2005).

11. *E.g*.: Bennett v. Regents of University of California, 133 Cal. App. 4th 347, 358 (Cal. App. 2nd Dist. 2005) ("class certification is generally inappropriate when each member of the proposed class must individually establish emotional distress damages"); Fuhrman v. California Satellite Systems, 179 Cal. App. 3d 408, 425 (Cal. App. 3 Dist. 1986) ("Perhaps no cause of action is less susceptible to a class action than one for infliction of emotional distress."); Altman v. Manhattan Savings Bank, 83 Cal. App. 3d 761, 767 (Cal. App. 2 Dist. 1978) ("[T]he testimony of each class member is required, first to demonstrate substantial damage to either property or person as a condition precedent to recovery for emotional distress, and second the complex proof unique to each member on his or her damages for loss of peace of mind.").

12. Hashw v. Department Stores National Bank, *et. al*., 182 F. Supp.3d 935, 944 (D. Minn. 2016) ("TCPA also provides for statutory damages of $500 per violation, in the alternative to actual damages…").

13. *See, e.g*.: Hansberry v. Lee, 311 U.S. 32, 44 – 46 (1940); Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir (Cal) 1998); *In re* Wells Fargo Home Mortg. Overtime Pay Litig., 527 F. Supp.2d 1053, 1064 (N.D. Cal. 2007).

14. *See, e.g*.: Key v. Gillette Co., 782 F.2d 5, 7 (1st Cir. 1986); Zapata v. IBP, Inc., 167 F.R.D. 147, 160 – 61 (D. Kan. 1996); City of San Jose v. Superior Court, 12 Cal.3d 447, 464 – 65 (1974).

15. *See, e.g*.: Thompson v. American Tobacco Co., 189 F.R.D. 544, 551 (D. Minn. 1999); Feinstein v. Firestone Tire & Rubber Co., 535 F.Supp. 595, 606 (S.D.N.Y. 1982); Small v. Lorillard Tobacco Co., 252 A.D.2d 1, 679 N.Y.S.2d 593, 601 – 602 (1998).

16. *See, e.g*.: Western States Wholesale, Inc. v. Synthetic Ind., Inc. 206 F.R.D. 271, 277 (C.D. Cal. 2001); *accord*: Mays v. Tennessee Valley Authority, 274 F.R.D. 614, 623-24 (E.D. Tenn. 2011) (named plaintiffs' abandonment of class members' claims makes them in adequate); Krueger v. Wyeth, Inc., No. 03CV2496JLS (AJB), 2008 WL 481956, *3 – 4 (S.D. Cal. Feb. 19, 2008); Drimmer v. WD-40 Co., No. OG-CV-900W (AJB), 2007 WL 2456003, at *3 (S.D. Cal. Aug. 24, 2007); Foster v. St. Jude Medical, Inc., 229 F.R.D. 599, 604 – 05 (D. Minn. 2005); *In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 209 F.R.D. 323, 339 – 40 (S.D. N.Y. 2002); Thompson v. American Tobacco Co., 189 F.R.D. 544 (D. Minn. 1999) ("representatives who 'tailored the class claims in an effort to improve the possibility of demonstrating commonality' obtained this 'essentially cosmetic' benefit only by 'presenting putative class members with significant risks of being told later that they had impermissibly split a single cause of action'. "); *In re* Ford Motor Co. Bronco II Prod. Liab. Litig., 177 F.R.D. 360, 368 (E.D. La. 1997); Evans v. Lasco Bathware, Inc., 178 Cal.App.4th 1417, (2009); *City of San Jose*, 12 Cal.3d at 464 – 65 (*supra* note 14).

17. Commentators have been critical of the "opt-out" mechanism as a panacea to the claim-splitting problem. Newberg on Class Actions § 18:22 (5th ed. 2016) ("Settlements using a (b)(2) injunction form to effect (b)(3) money damage claims are part of a larger trend: they resemble corporations' growing practice of securing class action waivers from customers through form contracts that compel arbitration and bar class actions or class arbitrations. The only difference is that the 'contract' in this case is a settlement agreement resulting from related litigation. Rule 23(b)(2) settlements releasing or burdening the litigation of money damage claims raise two interrelated concerns. First, they run up against the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*. In part of that decision, all nine Justices unanimously agreed that individualized money damage claims could not be litigated in a (b)(2)/injunctive relief class action. The theory underlying an injunctive class action is that a class is so cohesive that injunctive relief will apply to all if it applies to any, meaning that there is no reason to provide the class notice and an opportunity to opt out. Yet individualized money damages claims do not share that feature of cohesiveness and the Court has long held that they may be compromised only in a format that enables an opt-out right. Second, the release in the concussion case runs up against the Supreme Court's decision in *Smith v. Bayer*. There, the Court held that the denial of class certification has no binding effect on putative class members, who remain free to re-litigate their own class certification motions. If one class member's failed effort to certify a money damage class cannot bar other class members from trying, it is unclear whether that outcome can be achieved through the backdoor of a (b)(2) class action. In short, courts have long struggled to determine the preclusive effect of an injunctive relief class action on later money damage cases and they are increasingly grappling with efforts that more explicitly aim to utilize the former to foreclose the latter.").

proper and the class representative must comply with his or her fiduciary duties before the opt-out process is engaged in the administration process. Engaging the opt-out process in order to justify an otherwise uncertifiable class violates Rule 23 and a defendant's due process.

There is little jurisprudence involving the effect of claim-trimming on certification of TCPA class actions,[18] or, by analogy, on other consumer protection "penalty-only" class actions such as the Fair Debt Collection Practices Act (FDCPA)[19] or Fair Credit Reporting Act (FCRA).[20] Accordingly, this article explores the effect of claim-trimming on certification of TCPA class actions.

II. Claim-Trimming and Its Effect on Certification of TCPA Class Actions

A. Damages Permissible under the TCPA

1. Actual Damages; Economic and Non-Economic Loss

As noted above at Part I., the TCPA permits an action to recover actual damages.[21] Actual damages are available only as an alternative to statutory damages -- a plaintiff may recover the larger of the two but not both.[22] As with other consumer protection statutory schemes, actual damages would likely include "economic loss" (*i.e.* out-of-pocket monetary losses) and "non-economic loss" (*i.e.* mental anguish, humiliation, or embarrassment).[23] While it is true that most TCPA plaintiffs' attorneys plead actual economic and/or non-economic loss along with the statutory damages as a matter of form,[24] few cases have explored the breadth and scope of the actual damages recoverable in the TCPA setting.[25]

2. Statutory Penalty

The TCPA authorizes an award of $500 per violation in statutory damages.[26] Some courts hold that this is the minimum amount that can be awarded for a violation of the statute, and a court has no discretion to reduce that amount.[27] The TCPA permits trebling of the statutory damages if, in the trial court's discretion, the statute was willfully or knowingly violated.[28] Although damages for actual monetary losses are theoretically available under the TCPA, virtually all plaintiffs bringing a cause of action for unlawful calls or faxes sue for the $500 statutory per-text/per fax amount.[29]

18. Since the Supreme Court's *Spokeo* decision is relatively recent and district courts continue to wrestle with its effects, and since few TCPA class actions involve a contest of class certification anyway, there is little if any jurisprudence in TCPA class actions regarding the effect of claim-trimming on the certification of TCPA class actions. *E.g.,* Lyons v. Dish Network L.L.C., No. 13-cv-00192-RM-KMT, 2013 WL 5637992 *2 (D. Colo. October 15, 2013) ("However, it was reasonable for Plaintiff to abandon those claims. Because Plaintiff's Complaint seeks relief on behalf of class members nationwide, asserting claims under state law could undercut the likelihood of obtaining class certification. *See* Fed.R.Civ.P. 23(a)(2), (b)(3) (class action certification requires that there be questions of law or fact common to the class and that the court find those questions predominate over any questions affecting only individual members).").

19. Nor has litigation under the FDCPA yielded much precedent. *E.g.*: Williams v. Pressler and Pressler, LLP, No. 11-7296 (KSH), 2013 WL 5435068 at *10 (D. N.J. Sept. 7, 2013) ("Both Williams and Setneska will abandon their individual claims – and Williams her request for actual damages – if the class is certified. "Because the [proposed] class members here all share a common nucleus of fact-the receipt of nearly identical [settlement] letters – and the viability of their claims turn on a…determination as to the conformity of the letters with [FDCPA], the Court finds that this class satisfies Rule 23(b)(3)'s predominance requirement."); Herrera v. LCS Financial Services Corp., 274 F.R.D. 666, 680 (N.D. Cal. 2011) ("Ocwen argues that individualized issues regarding damages predominate. While emotional distress damages could involve intensive individualized inquiry, Herrera has abandoned her class claim for emotional distress damages. Ocwen also points out that some class members may seek actual damages, the assessment of which could involve limited individualized inquiry. However, individual damages issues typically do not bar class certification where common questions predominate over individual questions as to liability. 5 James W. Moore, Moore's Federal Practice § 23.45[2][a] (3d ed. 2010); *see also* Hazelwood v. Bruck Law Offices SC, 244 F.R.D. 523, 525 (E.D. Wis. 2007) (holding that common questions as to whether a collection letter violated the FDCPA predominated over individual questions regarding class members' actual damages). Here the predominant issue is liability under the FDCPA, and this issue is common to the class.").

20. Clark v. Experian Information Solutions, Inc., Nos. Civ.A.8:00-1217-24, Civ.A.8:00-1218-24, Civ.A.8:00-1219-24, 2001 WL 1946329 *3 – 4 (D.S.C. Mar. 19, 2001) ("Defendants contend that Plaintiffs cannot satisfy the adequacy of representation requirement since they 'have disclaimed and abandoned the other, more substantial claims that proposed class members might have.'…These include other potential claims under the FCRA, claims for actual and compensatory damages, claims under state credit-reporting statutes, and state common law claims. Id. at 39 – 40. Defendants argue that, by not bringing these additional claims, absent class members may be forever barred by the doctrine of res judicata. *Id.* at 38…Plaintiffs attempt to remedy this shortcoming by arguing that 'a class member can bring a separate action through an individual suit or decide to opt out of the present litigation.' *Id.* The court disagrees. 'The

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ability to opt out of the class is insufficient to protect the rights of putative class members who would want to seek remedies other than those chosen by the [class] representatives.' Small v. Lorillard Tobacco Co., 679 N.Y.S.2d 593, 601 – 02 (N.Y.App.Div.1998). Moreover, the implications of res judicata cannot be ignored. Plaintiffs' efforts to limit their relief to only statutory damages in this case, may, in fact, jeopardize the remaining class members' rights to seek alternative grounds of relief in a subsequent case….With a projected class as large as the one envisioned by Plaintiffs, in excess of one million individuals, the potential prejudice to class members who may wish to pursue claims and relief other than those advanced by Plaintiffs guides the court to conclude that the interests of Plaintiffs are not aligned with those of the class. Thompson, 189 F.R.D. at 551. Thus, the court finds that Plaintiffs do not adequately represent the proposed class members. Accordingly, the provisions of Rule 23(a) have not been satisfied.").

21. 47 U.S.C. § 227(b)(3)(B) ("an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater").

22. Hashw v. Department Stores National Bank, *et al*., 182 F. Supp.3d 935, 944 (D. Minn. 2016) ("TCPA also provides for statutory damages of $500 per violation, in the alternative to actual damages….").

23. *See, e.g.*, Anderson v United Fin. Co., 666 F.2d 1274 (9th Cir. 1982). *See generally,* Troutman & Hyman, *The Telephone Consumer Protection Act,* § 2.57-59, Debt Collection Practices in California (CEB 2017).

24. Fuhr, *Litigation Concerning Text Messaging of Advertisements in Violation of Telephone Consumer Protection Act, 47 U.S.C.A. § 227,* 141 Am. Jur. Trials § 11 (2015 and 2017 Supp.).

25. Consumer protection statutes often borrow standards from each other. For example, courts interpreting the FDCPA often look to standards for recovering non-economic loss under the FCRA or under relevant state tort law. Under the FDCPA, for example, some courts borrow the standards from the relevant state law torts of intentional or negligent infliction of emotional distress. *See, e.g.*, Baker v G.C. Servs. Corp., 677 F.2d 775 (9th Cir. 1982). Others have not required such a stringent standard, holding that emotional distress recovery under the FDCPA is statutory, and independent of any tort claim. *See, e.g.*: Riley v Giguiere, 631 F. Supp.2d. 1295 (E.D. Cal. 2009); Smith v Law Offices of Mitchell N. Kay, 124 B.R. 182, 185 (1991). Such courts still require proof of corroborating medical evidence or nonexpert testimony establishing manifestations of anguish and significant emotional harm. Corroborating evidence may not be necessary, such courts say, when the conduct is egregious or when the circumstances make it obvious that a reasonable person would suffer significant emotional harm. *See, e.g.*: Basinger-Lopez v. Tracy Paul & Assocs., Inc., No. C 08-5192-SBA, 2009 WL 1948832 (N.D. Cal. July 6, 2009) ("The Court thus concludes that Plaintiff has not made a sufficient showing to warrant an award of actual damages."); Fausto v. Credigy Servs. Corp. 598 F. Supp.2d 1049 (N.D. Cal. 2009).

26. 47 U.S.C. § 227(b)(3)(B).

27. *See, e.g.*, Adamcik v Credit Control Servs., Inc. 832 F. Supp.2d 744, 754 (W.D. Tex. 2011) (Congress mandated at least $500 per violation, and no less, regardless of underlying behavior of consumer or other equitable considerations). *See generally,* Troutman & Hyman, *The Telephone Consumer Protection Act,* § 2.57-59, Debt Collection Practices in California (CEB 2017).

28. 47 U.S.C. § 227(b)(3)(B); Bridgeview Healthcare Ctr., Ltd., No. 09 C 5601, 2013 US Dist Lexis 37310 (N.D. Ill. Mar. 19, 2013).

29. *See* Fuhr, *supra* note 24.

B. Standing Issues: the TCPA Plaintiffs' Bar's Response to *Spokeo*

In *Spokeo, Inc. v. Robins*,[30] the United States Supreme Court held, in the context of interpreting the FCRA, that "a plaintiff [does not] automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." Instead, where the violation of a statute does not cause concrete harm a plaintiff lacks standing to sue, even where his statutory rights were violated. The Supreme Court noted that the violation of the procedural protections of the FCRA may not cause any actual harm. As such the plaintiff could not satisfy the demands of Article III by alleging "a bare procedural violation" of the FCRA.

Following *Spokeo*, many courts interpreting the TCPA have found that the protections of the statute are both prophylactic in nature and derive from or afford affirmative substantive rights.[31] Numerous post-*Spokeo* decisions have held that a violation of the TCPA can cause harm, but none have directly held that a violation of the statute itself is, per se, harm.[32] Since some courts have dismissed TCPA complaints at the pleadings stage where specific allegations of harm were not alleged,[33] most TCPA individual and class action plaintiffs attempt to plead *Spokeo*-based "concrete harm" by pleading some sort of nominal damages, such as lost battery life, lost voicemail space, lost telephone minutes,[34] and, in junk-fax cases, lost ink toner, paper, or fax-machine time.[35]

C. Rule 23 Requirements

1. Obligations Imposed on the Class Representative

a. General Requirements

Federal Rule of Civil Procedure 23 requires that a class action satisfy four criteria: numerosity; commonality; typicality; and adequacy of representation. Additionally, Rule 23 requires that "the court find that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[36]

The "predominance" and "superiority" inquiries under Rule 23 require analysis of: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action."[37] Predominance, in particular, "also requires that damages resulting from the injury be measurable on a class-wide basis through use of a 'common methodology.'"[38]

b. The Class Representative

i. Adequacy, Typicality, and, Let's Just Say It, Independence, Too

Class representatives must not have interests antagonistic to the class because they may interfere with the vigorous prosecution of the action. The adequacy test "is designed to ferret out potential conflicts" between representatives and other members of the class because a class action judgment's preclusive effect may deprive inadequately represented class members of their right to be heard.[39]

A class representative also must demonstrate that he or she "can adequately represent the class by vigorously and tenaciously protecting the class members' interests."[40] This, in part, means that a class representative cannot "simply 'lend[] his name to a suit controlled entirely by the class attorney.'"[41] When the class representative trims his or her claims in the interest of maximizing the probability of class certification to the detriment of putative class members, the class representative abandons his or her role of vigorously protecting the class members' interests to a suit controlled entirely by the class attorney. In other words, the class representative puts himself or herself in an inherent conflict with the class.

30. 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016).

31. *See, e.g.*, Mahala A. Church v. Accretive Health, Inc., No. 15-15708, 2016 WL 3611543 (11th Cir. July 6, 2016) (Unpub.) (noting that certain statutes create substantive rights, the violations of which cause "harm" per se for Article III purposes).

32. *See e.g.*, Mey v Got Warranty, Inc., *et al.*, 193 F. Supp.3d 641, 647 (N.D. W.V. 2016) (noting that such calls may invade consumer privacy and trespass upon chattels).

33. Sartin v. EKF Diagnostics, Inc., No. CV 16-1816, 2016 WL 3598297, at *1 (E.D. La. July 5, 2016). *See also* Stoops v. Wells Fargo Bank, N.A., No. 3:15-83, 2016 WL 3566266 (W.D. Pa. June 24, 2016) (plaintiff who was manufacturing TCPA lawsuits lacked standing to sue under Article III).

34. *E.g.*, Mey v Got Warranty, Inc., *et al.*, 193 F. Supp.3d 641, 647 (N.D. W.V. 2016) ("A number of courts have held that temporary electronic intrusion upon another person's computerized electronic equipment constitutes trespass to chattels….Courts have applied this tort theory to the very actions alleged here – unwanted telephone calls.").

35. *See, e.g.*, Palm Beach Golf Center – Boca, Inc. v Sarris, 781 F.3d 1245 (11th Cir. 2014) (plaintiff "suffered a concrete and personalized injury in the form of the occupation of its fax machine for the period of time required for the electronic transmission of the data (which, in this case was one minute)."). *See generally* Troutman & Hyman, *The Telephone Consumer Protection Act,* Debt Collection Practice in California § 2B-16 (CEB 2016).

36. *See generally,* Hyman & Kenney, *The Effect of the FDCPA's Class-Action Penalty Cap on Class Certification*, 69 Consumer Fin. L.Q. Rep. 137 (2016).

37. *See generally*, Kaye, *Satisfaction of Superiority Requirement for Class Actions under the Fair Debt Collection Practices Act, 15 U.S.C.A. §§ 1692 et. seq.*, 51 A.L.R.Fed.2d 1 (2010 and Supp.).

38. Randolph v. J.M. Smucker Co., 303 F.R.D. 679, 696 (S.D. Fla. 2014) (quoting Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1430 (2013)).

39. 1 McLaughlin on Class Actions § 4:30 (13th ed. 2016).

40. Sharp v. Next Entertainment, Inc., 163 Cal.App.4th 410, 432 – 33 (2008).

41. Howard Gunty Profit Sharing Plan v. Superior Court, 88 Cal.App.4th 572, 579 – 580 (2001).

ii. There Can Be No Conflict Between the Class Representative and the Putative Class

Courts have also recognized antagonistic interests between the class representative and putative class members when the representative adopts a claim-splitting approach to certification in order to maximize the prospect that common issues will predominate.[42] The class representative must also have some rudimentary understanding of the litigation.[43]

c. The Class Representative Owes a Fiduciary Duty to the Putative Class

Courts have found that the class representative owes a fiduciary duty to protect the interests of the absent class members.[44] This duty arises even before the class is certified,[45] and includes the duty not to throw away what could be a major component of the class's recovery.[46] For example, courts have prohibited class representatives from bargaining away the rights of putative classmembers to the benefit of class representatives.[47]

D. Claim-Trimming's Effects

1. The Effect on the Class Representative's Duties

A class representative is not an adequate representative when the class representative abandons particular remedies to the detriment of the class.[48] Many TCPA class actions by the nature of the TCPA's "either/or" election of remedies requirement bake "claim-trimming" into the class. Specifically, as noted, the TCPA permits recovery of actual damages only as an alternative to statutory damages -- a plaintiff may not recover both.[49] Although damages for actual monetary losses are theoretically available under the TCPA, virtually all plaintiffs bringing a TCPA cause of action sue for the $500 statutory per-call amount.[50] Thus, a TCPA class representative typically will trim the economic and non-economic losses of the putative classmembers in order to certify a penalty-only class and avoid the material variances in damages.[51]

But, "[t]o fulfill []his fiduciary duty [to the class,] the representative plaintiff must raise those claims 'reasonably expected to be raised by the members of the class.'"[52] The rule stems from the class judgment's operation as res judicata, thus barring later individual suits by class members on the same cause of action.[53] If the class representative fails to bring claims class members might otherwise pursue, the class members will lose those claims forever, whatever the outcome of the class action.[54] Hence, a class representative's failure to bring all claims class members would reasonably expect is a breach of fiduciary duty, rendering him or her inadequate.[55]

42. 1 McLaughlin on Class Actions § 4:30 (13th ed. 2016).

43. *Adequacy of class representative—Qualifications—Knowledge of the case and of duties as class representative*, Newberg on Class Actions § 3:67 (2016) ("Adequacy is satisfied, though, if the plaintiff has some rudimentary knowledge of her role as a class representative and is committed to serving in that role in the litigation.").

44. *See, e.g.*: Armour v. Network Associates, Inc., 171 F. Supp.2d 1044, 1051 (N.D. Cal. 2001) ("In order to establish itself as the 'most adequate plaintiff' under the PSLRA, Louisiana Teachers must show that it can discharge the fiduciary duties that a class representative owes to absent class members under Rule 23"); Crawford v. Equifax Payment Services, Inc., 201 F.3d 877, 880 (7th Cir. 2000) (stating that a class representative owes a fiduciary duty to the class members to act in the best interest of the members); Roper v. Consurve, Inc., 578 F.2d 1106, 1110 (5th Cir. 1978), *aff'd on other grounds sub nom*. Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980) (representative plaintiff owes a fiduciary duty to other members even before class is certified); City of San Jose v. Superior Court, 12 Cal.3d 447, 464 (1974); La Sala v. American Sav. & Loan Assn., 5 Cal.3d 864, 871 (1971); Technograph Printed Circuits, Ltd. v. Methode Electronics, 285 F. Supp. 714, 721 (N.D.Ill. 1968).

45. Epps v. Wal-Mart Stores, Inc., 307 F.R.D. 487, 492 (E.D. Ark. 2015).

46. Standard Fire Ins. Co. v. Knowles, 133 S.Ct. 1345 (2013).

47. *E.g.*, Karvaly v. eBay, Inc., 245 F.R.D. 71, 89 – 90 (E.D.N.Y. 2007) ("Here, the class representatives seek to advance their own interests by sacrificing the rights of the majority of Class Members, who stand to gain nothing of substantial value from the proposed settlement, for the benefit of the small group of Eligible Class Members, the relatively few individuals who may expect to receive an uncertain monetary award under the terms of the proposed settlement. This is the very situation that lies "[a]t the heart of [the Second Circuit's] concern…that a class representative not sharing common interests with other class members would 'endeavor[ ] to obtain a better settlement by sacrificing the claims of others at no cost to themselves' by throwing the others' claims 'to the wind.'" TBK Partners, 675 F.2d at 462 (quoting National Super Spuds, 660 F.2d at 19 n. 10, 17 n. 16). ("This Court, which owes a 'fiduciary' duty to the non-representative class members who were not party to the settlement agreement, will not permit the Eligible Class Members to bargain away the rights of other Class Members to assert legal claims unrelated to the present action against eBay and PayPal for the sake of the Eligible Class Members' own pecuniary interests.") (additional citations omitted).").

48. *See*: Nafar v. Hollywood Tanning Systems, Inc., 339 Fed. Appx. 216, 224 (3d Cir. N.J. 2009) (stating that "[b]y seeking only partial relief, [plaintiff] may be engaging in claim splitting, which is generally prohibited by the doctrine of res judicata" and concluding that the district court abused its discretion in certifying the class without considering whether assertion only of consumer claims for economic loss might preclude personal injury claims); Tasion Commc'ns, Inc. v. Ubiquiti Networks, Inc., 308 F.R.D. 630, 642 (N.D. Cal. 2015) ("A class representative is not an adequate representative when [he] abandons particular remedies to the detriment of the class."); Cholakyan v. Mercedes-Benz, USA, LLC, 281 F.R.D. 534, 565 (C.D. Cal. 2012) ("The fact…that [plaintiff] and his attorneys are willing potentially to sacrifice individual class members' right to pursue the recovery of monetary damages without fully exploring the implications of their actions raises concerns about their adequacy."); Mays v. Tennessee Valley Authority, 274 F.R.D. 614, 622 – 23 (E.D. Tenn. 2011) (adequacy requirement not met where named plaintiffs "have demonstrated a willingness to abandon claims on behalf of themselves and unnamed class members"); Sanchez v. Wal Mart Stores, Inc., 2009 WL 1514435, at *3 (E.D. Cal. 2009) ("strategic claim-splitting decision creates a conflict between Plaintiff's interests and those of the putative class, and renders Plaintiff an inadequate class representative"); Krueger v. Wyeth, Inc., 2008 WL 481956, at *4 (S.D. Cal. 2008) (representative inadequate where "Plaintiff leaves the class open to those who have suffered personal injuries, while stating she does not seek to pursue personal injury damages claims.").

49. Hashw v. Department Stores National Bank, *et. al.*, 182 F. Supp.3d 935, 944 (D. Minn. 2016) ("TCPA also provides

(Continued in next column)

49. *(Continued from previous column)*

for statutory damages of $500 per violation, in the alternative to actual damages…."). *See supra* Parts I. & II.A.I.

50. *See supra* note 49; and Fuhr, *supra* note 24.

51. Newberg on Class Actions § 3.59 ("In general, class members who have suffered a large amount of monetary damage will wish to pursue actual damages, both because doing so usually maximizes their recovery and because the standard for liability is often less stringent than that for statutory damages that may require a showing of willfulness or intent. On the other hand, the class representative and members of the class who suffered a small amount of monetary harm have an interest in pursuing statutory damages only, both because doing so will maximize the value of their claims and because class-wide proof is made easier when the damages are set by statute and remain constant across the class.").

52. City of San Jose v. Superior Court, 12 Cal.3d 447, 464 (1974) (citation omitted).

53. *Id. See also* Johnson v. American Airlines, Inc., 157 Cal.App.3d 427, 431 (1984).

54. *City of San Jose*, 12 Cal.3d at 464 – 465 (*see supra* note 52).

55. *Id. See also Evans*, 178 Cal.App.4th at 1432 – 1434 (*see supra* note 16). *See also supra* Part II.C.1.b.

2. The Effect on the Putative Class' Claims

As noted, if a class is certified, a judgment operates as res judicata.[56] Thus, even if a class prevails on the claim, class members will be barred from seeking actual damages or any other relief on the abandoned claims. Claim-splitting and tailoring of the class claims places class members at risk of being later told they had impermissibly split their single cause of action.[57] A court reviewing class certification must consider the preclusive effect of a judgment on putative classmembers' claims.[58]

3. Judicial Interpretations

a. Claim-Trimming Renders the Class Representative Inadequate and the Class Uncertifiable

"In assessing [the] adequacy of representation, it is reversible error not to consider the potential preclusive effect on class members of disclaiming certain kinds of damages potentially arising from the same set of facts or transactions."[59] Some federal[60] and state courts have held that "claim-trimming" or "claim-splitting" by the class representative is immediately disqualifying.[61] Others have argued,[62] and some courts have held, that "claim preclusion might bar the claims of the proposed class representative, rendering her inadequate to represent the class, even if the class's claims are not precluded."[63]

A seminal case is the California Supreme Court decision in *City of San Jose v. Superior Court,*[64] where the plaintiffs filed a class action against the City of San Jose, seeking recovery for diminution in the market value of their property caused by aircraft noise, vapor, dust, and vibration caused by the flight path of San Jose International Airport. The plaintiffs proceeded on theories of nuisance and inverse condemnation, but did not seek recovery for tort damages, injury to land, or future loss.

The California Supreme Court found such claim-trimming to create inexorable conflicts between the class representative and the putative class.

> The plaintiffs here inadequately represent the alleged class because they fail to raise claims reasonably expected to be raised by the members of the class and thus pursue a course which, even should the litigation be resolved in favor of the class, would deprive class members of many elements of damage. Damages recoverable in a successful nuisance action for injuries to real property include not only diminution in market value

56. *See, e.g.*, Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998).

57. *See, e.g.*: Legge v. Nextel Commc'ns, Inc., No. CV 02-8676DSF(VNKX), 2004 WL 5235587, at *11 (C.D. Cal. June 25, 2004); Thompson v. Am. Tobacco Co., 189 F.R.D. 544, 551 (D. Minn. 1999).

58. *See generally* Wolff, *Preclusion in Class Action Litigation,* 105 Colum. L. Rev. 717, 722 (2005) ("No court can legitimately rule on a request for certification in a class action -- at least, a class action that may proceed to a litigated outcome -- without achieving a clear understanding of the likely preclusive effect that a judgment in the case would have upon the members of the class and the options that the court has at its disposal for altering or constraining those effects. Nonetheless, many courts regularly proceed without achieving any such understanding. Some flatly refuse to certify a class when preclusion obstacles become apparent, complaining that the time-frame problem prevents any resolution of the issues in the initial forum and concluding that there is an unmanageable "risk" that absentees will suffer adverse preclusion consequences in future proceedings. Others -- most others -- simply fail to address the matter at all, creating the possibility that the interests of absentees will be improperly compromised in future cases. The first approach is inadequate and may prevent socially desirable class actions from being certified. The second constitutes a form of judicial malfeasance. The fact that most certifying courts have not been mindful of preclusion issues in the past cannot authorize further inattention.").

59. 1 McLaughlin on Class Actions § 4:30 (13th ed. 2016), *citing* Nafar v. Hollywood Tanning Systems, Inc., 339 Fed. Appx. *(Continued in next column)*

59. *(Continued from previous column)*

216 (3d Cir. 2009). *See also* Citizens Ins. Co. of America v. Daccach, 217 S.W.3d 430, 458 (2007) ("A class representative's decision to abandon certain claims may be detrimental to absent class members for whom those claims could be more lucrative or valuable, assuming those class members do not opt out of the class. Abandoning such claims, or claims "reasonably expected" to be raised by class members, could undermine the adequacy of the named plaintiff's representation of the class. *See City of San Jose v. Super. Ct. of Santa Clara County,* 525 P.2d 701, 711 – 13 (Cal. 1974). *But see Regions Bank v. Lee,* 905 So.2d 765, 772 – 73 (Ala. 2004) (rejecting adequacy challenge based on effect of res judicata because abandoned claims would involve a different cause of action against a different defendant than that involved in the class action). We hold, therefore, that Texas Rule of Civil Procedure requires the trial court, as part of its rigorous analysis, to consider the risk that a judgment in the class action may preclude subsequent litigation of claims not alleged, abandoned, or split from the class action. The trial court abuses its discretion if it fails to consider the preclusive effect of a judgment on abandoned claims, as res judicata could undermine the adequacy of representation requirement.").

60. *See, e.g.*: Thompson v. American Tobacco Co., 189 F.R.D. 544 (D. Minn. 1999) ("The Court finds that the named Plaintiffs' efforts to reserve personal injury and damage claims may, in fact, jeopardize the class members' rights to bring such claims in a subsequent case. The governing legal principle is that of res judicata, which precludes subsequent litigation when certain conditions are met."); Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 606 – 7 (S.D.N.Y. 1982) ("It is fair to say that, during the course of preliminary hearings in this case, plaintiffs so tailored the class claims in an effort to improve the possibility of demonstrating commonality. But that improvement-essentially cosmetic, as the foregoing analysis demonstrates-was purchased at the price of presenting putative class members with significant risks of being told later that they had impermissibly split a single cause of action.").

61. *See, e.g.*: Grullon v. Bank of America, N.A., 2013 WL 9681040 (D.N.J. Mar. 28, 2013) (in a FDCPA case, "dropping the other claims will prevent any class members from asserting them in the future, and is evidence that the named plaintiff is not adequate class representative"); Krueger v. Wyeth, Inc., *et al*. No. 03cv2496 JLS (AJB), 2008 WL 481956 *3 – 4 (S.D. Cal. February 19, 2008) ("Other courts agree that the existence of claim splitting constitutes a compelling reason to deny class certification…In the present action, Plaintiff leaves the class open to those who have suffered personal injuries, while stating she does not seek to pursue personal injury damages claims. As a result, the Court finds that Plaintiff Krueger is an inadequate class representative under the current class definition."); Drimmer v. WD-40 Co., 2007 U.S. Dist. LEXIS 62582, at *8 (S.D. Cal.2007) ("[A]ssuming for the sake of argument that res judicata would not bar the class members from obtaining further relief [citation], the court cannot ignore the inference that [the class representative] holds different priorities and litigation incentives than a typical class member."); Thompson v. American Tobacco Co., 189 F.R.D. 544, 550 – 51 (D. Minn.1999) ("the possible prejudice to class members is simply too great for the Court to conclude that the named Plaintiffs' interests are aligned with those of the class."); Pearl v. Allied Corp., 102 F.R.D. 921, 922 – 23 (E.D. Pa.1984) (named plaintiffs were inadequate class representatives because they sought to recover the cost of removing an allegedly defective product, punitive damages, and a fund for testing, screening and treatment of future medical problems, while they abandoned their claims for present physical injury, dimunition in property value, and breach of express warranty); Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 606 (S.D.N.Y. 1982) ("[A] serious question of adequacy of representation arises when the class representatives profess themselves willing, as they do here, to assert on behalf of the class only such claims as arise from the breach of an implied warranty…Plaintiffs so tailored the class claims in an effort to improve the possibility of demonstrating commonality. But that improvement-essentially cosmetic…was purchased at the price of presenting putative class members with *(Continued in next column)*

61. *(Continued from previous column)*

significant risks of being told later that they had impermissibly split a single cause of action.").

62. Newberg on Class Actions § 18.7 (5th ed. 2016).

63. Martin v. Cash Exp., Inc., 60 So. 3d 236 (Ala. 2010) (affirming ruling that several prospective class representatives were barred from being representatives because they had not asserted the illegality of a loan in prior action against lender, thereby extinguishing that claim); Greenberg v. Bear Stearns & Co., Inc., 80 F. Supp.2d 65, (E.D. N.Y. 2000) (dismissing one class representative because his claims were barred by earlier arbitration award, but finding other putative representative's claims not precluded); Newton v. Southern Wood Piedmont Co., 163 F.R.D. 625 (S.D. Ga. 1995), *aff'd*, 95 F.3d 59 (11th Cir. 1996) (affirming ruling that class representative was not adequate because her claims were barred by res judicata and that class definition was defective because it included members who had already settled claims against defendant and so were claim precluded); Magee v. J.G. Wentworth & Company, Inc., 2000 PA Super 300, 761 A.2d 159 (2000) (finding lead plaintiff's claims barred by res judicata because he failed to bring a timely petition).

64. 12 Cal.3d 447 (1974) (*see supra* notes 14, 52 – 55).

> but also damages for annoyance, inconvenience, and discomfort (Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal.2d 265 [288 P.2d 507]); actual injuries to the land (Spaulding v. Cameron (1952) 38 Cal.2d 265 [239 P.2d 625]); and costs of minimizing future damages. (Barnes v. Berendes (1903) 139 Cal. 32 [69 P. 491, 72 P. 406].) The plaintiffs, however, seek only recovery for diminution in market value.[65]

The California Supreme Court explained the jeopardy in which the class representative placed the putative class by claim-trimming:

> It is clear under California law a party cannot, as a general rule, split a single cause of action because the first judgment bars recovery in a second suit on the same cause. (3 Witkin, Cal. Procedure (2d ed. 1971) Pleadings, § 32, pp. 1715 – 1716.) ([17c]) As a result, by seeking damages only for diminution in market value, plaintiffs would effectually be waiving, on behalf of the hundreds of class members, any possible recovery of potentially substantial damages – present or future. This they may not do.[66]

Finally, the California Supreme Court noted that claim-trimming violated the class representative's fiduciary duty to the class.

> This court has long been concerned with requiring the representative party to protect the interests of the absent class members, even imposing a fiduciary duty to do so on the representative class member. (*La Sala v. American Sav. & Loan Assn., supra,* 5 Cal.3d 864, 871.) To fulfill this fiduciary duty the representative plaintiff must raise those claims "reasonably expected to be raised by the members of the class." (*See, Technograph Printed Circuits, Ltd. v. Methode Electronics* (N.D.Ill. 1968) 285 F. Supp. 714, 721.) Clearly, under the facts alleged here the members of the class would reasonably be expected to seek recovery of damages beyond mere diminution in market values. ([17d]) Thus, by certifying this class, the trial court sanctioned a clear violation of plaintiffs' fiduciary duty.[67]

Some federal courts have applied the same analysis as the California Supreme Court did in *City of San Jose*, even if the federal courts did not cite the decision. In *Thompson v. American Tobacco Co., Inc.*,[68] the plaintiffs' class definition sought to "reserve" personal injury damages for the class. The district court did not agree, procedurally or substantively. First, the court was unsure that the procedural mechanism proffered by the plaintiffs would work:

> If the named Plaintiffs have in fact jeopardized the class members' potential claims for personal injury damages, they would be deemed to have interests "antagonistic" to those of the class. See Arch v. American Tobacco Co., 175 F.R.D. 469, 479 – 480 (E.D. Pa. 1997)…Thus, even if the Court permits the reservation of issues in this case, whether a subsequent court would honor such a reservation is, at best, undeterminable at this time. See Small v. Lorillard Tobacco Co., 252 A.D.2d 1, 679 N.Y.S.2d 593, 601 – 602 (1 Dept., 1998). A subsequent court may very well find that individual injury and damage claims should have been litigated in this lawsuit.[69]

Accordingly, the district court held that:

> This possible prejudice to class members is simply too great for the Court to conclude that the named Plaintiffs' interests are aligned with those of the class. Therefore, the Court finds that Plaintiffs' proposed class action does not satisfy all of the prerequisites of Rule 23(a). Although Plaintiffs' failure to meet these prerequisites precludes class certification, the most glaring difficulty with Plaintiffs' proposed class is that it fails to meet the requirements of Rule 23(b).[70]

Most recently, the United States Court of Appeals for the Fifth Circuit, in *Slade v. Progressive Security Insurance Company,*[71] remanded a case to the district court to determine whether the class representative's trimming of certain claims in order to establish commonality jeopardized class certification and/or whether such jeopardy could be cured through the opt-out process during claims administration:

> Instead, on remand, the district court can consider the risk of preclusion, the value of the potentially waived claims, and the relative strategic value of Plaintiffs' proffered waiver. In doing so, we note that the district court has a number of options at its disposal, each of which may or may not be appropriate depending on how the case develops, including, but not limited to:
>
> - Concluding the risks of preclusion are too great and declining to certify the class;

65. *Id.,* at 464.

66. *Id.*

67. *Id.,* at 464 – 465.

68. 189 F.R.D. 544, 550 – 551 (D. Minn. 1999).

69. *Id.*

70. *Id. See also* Small v. Lorillard Tobacco Co., 252 A.D.2d 1, 679 N.Y.S.2d 593, 601 – 602 (1 Dept., 1998) (" [R]epresentatives who 'tailored the class claims in an effort to improve the possibility of demonstrating commonality' obtained this 'essentially cosmetic' benefit only by 'presenting putative class members with significant risks of being told later that they had impermissibly split a single cause of action.").

71. Slade v. Progressive Security Insurance Company, 856 F.38 408 (5th Cir. 2017).

- Certifying the class as is and then tailoring the notice and opt-out procedure to alert the class of the risk of preclusion;

- Concluding that the benefits of proceeding as a class outweigh the risks of future preclusion and certifying the class as is; or

- Defining the class in a way to exclude unnamed plaintiffs who may quarrel with the condition adjustment.[72]

Again, however, the opt-out issue should be an issue for claims administration, not for whether a class can be certified in the first instance, and it has been held that the right to opt out of the class is insufficient to protect the rights of purported class members who might wish to pursue remedies other than those chosen by the representative.[73]

b. Claim-Trimming Has No Effect

i. Litigants Can Settle Away Potentially Preclusive Effect of the Class Judgment

Although some courts have said that the mere fear of a collateral estoppel effect prohibits claim-trimming, some courts have held that parties settling a class action can control the scope of a judgment's preclusive effect on the class, particularly where the claim representative is bringing the "majority" of the claims anyway.[74] In *Choi v. Mario Badescu Skin Care, Inc.*,[75] for example, the California Court of Appeal held that:

> However, "[i]t is axiomatic that [a stipulated judgment's] res judicata effect extends only to those issues embraced within the consent judgment. [Citations.] Thus, while a stipulated judgment normally concludes all matters put into issue by the pleadings, the parties can agree to restrict its scope by expressly withdrawing an issue from the consent judgment. [Citations.]" [citation omitted] Res judicata will not apply to claims that the parties agreed in a court-approved stipulation to reserve for later litigation.[76]

Citing the United States Court of Appeals for the Ninth Circuit's decision in *Hanlon v. Chrysler Corporation*,[77] in *Choi* the Court of Appeal stated that "[R]es judicata does not bar future litigation of claims and damages that are expressly excluded by the contracting parties from the release of claims in a stipulated class action settlement" and, "[a]ccordingly, no conflict of interest exists between the class representatives and the class members on the basis of personal injury, let alone a conflict that goes to the very subject matter of the litigation."[78]

Decisions such as *Choi* suggest that settling parties can control the preclusive effect of a class judgment and, therefore, can prevent a challenge from objectors fearful of the settlement's preclusive effect.[79] Others have suggested that even where class certification is contested, class counsel can control the preclusive effect of a class judgment by tweaking the class definition.[80]

ii. Putative Class Members Can Always Opt-Out

Some commentators[81] and federal courts have found that claim-trimming

72. *Id.*

73. Clark v. Experian Information Solutions, Inc., Nos. Civ.A.8:00-1217-24, Civ.A.8:00-1218-24, Civ.A.8:00-1219-24, 2001 WL 1946329 *3 – 4 (D.S.C. Mar. 19, 2001) ("The court disagrees. 'The ability to opt out of the class is insufficient to protect the rights of putative class members who would want to seek remedies other than those chosen by the [class] representatives.' Small v. Lorillard Tobacco Co., 679 N.Y.S.2d 593, 601 – 02 (N.Y.App.Div.1998)."). *See generally* 1 McLaughlin on Class Actions § 4:30 (13th ed. (2016), also *citing Small*, 679 N.Y.S.2d 593, 601 – 602, *order aff'd*, 94 N.Y.2d 43, 698 N.Y.S.2d 615, 720 N.E.2d 892 (1999).

74. Todd v. Tempur-Sealy Int'l, Inc., No. 13-CV-04984-JST, 2016 WL 5746364, at *5 (N.D. Cal. Sept. 30, 2016) ("A strategic decision to pursue those claims a plaintiff believes to be most viable does not render her inadequate as a class representative."); O'Connor v. Uber Techs., Inc., 311 F.R.D. 547, 566 (N.D. Cal. 2015) ("[A] decision to abandon a claim that may not be certifiable does not automatically render a plaintiff inadequate, particularly when they seek the majority of the claims.").

75. B257480, 2016 WL 1754236 (April 29, 2016) (Not Officially Published, Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115). Scholarly commentary is not limited by the same rules of court that prohibit citation to unpublished or depublished decisions. California Rule of Court 8.1115 ("(a) Unpublished opinion. Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action. (b) Exceptions. An unpublished opinion may be cited or relied on:(1) When the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or (2) When the opinion is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action."). *See generally*: Mandell, *Trees that fall in the forest: The precedential effect of unpublished opinions,* 34 Loy. L.A. L. Rev. 1255 (2001); Schiavoni, *Who's afraid of precedent? The debate over the precedential value of unpublished opinions,* 49 UCLA L. Rev. 1859 (2002).

76. *Choi*, 2016 WL 1754236 (*see supra* note 75).

77. Hanlon v. Chrysler Corporation, 150 F.3d 1011, 1020 (9th Cir. 1998).

78. *See In re* Toyota Motor Corp. Unintended Acceleration, Marketing, Sales Practices and Products Liability Litigation, No. 8: 10ML 02151 JVSFMOx, 2013 WL 3224585, at *14 (C.D. Cal. June 17, 2013) (proposed settlement by "Economic Loss" class does not apply to personal injury, wrongful death, and physical property damage claims because those claims were carved out of the settlement for later litigation).

79. *See Choi*, 2016 WL 1754236 (*see supra* note 75), at n. 8 ("The Restaino Objectors' reliance on *Cholakyan v. Mercedes–Benz USA, LLC* (C.D. Cal. 2012) 281 F.R.D. 534, is unavailing. There, the court declined to certify an adjudicatory class seeking an injunction and declaration that the defendant's cars possessed a defectively designed water management system because it might defeat a class member's effort to obtain compensatory damages for that very same defect. (Id. at p. 564.) That case did not involve a settlement class. Here, by contrast, nothing related to physical injury has been adjudicated or settled, and so that issue would not be precluded in a later suit.").

80. *See*: Sherman, *"Abandoned Claims" in Class Actions: Implications for Preclusion and Adequacy of Counsel*, 79 Geo. Wash. L. Rev. 483, 503 – 4 (2011) ("First, a court should make a determination as to whether the omitted claims are likely to be of importance to the class and whether the risk of preclusion is high enough to refuse certification…Second, if a court is to weigh the risk of preclusion when claims are not asserted or dropped, it should consider what prophylactic measures it might take to avoid preclusion if it is persuaded that this case can be manageable as a class action through the use of segmenting devices….Third, even with these precautions, it may still be necessary for a court to order that notice be given to the class members to inform them fully of the claims that are not being asserted and of the risk of preclusion. The 2003 Rule amendment to permit a court to provide for notice in (b)(2) class actions."); Anderson, *Preserving Adequacy of Representation When Dropping Claims in Class Actions,* 74 UMKC L. Rev. 105, 126 (2005) ("To properly unbundle the class claims from the outstanding, unlitigated, individual claims, class counsel should take care to define the class to fit the intended preclusive effect…Class counsel should, when tailoring the class to include only common claims, ensure that the certifying court expressly reserves the class members' rights to pursue individual claims. The court's express reservation of those rights conforms to the principle articulated in Restatement (Second) of Judgments § 26(1)(b) that the general rule against claim splitting does not apply where '[t]he court in the first action has expressly reserved the plaintiff's right to maintain the second action'.").

81. *See, e.g.*: Sherman, *supra* note 80; Anderson, *supra* note 80.

is the "proper course to take"[82] when there is both[83] an opt-out option[84] and the probability of miniscule damages[85] or aggressive legal theories[86] held by putative classmembers that would be waived. Others focus on the class representative's duty to the class, holding that it is the class representative's duty to investigate and pursue those claims that are best suitable for class treatment.[87]

Some California state courts, despite *City of San Jose*, have held that the existence of other claims that add nothing to a putative classmember's claim combined with the right to opt out should not result in a denial of class certification when the class representative does not pursue all available legal theories.[88] Or, stated another way, a class can still be certified when the class representative asserts the "majority" of the claims.[89] Others have held[90] or argued[91] that the court should explore certification of sub-classes to avoid the problems set forth in *City of San Jose*.

III. Conclusion

Courts facing contested class certification motions in TCPA cases must diligently hold class representatives to their fiduciary duties to the class, make sure that they do not trim their claims to the detriment of the class, and ensure that they do not abandon such claims to class counsel in the interest of uniformity to reach class certification. In matters where class certification is contested, and a class representative trims claims or damages that jeopardize potential claims of the putative class members, courts should not hesitate to find that the class representative is inadequate to represent the class and should deny class certification.

82. Sullivan v. Chase Inv. Servs. of Boston, Inc., 79 F.R.D. 246, 258 (N.D. Cal. 1978) ("The fact that class counsel have not tried to press claims…which they believe (and justifiably so) are unsuitable for class treatment does not make them inadequate. To the contrary, that is the proper course for them to take.").

83. Beck-Ellman v. Kaz USA, Inc., 283 F.R.D. 558, 566 (S.D. Cal. 2012) ("defendants cannot claim that plaintiff is inadequate because she declines to assert a theory that could unravel the putative class").

84. *See, e.g.*: Chakejian v. Equifax Information Services LLC, 256 F.R.D. 492, 500 (E.D. Pa. 2009) (In finding that the plaintiff's failure to seek all available remedies in the FCRA class action was not a conflict of interest between the named representative and the other class members, Judge Brody stressed the availability of the opt-out mechanism for those members of the putative class with claims for actual damages.); Murray v. GMAC Mortgage Corporation, 434 F.3d 948, at 953 (7th Cir. 2006) ("When a few class members' injuries prove to be substantial, they may opt out and litigate independently."); *In re* Universal Serv. Fund, 219 F.R.D. at 669 ("This is not a case where the class representatives are pursuing relatively insignificant claims while jeopardizing the ability of class members to pursue far more substantial, meaningful claims.").

85. *See also*: *Murray*, 434 F.3d at 952 – 53 (*see supra* note 84) ("Unless a district court finds that personal injuries are large in relation to statutory damages, a representative plaintiff must be allowed to forego claims for compensatory damages in order to achieve class certification."); 1 McLaughlin on Class Actions § 4:30 (13th ed. (2016) ("Certain courts have limited recognition of the claim-splitting concern to instances in which the proposed representative has for strategic reasons pursued the weaker claims available and not far stronger claims for monetary damages.").

86. *E.g., In re* Universal Service Fund Telephone Billing Practices Litigation, 219 F.R.D. 661, 669 (D. Kan. 2004) ("Although the named plaintiffs abandoned their common law fraud claim, they continue to pursue all of their other claims for compensatory damages, treble damages (a remedy akin to the punitive damage claim plaintiffs elected to forego when they abandoned their fraud claim), attorneys' fees and costs, and a judgment enjoining defendants from continuing their allegedly unlawful combination or conspiracy. This is not a case where the class representatives are pursuing relatively insignificant claims while jeopardizing the ability of class members to pursue far more substantial, meaningful claims. Rather, here the named plaintiffs simply decided to pursue certain claims while abandoning a fraud claim that probably was not certifiable.").

87. *E.g.*, Kennedy v. Jackson National Life Ins. Co., No. C 07-0371 CW, 2010 WL 2524360 at *5 (N.D. Cal. June 23, 2010) ("Although so-called claim splitting could render a plaintiff inadequate to represent a class, the concerns raised by Defendant do not apply here. Defendant contends that Plaintiff is inadequate because she does not seek recovery based on the unsuitability of the deferred annuities for class members, "flexible premium Contracts," "fees for 'electing early annuitization,'" and "'surrender charges.'"…However, after Plaintiff conducted discovery on these matters, she apparently concluded that the theories she now asserts afford the greatest likelihood of success on behalf of the class.").

88. *E.g.* Lebrilla v. Farmers Group, Inc., 119 Cal.App.4th 1070, 1088 (2004) ("In its final argument, Farmers is highly critical of the Lebrillas' failure to seek class certification of every cause of action. Citing *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 115 Cal.Rptr. 797, 525 P.2d 701, Farmers suggests the Lebrillas breached their fiduciary duty to the class by trying to achieve commonality for certification purposes by impermissibly abandoning a portion of the rights and remedies available to member of the putative class. It states an absent policyholder bound by any judgment in a certified UCL action would be forever barred from pursuing a breach of contract action or any other claim for damages….Farmers fails to point out what the class would have to gain by this additional claim, in addition to the ones already alleged. Unlike the case in *City of San Jose*, exclusion of the claim does not waive a crucial or unique category of damages. As currently filed, the class action seeks full restitution to each class member "of all monies wrongfully acquired by Farmers resulting from its wrongful conduct." The Lebrillas note that had they sought certification on all causes of action, "Farmers would no doubt contend that a class action would be unwieldy." And, as the Lebrillas correctly point out, anyone dissatisfied with their potential relief in a class action has various remedies, including opting out of the class.").

89. *See, e.g.*: Todd v. Tempur-Sealy Int'l, Inc., No. 13-CV-04984-JST, 2016 WL 5746364, at *5 (N.D. Cal. Sept. 30, 2016) ("A strategic decision to pursue those claims a plaintiff believes to be most viable does not render her inadequate as a class representative."); O'Connor v. Uber Techs., Inc., 311 F.R.D. 547, 566 (N.D. Cal. 2015) ("[A] decision to abandon a claim that may not be certifiable does not automatically render a plaintiff inadequate, particularly when they seek the majority of the claims.").

90. *E.g.*. Hicks v. Kaufman & Broad Home Corp., 89 Cal. App. 4th 908, (Cal. App. 2001) ("there are several ways in which the trial court could certify a class without waiving the right of class members with property damage to recover for that damage."…For example, division into subclasses or limiting the class issues to liability and then letting class members use that judgment "as the basis for an individual action to recover damages for the breach.").

91. Anderson, *Preserving Adequacy of Representation When Dropping Claims in Class Actions,* 74 UMKC L. Rev. 105, 128 (2005) ("The very purpose of subclassing is that it allows defining the scope of the claims asserted, and their preclusive effect, so that common issues get tried in common, and different issues get tried elsewhere. And the processors' collective decision to abandon the trespass claim should similarly have no preclusive effect on those individual processors who do have a trespass claim, which they seek to pursue separately.").

CFPB Tweaks…

(Continued from page 67)

or emerges from bankruptcy. The single-billing-cycle exemption applies only if the payment due date for that billing cycle is no more than fourteen days after the date on which one of three specified triggering events occurs: (1) a mortgage loan becomes subject to the requirement to provide a modified periodic statement, *i.e.,* a borrower enters bankruptcy; (2) a mortgage loan ceases to be subject to the requirement to provide a modified periodic statement, *i.e.,* a borrower emerges from bankruptcy; or (3) the servicer ceases to qualify for an exemption.

The CFPB is proposing to amend Regulation Z to replace the single-billing-cycle exemption with a single-billing–statement exemption. This change would provide operational flexibility to mortgage servicers and mean that, as of the date on which one of the above triggering events occurs, mortgage servicers will be exempt from transitioning to the modified or unmodified billing statement requirements, as applicable, for the next periodic statement or coupon book, but thereafter must provide the modified or unmodified periodic statements or coupon books that comply with the requirements of Regulation Z.

The proposed effective date is April 19, 2018, the same date that the related sections of the 2016 Mortgage Servicing Final Rule amendments become effective. The CFPB is seeking public comment on the interim final rule and the proposed rule. The comment period for the interim final rule closed on November 15, 2017, and for the proposed rule on November 17, 2017.

IV. Conclusion

It can be noted that the CFPB continues to focus on the oversight of service providers, including mortgage servicers. Owners of mortgage loans and mortgage servicing rights, as well as warehouse lenders and other financing parties, should endeavor to ensure that the applicable mortgage servicers' operational procedures have been updated to incorporate the new timing requirements contained in the interim final rule discussed above, as well as the multitude of other changes contained in the 2016 Mortgage Servicing Final Rule, again most of which became effective on October 19, 2017.