

Testimony of Adonis E. Hoffman, Esq.

Before the
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice

Hearing on
“Lawsuit Abuse and the Telephone Consumer Protection Act”

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*“Businesses face regulatory challenges every day that were not intended by Congress or the FCC. Look at the TCPA—the Telephone Consumer Protection Act—for example. This consumer protection, anti-telemarketing statute has been leveraged by aggressive plaintiffs’ lawyers to line their pockets lavishly with millions, while consumers usually get peanuts. The proliferation of class-action litigation involving the TCPA has reached an outlandish level. I think the TCPA should be known by its real acronym-- **“Total Cash for Plaintiffs’ Attorneys.”** This is just one example where the public interest is not being advanced responsibly.”¹*

-Adonis Hoffman

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¹ Broadcasting & Cable, March 23, 2015. <http://www.broadcastingcable.com/news/washington/fcc-s-hoffman-looks-back-moves-forward/139013>

Good afternoon Mr. Chairman, Vice Chairman, Ranking Member, and Members of the Subcommittee. I appreciate the opportunity to appear before your Subcommittee to discuss the important issues surrounding lawsuit abuse and the Telephone Consumer Protection Act. (TCPA).²

Introduction and Background

I am here today in my individual capacity. Although I serve as chairman of Business in the Public Interest, Inc.³ and teach as an adjunct professor at Georgetown University,⁴ I am not representing any company, client, firm, organization, trade association or entity concerning this issue, and I have not received any compensation from anyone concerning this matter. Nor am I arguing for or against any specific legislation that is pending in Congress.

It is a special honor for me to return to these hallways, as I spent several years as a Legislative Director, Committee Counsel and Subcommittee Staff Director in the House during the 97th, 98th and 102nd Congresses. Serving during those times changed my life and career, and I have the greatest affinity and highest regard for this institution.

In addition to Congress, I have spent nearly thirty years as a lawyer in Washington, DC, working in private practice, at a policy think tank, and as in-house general counsel for a national trade association. Most relevant to this hearing, I served as chief of staff and senior legal advisor to FCC Commissioner Clyburn from 2013-2015.

Intent of the TCPA-- Consumer Privacy and Protection

When Congress passed the Telephone Consumer Protection Act (TCPA) in 1991, the world was a very different place. Median household income was \$30,000; a dozen eggs cost a dollar, and a first-class postage stamp was 25 cents. Almost every home had a hard-wired, landline telephone and cell phones were an emerging novelty. With a sputtering economy, many companies turned to telemarketing to boost lagging sales and increase market share.

But, as we all know by now, telemarketing got out of hand, and prime time calls from telemarketers became unwanted guests at the family dinner table. In response, a bipartisan Congress, with guidance from consumer advocates, stepped in to establish needed rules for an intrusive practice.

The TCPA was intended to address what was widely accepted as an invasion of consumer privacy by overzealous companies. The law authorized the FCC to implement rules that would outlaw two main business practices: (1) making telemarketing calls using an artificial or

² 47 U.S.C 272

³ Business in the Public Interest, Inc. provides strategic research, information and analytics on public policy, corporate responsibility and the role of business in society. We help companies to align business policies, practices and priorities with the public interest.

⁴ Georgetown University Graduate School of Arts & Sciences, Communication, Culture & Technology (CCT).

prerecorded voice to *residential* telephones without prior express consent; and (2) making any non-emergency call using an automatic telephone dialing system (“autodialer”) or an artificial or prerecorded voice to a *wireless* telephone number without prior express consent.

The law requires businesses to obtain written consent from consumers for any telemarketing or advertising calls. If companies call a wireless number using an autodialer or prerecorded call for non-marketing purposes, the consent may be oral or written. For each violation, the FCC can sue. The law also grants consumers a private right to sue for the greater of \$500 or the actual monetary loss in damages, and treble (triple) damages for each willful or knowing violation.

As technology advanced, new hardware and software systems were introduced. More Americans acquired cell phones, and with a robust and competitive market, changing plans, providers and numbers became common. Today, the FCC points out that over 100,000 numbers are reassigned every day. These developments have produced conflicting judicial interpretations of the TCPA. What was once clear became quite complex, and businesses struggled to understand and comply with contemporary applications of a law passed for another time and space.

In 2016, the FCC noted that it has sought to “reasonably accommodate individuals’ rights to privacy as well as the legitimate business interests of telemarketers and other callers.” But all is not well. Somewhere along the line, the reasonable balance that was originally intended shifted away from business into the hands of plaintiffs’ lawyers.

Business Asks the FCC to Clarify the Rules

Recognizing that calling and texting consumers *en masse* has never been easier or less expensive, companies have sought innovative, effective and compliant methods to reach consumers using automated dialing technologies. Dialing options today include cloud-based and smartphone app technology. But many of those methods have given rise to inconsistent interpretations and enforcement of the TCPA.

Given this harsh reality, and citing abuses and unintended consequences of the law, the business sector sought relief from the FCC. From 2012 through 2014, nineteen banks, credit agencies, retailers, healthcare, utilities, universities, telecom and educational organizations, among others, petitioned the FCC to clarify its interpretation of key provisions of the TCPA, since the courts had deferred to the FCC’s authority to interpret the Act and promulgate implementing regulations.⁵

These issues included:

- The definition of an auto-dialer
- Prior consent, and re-assigned numbers
- Liability of third parties, and a few others

⁵ American Association of Healthcare Management Petition for Expedited Declaratory Ruling and Exemption, CG Document No 02-278, et al. October 21, 2014.

For example, until the FCC issued its Declaratory ruling in July 2015, there were at least four different interpretations of the term "called party" being applied in TCPA cases throughout the country. The business sector hoped a common sense, business-friendly, interpretation would clarify that and other ambiguities in the statute.

I met with dozens of interested parties as part of the FCC review of the petitions. We heard from banks, credit agencies, debt collectors, educational institutions, financial institutions, healthcare providers, insurance companies, retailers, service providers utility companies and other commercial entities. We also heard from trade associations representing numerous industries. And last, but not least, we heard from attorneys and law firms representing classes of consumers who were suing companies under the TCPA.

The business voices told us that the TCPA was harming business because it paralyzed their ability to communicate effectively and efficiently with consumers and customers by telephone. The consumer voices told us that TCPA complaints are the largest category of informal complaints received by the FCC, averaging over 10,000 per month. The Federal Trade Commission (FTC) reported that it received “approximately 63,000 complaints about illegal robocalls each month” during the fourth quarter of 2009, but that “[b]y the fourth quarter of 2012, robocall complaints had peaked at more than 200,000 per month.” The Consumer Federation of America ranked do-not-call and telemarketing abuse issues as number eight on its list of complaints, the fastest-growing complaint subject in 2013.⁶

Regulatory Ambiguity Spawned Explosion of Class Action Lawsuits

As the FCC deliberated, dozens of class action lawsuits were filed in various jurisdictions under the TCPA. Since 2012, the TCPA has been used to extract large settlements from many companies. Consider a few of the biggest settlements to date:

- Capital One - \$75 million
- ATT Mobility - \$45 million
- Sirius XM - \$35 million
- JP Morgan Chase - \$34 million
- Bank of America - \$32 million
- MetLife - \$23 million
- Wells Fargo - \$16 million
- Papa John’s Pizza - \$16 million
- Walgreen’s Pharmacy - \$11 million
- And scores of others below

TCPA – Total Cash for Plaintiffs’ Attorneys—Coining the Phrase

I first coined the phrase, “Total Cash for Plaintiffs’ Attorneys” in an exit interview with Broadcasting & Cable magazine in March 2015:

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⁶ Declaratory Ruling and Order in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, FCC 15-72, Adopted June 18, 2015.

plaintiffs’ lawyers to line their pockets lavishly with millions, while consumers usually get peanuts. The proliferation of class-action litigation involving the TCPA has reached an outlandish level. I think the TCPA should be known by its real acronym-- “Total Cash for Plaintiffs’ Attorneys.” This is just one example where the public interest is not being advanced responsibly.⁷

Although somewhat flippant, it was my intent to put the TCPA into perspective by calling a spade a spade. The law has become the second most popular vehicle for class action lawyers to reap millions in the name of consumer protection. As an attorney, a consumer and a citizen, this really bothers me because it is a bastardization of the public interest and a travesty to our legal system. As a matter of equity, it just seems to be plain wrong.

Plaintiffs’ Attorneys Reap Windfalls at the Expense of Consumers

The TCPA is a strict liability statute. This means a single mis-step, however well intended, can result in a violation. Even if a company is mistaken or has attempted to comply with the law, the TCPA can be unforgiving. For example, if a company calls the wrong party or calls a customer without prior express permission, each violation entitles that person to file a lawsuit seeking damages of \$500 to \$1,500 per unsolicited call, text or fax per person.⁸

This drop-dead aspect of the TCPA has found special favor with the plaintiffs’ bar, which has exploited the loopholes to reap extraordinary financial gain. To date, hundreds of class action lawsuits have been filed against businesses because they either have called a consumer in error, or have called many customers using automatic dialing systems, but failed to obtain the necessary consent required by the law. Often these communications are designed to alert us about fraud and identity theft; to confirm transactions; to remind us of appointments or due dates; to help avoid overdraft fees, and generally to facilitate better customer service or relations.

The proliferation of class action lawsuits under the TCPA has been tracked and well-documented by the Institute for Legal Reform at the U.S. Chamber of Commerce.⁹ I will defer to their data on the numbers. Suffice it to say, that there has been an explosion of TCPA class action filings and settlements. What once was a little-known statute has become the subject of “how-to-get-rich-quick” books online.

As I pointed out in a recent article in The Wall Street Journal,¹⁰ the average recovery for a consumer in a TCPA class action settlement was \$4.12. Their lawyers, by contrast, received an average of \$2.4 million. Something is wrong with this picture.

⁷ “Hoffman Looks Back, Moves Forward.” Broadcasting & Cable, March 23, 2015. <http://www.broadcastingcable.com/news/washington/fcc-s-hoffman-looks-back-moves-forward/139013>

⁸ 47 U.S.C. 227(b)(3)

⁹ <http://www.instituteforlegalreform.com/issues/telephone-consumer-protection-act>

¹⁰ “Sorry, Wrong Number, Now Pay Up”, The Wall Street Journal, June 15, 2015.

Small and Minority Businesses

We tend to focus on the sensational settlements reached by big companies, as well we should. But there is another dimension of TCPA litigation. That is its potentially devastating effect on a small, minority or community-based business. For these organizations, a TCPA claim could

mark the end of their existence due to the strict liability mandate, which can mean millions of dollars in fees for companies that can least afford it.

FCC Declaratory Ruling and Order Rebuffs Business

When the FCC finally acted on the Petitions, it did not provide business with much comfort. FCC Chairman Tom Wheeler said he intended to use the "petitions as an opportunity to empower consumers and curtail these intrusive communications." The party-line vote signaled a deeper fissure between consumer protection and reasonable business practices at the FCC, with business on the short end of the compromise.¹¹

The FCC's Declaratory Ruling tightened the restrictions on businesses in communicating with customers and consumers. In sequence, the ruling defined "autodialer" as just about any device short of a rotary telephone. It clarified that text messages are considered calls for purposes of the law. The FCC ruled that consumers can revoke consent at "any time and through any reasonable means." And perhaps most challenging for businesses was the FCC's interpretation of who is a "called party" under the law. The Commission ruled that the "called party" is the subscriber, or recipient, and not the "intended party" as most businesses preferred. Thus, when it comes to calls to reassigned wireless numbers, the FCC ruled that such calls violate the TCPA when a previous subscriber, not the current subscriber or customary user, provided the prior express consent on which the call is based.

Several business associations immediately appealed the FCC's ruling to the U.S. Court of Appeals for the District of Columbia, and the case has been joined or supported by numerous companies, business associations and organizations.

Now Up to Congress

Let's be honest. None of us relishes intrusive calls from telemarketers, even if their data show we might be interested in their products or service. On the other hand, there is a valuable function and utility to allowing companies to communicate with their customers, clients, patients or patrons without fear of costly legal action. In essence, business should be able to talk to the people they serve.

The new interpretation of the TCPA has driven a deeper wedge between consumers and corporations, unnecessarily so. Surely, this cannot be what Congress intended when consumer activists and well-meaning legislators found compromise on the law nearly twenty-five years

¹¹ Declaratory Ruling and Order in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, FCC 15-72, Adopted June 18, 2015.

ago. If there is any discomfiture with the TCPA--and there should be--it is because class action lawyers have turned a law meant to serve consumers into a law that is simply self-serving.

Do regulators expect that massive TCPA fines against companies or tremendous class action settlements inure to the benefit of consumers? To the contrary, the only ones being enriched in these cases are an elite group of plaintiffs' attorneys and the U.S. treasury, not to be confused with one another.

As enforced today, the TCPA serves to drive an unnecessary wedge between corporations and the people they serve. None of the companies which have been subjected to large class action settlements are bad companies. A close look at the records in many of these cases shows that they want to reach their customers and comply with the law. It is not an either – or choice. But the current interpretation of the statute has made this basic business determination a Hobbesian choice. This was not what Congress intended when it reached a compromise with consumer activists to shield people from unwanted telemarketing calls. If there is any discomfiture with the TCPA -- and there should be--it is because class action lawyers have turned a law meant to serve consumers into a law that is just self-serving.

Recommendations

Congress has the authority to end this burden on American businesses large and small. There are three measures that Congress can take to change what is a growing problem for U.S. companies under the TCPA.

1. Impose a Liability Cap on TCPA Awards
2. Amend Key Provisions of the TCPA
3. Provide a Safe Harbor for Substantial Compliance

I appreciate the opportunity to contribute to this hearing and would be glad to provide the Committee with details on these recommendations in a separate document.

Thank you.