

Consumer Bankers Association, Chamber of Commerce Join Legal Challenge to FCC Ruling Tightening TCPA Call Restrictions

September 10, 2015



The Consumer Bankers Association (CBA) and the United States Chamber of Commerce have joined the legal challenge to the Federal Communications Commission (FCC)'s [July declaratory ruling and order](#) ("FCC Ruling") responding to 21 petitions which had sought clarification of or exemptions from Telephone Consumer Protection Act (TCPA) provisions relating to automatic telephone dialing systems, prior express consent to call, revocation of consent, reaching wrong numbers, and others. The FCC is authorized to issue implementing regulations and interpret the TCPA. The TCPA strictly regulates telemarketing calls, faxed advertisements, and calls (or text messages) to cell phones. Calls to cell phones using automatic telephone dialing systems (ATDS) or prerecorded voice messages (PVM) are prohibited absent the "prior express consent" from the "called party." The statute provides for strict liability, and statutory damages of between \$500 and \$1,500 per call, text, or fax. The credit and collection industries, early adopters of predictive dialing equipment to connect live representatives

to called parties, have been targeted by TCPA plaintiff's class action attorneys for several years. But as other industries increasingly utilize technology to increase efficiency in group communications, the number of multimillion dollar class action settlements and industries targeted have mushroomed. To say the least, the FCC's interpretations in the ruling will make it more difficult for business to utilize automated communications technology, now standard in many industries. First, the agency denied a request to interpret the word "capacity," used in the TCPA's definition of an ATDS as meaning "present" capacity. Instead, the FCC ruled that the term includes equipment that generally has the capacity (to store or produce, and dial, random or sequential numbers), *even if not presently used or capable of being used for that purpose*. Thus "capacity," includes "*potential ability*," according to the FCC. Businesses have also long relied on prior express consent to call a number provided by a consumer to the business as a contact number, for example in a credit application, which the FCC previously ruled established such consent. In the ruling, however, the FCC denied a request that it confirm consumers could not revoke prior express consent, or if they could, that business could set a procedure for doing so. Instead, the FCC said that consumers can revoke consent "at any time and through any reasonable means," and, that callers "may not limit the manner in which revocation may occur." Thus, a business with prior express written consent to contact a customer at a particular number in connection with a credit or other transaction would face the possibility the customer will revoke that consent in some unknown, later to be determined "reasonable" fashion, perhaps soon after signing the contract, and likely well before completing payments or other obligations as agreed, making the value of prior express consent practically worthless. In response to a request for establishment of a "safe harbor" for entities that inadvertently reached wrong numbers, the FCC provided a safe harbor for only a single call, "to gain actual or constructive knowledge" that a wrong number had been reached, and only if that wrong number was originally provided by the party intended to be reached. The FCC also denied a request to define the "called party" as the intended recipient of the call, or to grant relief for reaching a wrong number due to human error in inputting. ACA International (ACA), a trade association of credit and collection professionals and one of the petitioners addressed in ruling, was the first plaintiff to file suit seeking judicial review of the ruling by the U.S. Court of Appeals for the D.C. Circuit. ACA asks the court to hold the FCC's interpretation of "capacity," within the definition of ATDS as an unlawful expansion of the statutory definition beyond what Congress intended, and argues its treatment of prior express consent is arbitrary and capricious, an abuse of discretion, and violating callers' rights of due process. The group also asks the court to establish a viable safe harbor for autodialed "wrong number" non-telemarketing calls to reassigned numbers. CBA, which represents the retail banking industry, is one of the latest of six businesses that have filed legal challenges to the FCC's interpretations. CBA is challenging, among others, the FCC's finding that the "capacity" of an ATDS is not limited to current configurations but also includes its potential functionalities and its determination that the TCPA does not allow callers to define the manner in which "prior express consent" may be revoked, even if by reasonable methods. The United States Chamber of Commerce asserts in its petition that the ruling "vastly expands the scope of the TCPA", including "sweeping in calls to wireless numbers from equipment that is not currently able to 'store or produce numbers, to

be called, using a random or sequential number generator" and "to dial such numbers" as set forth in the TCPA's definition of an ATDS, and that it improperly defines the term "called party" as "current subscriber" instead of the intended recipient of a call. All of the petitions have been consolidated before the D.C. Court of Appeals for determination.

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