

TELEPHONE CONSUMER PROTECTION ACT or the TCPA

WHAT TO BE CONCERNED ABOUT AFTER THE ACA v. FCC CASE



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A BIT OF HISTORY

Congress passed the TCPA in 1991 to address complaints about unsolicited telephone marketing calls to their homes and the increasing use of automated dialers and prerecorded messages.

Today's cell-phones didn't exist!



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The TCPA regulates

- **Telemarketing calls**, **Auto-dialed calls**, **Prerecorded calls**, **Text messages** and **Unsolicited faxes**.
- Covers both calls to land lines and cell phones. **NOT JUST MARKETING**
- The FCC is empowered to issue rules and regulations implementing the TCPA.



This is not about the Actions of the FTC and FCC

Fighting the Scourge of Illegal Robocalls

The screenshot shows a webpage for an event titled "Fighting the Scourge of Illegal Robocalls". The event is scheduled for March 23, 2018, at 9:30 am EDT in Room TW-C305, 445 12th Street S.W., Washington, DC. The page includes contact information for Keyla Hernandez-Ulloa (202.418.0965) and Mike Snyder (202.418.0997). A central banner features the FCC logo and the text "Fighting the Scourge of Illegal Robocalls March 23, 2018". A "Related Content" section lists "Chairman Pai Remarks at Joint FCC-FTC Illegal Robocall Policy Forum", "Agenda for FCC-FTC Joint Policy Forum on Illegal Robocalls", and "FCC and FTC to Host Policy Forum and Consumer Expo to..."



<https://www.fcc.gov/fcc-ftc-robocalls-forum>

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Industry Said **HELP - PLEASE**

- Sought rulemaking and requests for clarification
 - “Automatic Telephone Dialing System”
 - Reassignment of cellphone numbers
 - Revocation of consent



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Catching Up To Modern Technology

- In 2015 the FCC issued new rules – an Order updating and clarifying its 2012/13 Order on the TCPA
- Prohibits any call made using **automated telephone equipment** or an artificial or prerecorded voice to ... a **cellular telephone** ... 47 U.S.C. § 227(b)(1)(A)



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Broadly Speaking – What’s Prohibited by the 2015 FCC Order?

- Using an *Autodialer* - capacity
- Contacting members unless express written consent given
- Failing to accept a consent revocation
- Dialing a number that has been reassigned



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The TCPA – Key Terms

- The phrase *automatic telephone dialing system* (ATDS) is defined as “equipment **which has the capacity**--(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”

47 U.S.C. § 227(a)(1).



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Prior Written Consent

- **Since October 2013**, the FCC regulations require callers to obtain “**prior express written consent**” before making marketing calls to wireless numbers. See 47 C.F.R. § 64.1200(a)(2).
- The 2013 regulations dropped the “established business relationship exemption” for pre-recorded telemarketing calls to residential landlines.



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Revocation of Consent & Reassigned Numbers

- Opt – out: Neither the text of the TCPA nor its legislative history directly addresses the circumstances under which prior express consent is deemed revoked – fm FCC Declaratory Ruling as to Petition of SoundBite Communications, Inc., CG Docket No. 20-278 (Nov. 29, 2012) (“SoundBite Ruling”).
- Reassigned Numbers – “called party”



The TCPA – Penalties for Violations

- ***LAWYER RELIEF ACT***
- Uncapped damages of \$500 per unlawful call, with damages trebled (\$1,500 per call) for “knowing and/or willful violations” of the TCPA. 47 U.S.C. §§ 227(b)(3)(B).
- TCPA could be a powerful class action weapon, sometimes yielding astronomical sums in damages.



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Before you panic -

Some Things Still OK

- The FCC exempts communications for certain time-sensitive financial messages:
 - Suspicious activity alerts (fraud or identity theft)
 - Data security breach notifications
 - Steps consumers can take to prevent or remedy data breaches
 - Money transfers
 - *Numerous conditions apply to the above exemptions*



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ACA v. FCC March 2018

- After the FCC's order "clarifying" the rules for use of autodialers, 15 trade groups asked the court to decide:
 - What is an autodialer (ATDS)
 - What is consent to be called and how is it revoked, and
 - Is it Ok to call a reassigned number?



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Impact – Nearly 2/3rds of America only reachable on Cell Phones

- More than half of American homes (52.5%) had cell phones and no landline phones in the 1st half of 2017
- About 50.8% of all adults (128 million) lived in wireless only homes
- A sixth of American homes (15.1%, 40 million adults) still had a landline, but received all or almost all calls on their cell phones



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The Court Said

- Does this Mean any Cell Phone is an ATDS?
- It could not ignore the fact that landlines were disappearing faster than sand on a beach after Hurricane Florence



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What Does this Mean?

- The Court said NO to “capacity”
- As a practical matter – CUs have to be able to show that when a call was made, the system did not ---
store or produce telephone numbers to be called, using a random or sequential number generator.



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Along Comes Marks v. Crunch – 9th Circuit – 9/20/18

- 9th Circuit covers –
 - Alaska
 - Arizona
 - California
 - Hawaii
 - Idaho
 - Montana
 - Nevada
 - Oregon
 - Washington



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More Marks

- FCC Order definition of ATDS still invalid because DC Court has jurisdiction over FCC
- But, we can interpret statute – and – after struggling with the statutory language ourselves, we conclude that it is not susceptible to a straightforward interpretation based on the language alone.
- We find a system which can store numbers may be an ATDS and remand!



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Revocation of Consent

- 2015 Ruling Remains Intact - consumers can continue to revoke consent to receive ATDS calls “at any time and through any reasonable means.”



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Withdrawing Consent

- “...we clarify that a called party may revoke consent at any time and through any reasonable means. A caller may not limit the manner in which revocation may occur.”



Federal Communications Commission FCC 15-72 – ORDER of 10/9/15 at P 7989

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Revocation of Consent

- CUs need to provide “clearly defined and easy-to-use opt-out methods” for consumers who no longer wish to receive ATDS calls.
- Note - the 2015 Ruling “did not address whether contracting parties can select a particular revocation procedure by mutual agreement.”



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But There's More Reassigned Numbers

- FCC said – one call allowed
- Court said – Not really
- Case-by-Case to find out what's allowed...



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Is there a safe path?

- The Telephone Consumer Protection Act is a federal law that prohibits companies from placing phone calls and text messages using an automatic telephone dialing system, artificial or prerecorded voice to consumers who have not consented to receive the calls or texts.
- Wells Fargo denies the allegations but agreed to settle the TCPA class action lawsuit to avoid the expense and uncertainty of trial. Wells Fargo has **agreed to pay more than \$16.3 million to resolve the litigation.**
- If the Wells Fargo TCPA settlement is approved, it will resolve all claims in the following class action lawsuits: Markos v. Wells Fargo Bank NA, Page v. Wells Fargo Bank NA and Davis v. Wells Fargo Bank NA.



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Examples – caution advised

Telephone Calls: Calling, Monitoring, and Recording

- When you give a telephone number directly to us, or place a telephone call to us, you authorize us to place calls to you at that number. You understand that “telephone number” includes a cell phone number and “calls” includes both telephone calls and text messages to or from your phone or cell phone. As examples, we may place calls to you about fraud alerts, deposit holds, and amounts you owe us (collection calls) on your accounts. When we place calls to you, we may use automatic dialers, artificial, text, or prerecorded messages.
- You authorize us to monitor, and to record, telephone conversations and other electronic communications you have with us and our representatives for reasonable business purposes, including security and quality assurance. We will not remind you that we may be recording or monitoring a call at the outset unless required by law to do so.
- You consent in advance to these terms and conditions.



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Examples – Caution Advised

- **How will we contact you about your account?** In order for us to service your account or collect any amount you owe, you agree that we may contact you by phone, text, email, or mail We are permitted to use any address, telephone number or email address you provide You agree to provide accurate and current contact information and only give us phone numbers and email addresses that belong to you When you give us a phone number, you are providing your express consent permitting us (and any party acting on behalf of Wells Fargo) to contact you at the phone number you provide
- We may call you and send you text messages When we call you, you agree that we may leave prerecorded or artificial voice messages You also agree that we may use automatic telephone dialing systems in connection with calls or text messages sent to any telephone number you give us, even if the telephone number is a mobile phone number or other communication service for which the called party is charged



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Examples – caution advised

- > **Recording Your Service Requests** We may monitor or record your conversations with us or with an agent acting on our behalf. We do this from time to time to monitor the quality of service and accuracy of information given to you and to ensure that your instructions are followed.
- > **Your Consent for Us to Call You** You understand that we or our agents may contact you at any telephone number you provide to us, including your mobile phone number. You agree to receive these calls and messages, such as text messages or prerecorded or autodialed calls. You understand your service provider may charge you for these calls/messages.
- > **Your Consent for Us to Use Your Mobile** When you provide a mobile phone number to us, you authorize your wireless operator (AT&T, Sprint, T-Mobile, US Cellular, Verizon, or any other branded wireless operator) to disclose your mobile number, name, address, email, network status, customer type, customer role, billing type, mobile device identifiers (IMSI and IMEI) and other subscriber status details, if available, solely to allow verification of your identity and to compare information you have provided to Citi with your wireless operator account profile information for the duration of your business relationship
Citibank ©



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Examples – caution advised

- **Your Personal Information; Call Recording; Consent for Service Calls**
We will treat personal information about you and your account in accordance with the “PNC Privacy Notice, What Does PNC Do With Your Personal Information?” You agree to cooperate with us in any record keeping and reporting which we believe to be necessary to fulfill government requirements. You consent that any phone call with us may be monitored or recorded by us. By providing telephone number(s) to us, now or at any later time, you authorize PNC and its affiliates and designees to contact you regarding your account(s) with PNC and its affiliates at such numbers using any means, including but not limited to placing calls using an automated dialing system to cell, VoIP or other wireless phone number, or by sending prerecorded messages or text messages, even if charges may be incurred for the calls or text messages.
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Prospects for the Future

- FCC Chairman Pai was clear in opposing the FCC Order
- In all, the Order is likely to leave the American consumer, not to mention American enterprise, worse off. That's not something anyone should support. I certainly don't and accordingly dissent.



We're from Washington and we're here to help you!

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What to Do?

- **Consent** – in agreement – check it!
- **Marketing** – understands the rules
- **Outbound calls** – no present capacity to generate numbers to call....
- **Train** – termination of authority
- **Reassigned numbers?** Document



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Any Questions?



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