

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Rules and Regulations Implementing the) CG Docket No. CG 02-278
Telephone Consumer Protection Act of 1991)
)
Petition for Expedited Declaratory Ruling)
of the Consumer Bankers Association)

To: The Commission

COMMENTS OF ACA INTERNATIONAL

ACA International (“ACA”), through counsel, submits these comments in support of the Petition for Declaratory Ruling filed by Consumer Bankers Association (“CBA”) in the above-captioned proceeding.¹ ACA is an international trade organization of credit and collection companies that provide a wide variety of accounts receivable management services.²

Congress created a specific exemption from liability under the Telephone Consumer Protection Act (“TCPA”) when a call is made with the “prior express consent of the called party.”³ In its Petition, CBA asks the Federal Communications Commission (“Commission”) to declare that “called party,” for purposes of this exemption, means “intended recipient.” ACA strongly supports

¹ Consumer Bankers Association, *Petition for Declaratory Ruling*, CG Docket No. 02-278 (filed Sept. 19, 2014) (“CBA Petition” or “Petition”); see also *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from Consumer Bankers Association*, Public Notice, CG Docket No. 02-278, DA 14-1511 (rel. Oct. 17, 2014).

² With offices in Minneapolis, Minnesota, and Washington, D.C., ACA represents nearly 3,700 diverse members, including collection agencies, attorneys, credit grantors and vendor affiliates, and more than 230,000 employees worldwide. For more information regarding ACA International, please see <http://www.acainternational.org/>.

³ 47 U.S.C. § 227(b)(1)(A)(iii).

this much-needed clarification, which is the only interpretation consistent with the intent of Congress. Such clarification is urgently needed in order to eliminate the current ambiguity surrounding this issue, and to provide relief to callers making diligent, good-faith compliance efforts. To find otherwise would not only make liability unavoidable, but “a matter of sheer luck.”⁴

While ACA believes adoption of the straightforward, common-sense “intended recipient” clarification is preferable, if the Commission decides for any reason not to move forward with this approach, ACA continues to support the safe harbor approach it outlined in its pending Petition, as long as there is a concurrent path for retroactive waiver.⁵

I. Without Commission Action, Liability Will be Based on Luck

The current challenges surrounding lawsuits based on number reassignments and other “wrong number” calls have been well-documented in the Commission’s TCPA docket, including by ACA in its pending Petition.⁶ Without relief, companies continue to risk extraordinary liability when, despite attempting to initiate contact to a number expressly provided for such contact, the number

⁴ Comments of Twitter, Inc. in Support of Stage Stores, Inc.’s Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 13 (filed Aug. 8, 2014)(“Twitter Comments”).

⁵ In its pending Petition, ACA proposed that the FCC establish a safe harbor for non-telemarketing calls to apply in those circumstances when the caller had previously obtained appropriate consent and in good faith intended to contact the person who had provided such consent to be called. *See* ACA International, *Petition for Rulemaking of ACA International*, CG Docket Nos. 02-278, RM-11712, at 15 (filed Jan. 31, 2014)(“ACA Petition”).

⁶ *See, e.g.*, ACA Petition; Twitter Comments; United Healthcare Services, Inc., *Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed Jan. 16, 2014); Stage Stores, Inc. *Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed June 4, 2014) (“Stage Stores Petition”); Comments of Wells Fargo to Stage Stores, Inc. Petition, CG Docket No. 02-278 (filed Aug. 8, 2014)(“Wells Fargo Comments to Stage Store”).

has been reassigned without the caller’s knowledge, or a person other than the person who provided the consent happens to answer the call.

The Commission’s TCPA docket reflects that potential liability related to reassigned or other “wrong” number calls does not discriminate. Entities operating in nearly every sector of the economy have faced TCPA lawsuits based on calls or text messages to telephone numbers for which they had obtained prior express consent but inadvertently – and in good faith – reached someone other than the intended recipient of the call.⁷ From the National Rural Electric Cooperative Association to the National Council of Nonprofits, to Twitter to Wells Fargo, any entity that uses an automatic telephone dialing system (“ATDS”)⁸ to make calls to mobile telephone numbers, even when prior express consent has been obtained, faces tremendous risk that any of the numbers it dials may have been reassigned from the time prior express consent was provided (or risks that another person may simply happen to answer the call).

Significantly, there is no database in existence that reliably verifies the continued accuracy of the named subscriber to a given mobile telephone number, there is no database that reliably accounts for business or family plans where the “subscriber” may be different from the person providing consent to a telephone call, and there is no database that includes every single carrier.⁹ While some have pointed to third-party databases containing reassigned number information as a potential “solution,” the inescapable truth is that no database is even close to being accurate enough to protect

⁷ See Twitter Comments at 6.

⁸ An “automatic telephone dialing system” (“ATDS”) is defined in 47 U.S.C. § 227(a)(1).

⁹ See CBA Petition at 9, discussing the inadequacy of even the most stringent compliance measures to eliminate inadvertently calling reassigned numbers.

a caller from the strict liability imposed by the TCPA.¹⁰ Thus, in today’s hyper-litigious TCPA environment, reliance on such databases is ineffective to shield a company from liability for inadvertently placing a call to a reassigned number not captured by the database or for when someone other than the intended recipient answers the phone, such as a roommate or child.

Furthermore, because courts in different jurisdictions have been inconsistent in defining “called party” in the absence of explicit Commission guidance, liability and the theory of liability differs in such cases based on the jurisdiction of the lawsuit. Federal courts have interpreted the phrase “called party” in at least four different ways. Several courts have found correctly that “called party” must mean the “intended recipient,” and that to find otherwise renders the “prior express consent” defense useless.¹¹ Other courts have held differently, finding that “called party” means “current subscriber,” “regular user of the phone” and/or “the person who happened to answer the phone.”¹² As a result, not only is liability contingent on the “luck” of who happens to answer the

¹⁰ For example, Wells Fargo describes a putative nationwide class action lawsuit in which it was sued for placing a call to a cellular telephone number expressly provided by its customer. As soon as Wells Fargo learned the number had changed hands, it updated its system and the number was not called again. See *Heinrichs v. Wells Fargo Bank*, Case No. 3:13-cv-05434-WHA (N.D. Cal., filed Nov. 22, 2013) (described in Comments of Wells Fargo to Rubio’s Restaurant Inc. Petition, CG Docket No. 02-278 at 2 (filed Sept. 12, 2014)).

¹¹ Cases finding that “called party” means “intended recipient” include *Cellco P’Ship v. Dealers Warranty, LLC*, No. 09–1814 (FLW), 2010 WL 3946713, at *10 (D.N.J. Oct. 5, 2010) (finding that the phrase “called party” means “the intended recipient of the call”); and *Leyse v. Bank of Am.*, No. 09-7654, 2010 WL 2382400, at *4 (S.D.N.Y. June 14, 2010) (“*Leyse I*”) (unintended recipient not the “called party” because businesses will have no way of knowing whether the individual on the other end has given prior express consent). See also *Kopff v. World Research Grp., LLC*, 568 F. Supp. 2d 39, 40-42 (D.D.C. 2008)(unintended recipient of faxes lacks standing to sue).

¹² See, e.g. *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F. 3d 1036, 1043 (9th Cir. 2012) (called party means “recipient”); *Manno v. Healthcare Revenue Recovery Grp., LLC*, 289 F.R.D. 674, 682 (S.D. Fla. 2013) (called party means “the regular user of the phone”); *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637, 643 (7th Cir. 2012)(called party means “subscriber”).

telephone, but also the “luck” of which particular court or judge is interpreting the “prior express consent of the called party” defense.

The lack of explicit Commission guidance on what is meant by “called party” in this particular context has allowed a continuing onslaught of opportunistic TCPA litigation. The resulting harm is substantial and growing. Given the unforgiving nature of the TCPA’s statutory damages that quickly escalate, coupled with the fact that as many as 37 million telephone numbers are recycled each year by telephone companies,¹³ it is imperative that the Commission does not leave liability to luck.

II. The Requested Clarification Honors Congressional Intent

It is a fundamental tenet of administrative law that agencies are required to interpret and implement statutory language in a manner consistent with Congressional intent.¹⁴ Under the TCPA, while generally prohibiting prerecorded voice messages and autodialed calls to cellular telephones, Congress specifically chose to provide two exceptions: (1) calls made for emergency purposes, and (2) calls made with the “prior express consent of the called party.”¹⁵ While the Commission has the authority to interpret terms of a statute that are unclear, it does not have the authority to disregard or nullify the will of Congress. Here, Congressional intent is expressly clear: to provide an exception to the prohibition on autodialed calls to mobile numbers if the call is made with prior express consent.

Any interpretation of “called party” other than “intended recipient” nullifies the “prior express consent” exception because, as explained above, it is impossible for callers to know with

¹³ Alyssa Abkowitz, “Wrong Number? Blame Companies’ Recycling,” *The Wall Street Journal* (Dec. 1, 2011), available at <http://online.wsj.com/news/articles/SB10001424052970204012004577070122687462582>

¹⁴ See *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014).

¹⁵ See 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii).

complete certainty to whom a telephone number is currently assigned, whether the person providing consent is the actual “subscriber” of a number, or even who might just happen to answer the telephone.¹⁶ Thus, while the term “called party” may be subject to varying interpretations when read in isolation, once it is read in the context of the sentence in which it appears, there is only one interpretation of “called party” that is consistent with Congressional intent to provide a meaningful statutory defense: “intended recipient.”

The Supreme Court has recently confirmed the importance of context when interpreting statutes, emphasizing to agencies that “the words of a statute must be read in their context”¹⁷ and explaining that “the presumption of consistent usage ‘readily yields’ to context, and a statutory term – even one defined in the statute – ‘may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.’”¹⁸ This admonishment from the country’s highest court is especially instructive here - ascribing any interpretation other than “intended recipient” to the undefined phrase “called party” is unallowable as it would render meaningless the “prior express consent” exception that Congress expressly provided to callers.

A recent Commission Enforcement Advisory also implicitly presumes an “intended recipient” reading of the term “called party.” In that advisory, the Commission clarified that “[c]allers

¹⁶ Many other commenters have also highlighted how any interpretation other than “intended recipient” renders the prior express consent exception meaningless and illusory. *See, e.g.*, CBA Petition at 4; Comments of Wells Fargo to Consumer Bankers Association Petition, CG Docket No. 02-278 (filed Oct. 29, 2014) (“Wells Fargo Comments to CBA Petition”) at 3-4; *see also* Twitter Comments at 11.

¹⁷ *Utility Air Regulatory Grp.*, 134 S. Ct. at 2441 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133 (2000)).

¹⁸ *See id.* (quoting *Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007)).

contending that they have the prior express consent to make prerecorded voice or autodialed calls to cell phones or other mobile service numbers should know that they have the burden of proof to show that they obtained such consent.”¹⁹ While callers can meet their burden of proof for calling an “intended recipient” by simply showing evidence of prior express consent to call the mobile number in question, it would be impossible for a candidate (or any other caller) to ever meet the burden of proof in instances when an unintended recipient answers the call because there could be no way to obtain prior consent in those unexpected instances. Thus, for callers to ever have a meaningful opportunity to rely on the prior express consent defense that Congress specifically intended, “called party” must mean “intended recipient.”

III. Manual Dialing is No “Solution”

Some have suggested that companies should, despite having already obtained prior express consent, manually verify every single call prior to making any call through an ATDS. This unhelpful suggestion blatantly ignores the fact that Congress clearly saw the value and inherent efficiency associated with certain autodialed calls, including autodialed calls to mobile numbers, as reflected through the express exemption for such calls in the statute. A manual call for the purpose of just “checking to make sure” the number has not changed hands, or the intended recipient is available to answer the call, is nonsensical, cost-prohibitive, and undermines the very purpose of using an autodialer, i.e. to increase efficiency and decrease dialing mistakes. Not only is continuous manual verification simply unworkable, but is also likely to be annoying to consumers.

¹⁹ Enforcement Advisory, Warning Political Campaigns and Promoters Against Robocall Abuse, FCC, DA 14-505 (Oct. 21, 2014) *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1021/DA-14-1505A1.pdf.

Moreover, even manual dialing poses a separate set of risks, particularly without clarification from the Commission that explicitly limits an ATDS to equipment with the “present” ability to work as an ATDS under the statute,²⁰ as supported by the Department of Justice.²¹ For example, ACA has previously described a situation in which a member specifically used a manual system and was still sued, and is being threatened with additional lawsuits, under the frivolous theory that the dialing system “could be modified” to ultimately have the requisite “capacity” by, for example, *plugging the manual dialing system into an ATDS*.²² Under that theory, there literally is no way to comply with the statute or the Commission’s rules, ultimately rendering the statute and rules meaningless.

Because callers cannot completely avoid dialing numbers that have been reassigned, and manual dialing is not a solution, the Commission has the responsibility to provide guidance on this issue. To ensure that the statute does not “demand[] the impossible,”²³ ACA urges the Commission

²⁰ See, e.g., ACA Petition; ACA International, *Comments*, CG Docket No. 02-278, at 3, 5 (filed Mar. 24, 2014) and Reply Comments (filed Apr. 8, 2014); ACA International, *Notice of Ex Parte*, CG Docket No. 02-278 (filed May 9, 2014); ACA International, *Notice of Ex Parte*, CG Docket No. 02-278 (filed Jul. 2, 2014); ACA International, *Notice of Ex Parte*, CG Docket No. 02-278 (filed Jul. 21, 2014); ACA International, *Notice of Ex Parte*, CG Docket No. 02-278 (filed Sep. 16, 2014); and ACA International, *Notice of Ex Parte*, CG Docket No. 02-278 (filed Nov. 3, 2014).

²¹ See *Aja de los Santos v. Millward Brown, Inc.*, United States’ Memorandum in Support of the Constitutionality of the Telephone Consumer Protection Act, 9:13-cv-80670-DPG (S.D. FL. Jan. 31, 2014), at 11, n. 7 (citing *Hunt v. 21st Century Mortg. Co.*, 2:12-CV-2697-WMA, 2013 WL 5230006, at *4 (N.D. Ala. Sept. 17, 2013))(citing to a case which concludes “that device in question had to have present capacity, at the time the calls were being made, to store or produce and call numbers from a number generator.”).

²² ACA International, *Notice of Ex Parte*, CG Docket No. 02-278 (filed May 9, 2014).

²³ *In re Rules & Regulations Implementing the TCPA*, 19 FCC Rcd. 19215, 19219 (2004) (“2004 Order”) (quoting *McNeil v. Time Ins. Co.*, 205 F.3d 179, 187 (5th Cir. 2000)).

to clarify that “called party” refers to the “intended recipient” as requested by CBA and a chorus of others.

IV. The Clarification Will Not Cause Consumers to Lose Any of Their Rights under the TCPA or to Be Exposed to an Onslaught of Unwanted Mobile Number Calls

ACA is very mindful that any approach to “wrong number” calls must not result in a loss of consumer rights or subject consumers to an onslaught of unwanted calls to their mobile numbers.

CBA’s requested clarification does neither. Instead, clarifying that “called party” in section 227(b)(1)(A) means “intended recipient” is a straightforward, common-sense approach that is consistent with the statute and Congressional intent while at the same time being limited: the clarification will simply and only allow callers to rely on the prior express consent obtained.

Importantly, the requested clarification is further limited because once a caller learns that a number no longer belongs to the intended recipient, further calls to the number would be unlawful and subject to enforcement and private actions under the TCPA. As a result, the clarification affects only the calls for which a calling party, through no fault of its own, has no reason to know that the number it is dialing has been reassigned to another party or that its call would be picked up by someone other than the intended recipient.

Furthermore, callers making informational, non-telemarketing calls have no incentive to knowingly dial reassigned numbers, whether the clarification is made or not. Calling unintended recipients is a waste of time, money, and effort.²⁴ As a result, while the clarification will provide valuable relief from potentially massive liability for inadvertently dialing reassigned numbers, it will not open the floodgates to intentional wrong number calls as such calls will continue to be unlawful.

²⁴ See Notice of Ex Parte, ACA International, CG Docket Nos. 02-278, at 5 (filed May 9, 2014).

For these reasons, ACA supports CBA and others urging the Commission to act expeditiously and clarify that “called party” under the TCPA means “intended recipient.” Not only is this much-needed clarification the only interpretation of “called party” that honors the intent of Congress and avoids rendering the exemption meaningless, but it is also narrowly tailored to strike the appropriate balance between protecting consumers from unwanted calls and protecting callers from being held to an impossible compliance standard in which liability turns on sheer luck. This clarification is consistent with the law and common sense, and appropriately balances consumers’ growing reliance on mobile telephones, the speed and volume of mobile number reassignments, and the need for callers to be able to rely on the express consent they have been provided.

Alternatively, ACA urges the Commission to provide some form of relief by adopting, at a minimum, an extension of the existing TCPA safe harbor as ACA described in its Petition, along with a path for retroactive waiver.²⁵

Respectfully submitted,



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²⁵ See ACA Petition at 15-16. See also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 19 FCC Rcd 19215, 19218-19220 ¶¶ 7-13 (2004).