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TCPA: An Antiquated Law That Needs To Be Fixed

By **David Carter** (August 2, 2018, 11:48 AM EDT)

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More than 25 years after Congress adopted the Telephone Consumer Protection Act — the nation's first comprehensive law targeting the millions of abusive robocalls intruding into Americans' daily lives — people are more frustrated than ever about unwanted telemarketing. According to a report recently released by the Federal Trade Commission, the number of complaints about automated telemarketing calls jumped steeply (again) last year, and since 2009 these types of complaints have quintupled in number. At the same time, an astounding increase in TCPA-related litigation over the past few years has made the TCPA the second most filed type of case in our federal court system. Unfortunately, rather than serving as a deterrent to bad actors, the deluge of litigation filling our federal courts is targeting American businesses communicating with their own customers. This influx of litigation is occurring despite the fact that Congress did not have this in mind when the law was implemented. "Congress did not intend for the TCPA to be a 'barrier to the normal, expected or desired communications between businesses and their customers,'" a group of U.S. senators recently reminded Federal Communications Commission Chairman Ajit Pai.

These trends beg an important question: Why is the TCPA not reducing the number of unwanted calls and what should be done about it?

After years of bearing witness to these trends, reading nearly every TCPA opinion issued by the federal courts, and talking with countless businesses, my conclusion is that the TCPA is so outdated that it is broken. Simply put, the statute fails to reach its primary goal — protect consumers from unwanted calls. At the same time, it harms legitimate businesses, stymies innovation and ultimately deprives consumers of communications that they actually want.

The law is plainly outdated. Think of all the technological innovation that has occurred in the years since Congress adopted the TCPA in 1991. Teenagers now carry their own phone in their pocket, rather than having to get permission from mom and dad or fight with siblings for privacy. Text messages were not only invented, but have become a ubiquitous form of communication, with an estimated 90 percent of consumers receiving unlimited text messages as part of their monthly mobile service. At the same time, the global nature of businesses and the expectation of immediate access to information puts unprecedented pressure on businesses to keep consumers instantly updated and engaged. Congress could not have fully envisioned these dramatic changes.

Despite all these changes, however, Congress has not updated or modernized the TCPA's statutory language. Instead, in the absence of Congressional action, the FCC has taken it upon itself to change the regulations interpreting the TCPA in an effort to keep pace with technology. The FCC's actions have resulted in a constant expansion of the TCPA to more and more businesses. For example, the FCC — not Congress — declared that the TCPA should be expanded to cover text messages, not just phone calls. And it was the FCC — again, not Congress — that expanded the reach of the TCPA to cover not just calls made randomly to telephone numbers, but calls made

purposefully by businesses to communicate with their customers.

The FCC took both of these actions despite the fact that Congress emphasized in 1991 that the law was being implemented to address the practice of telemarketers using autodialers and prerecorded messages to randomly dial people to pitch them encyclopedias, timeshares or the latest household gadget. Again, Congress never intended to regulate the calls between companies and their existing customers.

The FCC's decision to constantly expand the TCPA finally caught up with it earlier this year, when a federal court found that the FCC had acted unlawfully in its 2015 expansion of the TCPA. In that case, the D.C. Circuit found that the FCC had twisted the TCPA to such an extreme interpretation that it encompassed the smartphones used by millions of everyday Americans. (Yes, that's right, under the FCC's 2015 TCPA interpretation, even you could have been sued in federal court just for calling someone without their permission!)

Like the reach of the statute itself, the face of TCPA litigation has also changed in unexpected ways since 1991. When the TCPA was first adopted, Congress sought to empower consumers who were truly annoyed with unwanted calls to take action, and it therefore anticipated that claims would be brought by individuals, without counsel, in small claims courts. Today's reality, however, is far different. Instead of individuals standing up to abusive robocallers, we see professional plaintiffs attorneys spend their days ginning up litigation against good faith American companies and partnering with professional plaintiffs that make a living off of filing TCPA claims. These attorneys and plaintiffs do not try to bring cases against bad actors, but instead work together in the hopes of extracting settlements from companies that fear the time, expense and distraction of defending themselves in court.

These TCPA litigation factories have popped up around the country in large part because the TCPA is a unique statute; so unique, in fact, that in 2011, U.S. Supreme Court Chief Justice John Roberts described the TCPA as "the strangest statute I've ever seen." One of the strangest aspects of the TCPA is that it allows individuals to receive statutory damages of $500 for each call or text message that is made or sent in violation of the TCPA, with no limitation or "cap" on the amount of damages and no prohibition against bringing class action claims. When it comes to the TCPA, the sky is the limit, and that is why professional plaintiffs and their lawyers have made it commonplace for businesses to face claims demanding hundreds of millions of dollars. The TCPA is also strange because it is a strict liability statute, a rare type of federal law that imposes liability even if the company's violations are accidental. (Indeed, a willful violation will result in even higher damages.) The TCPA's strict liability and uncapped statutory damages provisions are a combustible recipe that fuels high-stakes litigation.

Think about this for a moment: a U.S. business is more likely to face crippling litigation and be forced into bankruptcy for accidentally sending text messages than it is for intentionally discriminating against women or members of another protected minority group. Federal law caps the combined value of compensatory and punitive damages recoverable under Title VII and the Americans with Disabilities Act based on the size of the employer, with the highest award being $300,000; the TCPA includes no similar cap, no matter whether the violations are accidental or willful. Thus, federal law penalizes more harshly a company that inadvertently sends consumers a text message without appropriate consent than it does a company that intentionally discriminates. This simply makes no sense.

And, here is the other reality: The vast majority of the unwanted robocalls that consumers complain about are made by companies that either operate outside of the United States or that have no real assets to pay a judgment against them. There is nothing more challenging for a plaintiffs attorney than trying to track down a foreign company and nothing less appealing than trying to get blood out of the proverbial turnip. And, as a result, few of these class action claims are brought against the bad actors flooding your phones with unwanted calls. Instead, honest companies that have done their best to interpret and comply with the FCC's complex web of rules and regulations are the ones

that become ensnared in litigation.

Even worse, in my view, is that the very threat of TCPA litigation causes many good companies to forgo using modern methods of communication to keep their consumers informed. There is rarely a day that goes by that I do not hear from a new business that it trying to make the difficult decision about whether it can and should use text messaging to communicate with its customers. The fear of the TCPA that grips so many American companies leaves consumers as the ultimate losers. Consumers are stuck with the worst of both worlds: They keep getting the calls they don't want, while not getting the ones they do.

It does not have to be — and should not be — this way. When Congress adopted the TCPA it knew that technology would change; it knew that its 1991 solution to 1991 problems was not the final answer. That is why Congress directed the FCC to "propose specific restrictions to the Congress" if it concluded that the TCPA needed to be modified. It is time for the FCC to do just that. Let Congress do its job and adopt laws that actually target the bad actors while eliminating the incentive for TCPA litigation factories to continue targeting law-abiding American companies.

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