

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

**Comments in Reply to ACA International’s Reply Comments Regarding the
Petition for Declaratory ruling of the Consumer Bankers Association**

filed January 12, 2015

On December 1, 2014, ACA International (“ACA”) filed comments¹ responding to the opposition of the National Consumer Law Center,² National Association of Consumer Advocates,³ Americans for Financial Reform, Consumer Action, Consumers Union, Public Citizen, and U.S. Public Interest Research Group (collectively, “Consumer Groups”) to the Consumer Bankers Association’s (“CBA”) petition for a declaratory ruling limiting the term “called party” under the Telephone Consumer Protection Act (“TCPA”) to only consumers the caller *intended* to call.⁴

ACA suggests that the Consumer Groups are “engaged in a strategy of fear-mongering” and attempting to “scare” the Commission into denying the CBA’s petition. Notwithstanding ACA’s overheated (and unhelpful) rhetoric, it is apparent that ACA’s position lacks merit. We are

¹ See Reply Comments of ACA International, CG Docket No. 02-278 (filed Dec. 1, 2014) (available at <http://apps.fcc.gov/ecfs/document/view?id=60000989021>) (“ACA Reply”).

² The **National Consumer Law Center (“NCLC”)** is a non-profit corporation founded in 1969 to assist legal services, consumer law attorneys, consumer advocates and public policy makers in using the powerful and complex tools of consumer law for just and fair treatment for all in the economic marketplace. NCLC has expertise in protecting low-income customer access to telecommunications, energy and water services in proceedings at the FCC and state utility commissions and publishes *Access to Utility Service* (5th ed. 2011) as well as NCLC’s *Guide to the Rights of Utility Consumers* and *Guide to Surviving Debt*. These comments were written by Margot Saunders of the National Consumer Law Center and NACA member Dan Marovitch of the Burke Law Offices, LLC.

³ The **National Association of Consumer Advocates (“NACA”)** is a non-profit association of consumer advocates and attorney members who represent hundreds of thousands of consumers victimized by fraudulent, abusive, and predatory business practices. As an organization fully committed to promoting justice for consumers, NACA’s members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means.

⁴ See Public Notice, Consumer & Gov. Affairs Bureau Seeks Comment on Pet. for Declaratory Rulemaking from Consumer Bankers Ass’n, GC Docket No. 02-278 (Oct. 17, 2014) (available at <http://www.fcc.gov/document/cgb-seeks-comment-petition-consumer-bankers-association>); *Consumer Bankers Ass’n*, Petition for Declaratory Rulemaking, CG Docket No. 02-278 (filed Sept. 19, 2014) (available at <http://apps.fcc.gov/ecfs/comment/view?id=6019372731>) (“CBA Pet.”).

submitting these comments in reply to ACA's filing, to ensure that consumers are heard and adequately protected through an appropriate interpretation of the TCPA.

I. Granting the CBA's petition will benefit violators at the expense of consumers.

ACA International—a trade organization for the collection industry and repeat-petitioner for weaker TCPA protections⁵—asserts that “multiple calls to known wrong numbers and other egregious caller conduct” would still be prohibited if “called party” meant “intended recipient” under the TCPA.⁶

ACA's argument ignores our points about the reality and effects of these calls on consumers. For one, granting the CBA's petition will remove any incentive businesses currently have to avoid making autodialed or prerecorded voice calls to wrong numbers. Instead, because businesses will be able to rely on the purported “consent” provided months or even years prior, by whoever they intended to call, it will place the onus on the *consumer* to notify the caller of a wrong number. This is problematic, as many prerecorded messages do not permit recipients to even speak with a live person to make a direct wrong-number notification or do-not-call request. If the CBA's petition is granted, consumers will have the burden to affirmatively return the call and hope that they are able to speak to a live person.

Moreover, consumers report that their wrong-number notifications and do-not-call requests are frequently ignored by debt collectors, many of whom either do not care that they are calling the wrong number, or assume that the consumer is lying about not being the debtor they intended to call. If the CBA petition is granted, businesses would have little incentive to maintain adequate records of wrong number notifications, as such information can only serve as evidence against them if further calls are made to the particular number. Assuming the caller can actually be identified, it is often necessary for the consumer to take even more time to send a letter, fax, or e-mail to ensure that there is actually a record of the notification to the business that called a wrong number.

The TCPA is a consumer protection statute. The procedure proposed by the CBA would shift the burden of persuasion to the consumer to prove that callers had knowledge-in-fact that they were calling the wrong number. This procedure would be antithetical to decades of precedent holding that the proponent of a statutory exception bears the burden to show that it is entitled to such.⁷

⁵ See, e.g., *In re Rules & Regulations Implementing the TCPA*, 23 FCC Rcd 559, 563 ¶ 8 (2008) (seeking “clarification” that “the prohibition against autodialed or prerecorded calls to wireless telephone numbers in 47 C.F.R. § 64.1200(a)(1)(iii) does not apply to creditors and collectors when calling wireless telephone numbers to recover payments for goods and services received by consumers”); *Petition for Rulemaking of ACA Int'l*, CG Dkt. No. 02-278, at pp. 1-2 (Jan. 31, 2014) (attempting to limit the definition of an “automatic telephone dialing system,” attach the need for prior express consent to the debtor only, and establish a “safe harbor” for wrong number calls).

⁶ ACA Reply at 3-4.

⁷ See *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) (noting the “general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits”).

A rule that callers need only assert that they had the “prior express consent” of whoever they *intended* to call would create a disconnect between the person the statute was designed to protect, and the person who has a right to enforce the statute. It is not the intended recipient who receives wrong-number calls; wrong-number calls by definition are received by a bystander with no relationship with the caller. It is the bystander, rather than the intended recipient, whose life is repeatedly and robotically interrupted by such calls, and it is the bystander whom the statute is designed to protect.⁸ The onus should be on debt collection agencies and other callers, not on the bystander, to ensure compliance.

The “intended recipient” position is also entirely unworkable from an enforcement standpoint. The call recipient—or a government agency seeking to enforce the TCPA—will have absolutely no idea whether the caller (or, in the case of a debt collector, its third-party creditor client) had the “prior express consent” of some unknown individual previously associated with his or her current number. Only the caller would have this information, and the former owner of the number would ultimately need to be tracked down and questioned to determine whether consent was even provided in the first place. Likewise, an inquiry would be required into whether and when the caller knew it was calling a wrong number—likely relying (especially in the case of an oral notification) on the caller’s own records, which are often very poorly maintained. Granting the CBA’s petition, therefore, will unreasonably complicate the “prior express consent” analysis, greatly increase the time and expense of enforcement, and decrease the overall efficacy of the TCPA.

Granting the CBA’s petition would exacerbate the problem of wrong-number calls and undermine consumers’ ability to stop them. The CBA’s petition should be denied.

II. Congress did not grant callers a wholesale “bulletproof solution” to liability; rather, the TCPA prohibits robocalls and puts the burden on the caller to establish that it had the called party’s prior express consent to make what would otherwise be an illegal call.

ACA takes our acknowledgment that—as with anything in which humans are involved—human error can and likely will *to some extent* occur, as some kind of proof supporting its position. This misses the point. Calls to wrong numbers are not illegal. The TCPA allows autodialed and prerecorded calls to cell phones, as long as they are made with the “prior express consent of the called party.”⁹ Companies that choose—and it *is* a choice—to make calls using autodialer or prerecorded voice technology inherently assume some level of risk that they may end up calling a wrong number. ACA’s position seems to infer that the problem with autodialed calls to wrong numbers arises because consumers did something wrong. Not so. The issue exists because of the automated nature of the technology and debt collectors’ desire to increase efficiency at society and consumer expense.

Companies that hand-dial live calls to cell phones need not worry about the TCPA, or calling the wrong number. Live agents are able to interact with persons that answer calls. Live callers will listen to voicemail messages, and are able to understand that the voicemail message says that they

⁸ See *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637, 638-41 (7th Cir. 2012), *reh’g denied* (May 25, 2012) (describing—in opinion rejecting “intended recipient” argument—this wrong number bystander call situation and finding debt collector’s argument that Customer’s consent must last until Bystander revokes it as “odd”).

⁹ 47 U.S.C. § 227(b)(1)(A)(iii).

have reached the voicemail of “Frank” instead of a debtor named “Julia.” Computers cannot do this.

The potential for improper calls can be reduced or even eliminated by maintaining reasonable practices to ensure that only the right individual is called—for example, by independently verifying that the number is correct through use of a live operator before using an autodialer or prerecorded voice (rather than, as most debt collectors do, simply relying on outdated contact information provided by the creditor). This process is required in some states.¹⁰ Companies that wish to use autodialers may also use third-party services like Neustar to verify contact information before calling, manually dial after an extended period of no communication or after receiving a triple tone, remove known bad numbers from call lists, ask customers to verify or update their contact information on a regular basis, etc. Such practices not only provide necessary protections to consumers, but ensure that businesses waste less of their own resources calling the wrong person.

The defeatist argument that, because *some* wrong number calls might still be made, debt collectors and other callers should be absolved of *any* duty to prevent prohibited calls to wrong numbers, is absurd. Adoption of ACA’s proposed rule will result in widespread indifference on the part of debt collectors and other callers to the need to avoid wrong-number calls. It will result in many millions more wrong number calls to consumers, who will have the burden of proving the debt collector’s state of mind in order to make calls stop. Those consumers deserve to be protected just the same as any other recipient of an autodialed or prerecorded voice call to which they did not consent. Congress did not include a “wrong number call” exception to liability under § 227(b)(1)(A), and it would be inappropriate for the Commission to create one.

ACA greatly overstates the specter of liability for occasional wrong-number calls caused by human error. The TCPA provides for minimum statutory damages of only \$500, just \$100 more than what it costs to file a lawsuit in federal court.¹¹ Many consumers find the potential recovery simply not worth the time, expense, and risk of an individual *pro se* action against a sophisticated corporate defendant. Because the statute is not fee-shifting, consumers typically are only be able to retain counsel to pursue claims under the TCPA through a class action or if they were unfortunate enough to have received a significant number of calls. Only in the case of repeat violations are calls likely to face liability.

Without citing any authority, ACA asserts that “Congress was crystal clear that callers should be able to rely on [the prior express consent] exception when dialing mobile numbers[.]”¹² Nowhere in the statutory text of the TCPA, however, does it say that callers are entitled to rely on some *prior individual’s* consent. Rather, as reflected in the Commission’s own rulings, the TCPA places the responsibility of ensuring that the requisite consent exists on the calling party, not the party called.¹³

¹⁰ See, e.g., Minn. Stat. § 332.37(13) (prohibiting collection agencies from “communicat[ing] with a debtor by use of a recorded message utilizing an automatic dialing announcing device unless the recorded message is immediately preceded by a live operator who discloses prior to the message the name of the collection agency and the fact the message intends to solicit payment and the operator obtains the consent of the debtor to hearing the message”).

¹¹ See 47 U.S.C. § 227(b)(3).

¹² ACA Reply at 3.

¹³ See, e.g., *In re Rules & Regulations Implementing the TCPA*, 27 FCC Rcd 15391, 15398 ¶ 12 (2012) (“Entities that send opt-out confirmation text messages will bear the burden to show that their messages are

ACA asks the Commission to ignore the complete absence of “intended recipient” from the text of the TCPA,¹⁴ the repeated instances within the text of the TCPA in which “called party” clearly means the actual recipient of the call,¹⁵ the explicit findings of Congress indicating that it was the *recipient* of the call that the TCPA was intended to protect,¹⁶ other indications within the legislative history of the TCPA that Congress intended to “ban all autodialed calls, and artificial or prerecorded calls, to ... cellular phones [.]”¹⁷ and the Commission’s own references to consent being required from the “recipient” of the call.¹⁸ ACA’s position relies on the desire of its members for relief from liability because of their continued violations of the TCPA, not on the law, the legislative history, the Commission’s rulings, or judicial interpretations of the meaning of § 227(b)(1)(A).

That wrong number calls may occur does not mean that the Commission should take it upon itself to expand the limited exception provided by Congress and permit companies to make nonconsensual calls that Congress expressly intended to prohibit. Doing so would place the remedial purpose of the TCPA on its head—protecting violators at the expense of consumers. As the Seventh Circuit recognized, “replac[ing] ‘called party’ with ‘intended recipient of the call[]’ ... would expose new subscribers to unwanted calls and unjustified expense. Congress might have thought the current approach preferable, as a safeguard of persons assigned to recycled numbers, even though this protection comes at some cost to bill collectors.”¹⁹ The Commission should join virtually every court to have considered this issue, in rejecting the “intended recipient” argument as contrary to both the TCPA’s plain language and the consumer interests it was enacted to protect.²⁰ The CBA’s petition should be denied.

consistent with these characteristics or otherwise encompassed by prior express consent.”); *see also In re Rules & Regulations Implementing the TCPA*, 7 FCC Rcd 8752, 8765 ¶ 23 n. 44 (1992) (“We emphasize that ... the person or entity making a telephone solicitation, or on whose behalf a telephone solicitation is made, will ultimately be held responsible for compliance with our rules.”); *accord In re Rules & Regulations Implementing the TCPA*, 10 FCC Rcd 12391 ¶ 13 (1995).

¹⁴ *See Soppet*, 679 F.3d at 640 (“The phrase ‘intended recipient’ does not appear anywhere in § 227, so what justification could there be for equating ‘called party’ with ‘intended recipient of the call?’”).

¹⁵ *See* 47 U.S.C. §§ 227(b)(1)(A)(iii), 227(c), and 227(d)(3)(B) (referencing “called party” as party charged for the call or the call’s recipient). In fact, while ACA cites *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427 (2014), for the unexceptional proposition that words of a statute must be read in their context, ACA Reply at 4, it omits the Supreme Court’s other admonition that “[o]ne ordinarily assumes ‘that identical words used in different parts of the same act are intended to have the same meaning.’” *Util. Air Regulatory Grp.*, 134 S. Ct. at 2441 (quoting *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 57 (2007)).

¹⁶ “Banning ... automated or prerecorded telephone calls ..., except when the **receiving party** consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.” Pub. L. No. 102-243, § 2(12) (1991), *codified at* 47 U.S.C. § 227 (emphasis added).

¹⁷ S. Rep. No. 102-178, 6 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1974.

¹⁸ *See, e.g., In re Rules & Regulations Implementing the TCPA*, 27 FCC Rcd 15391, 15398 ¶ 14 (2012) (“[T]he transmission of such text messages is permissible under the TCPA because **recipients** of these texts have given prior express consent within the meaning of section 227.”) (emphasis added).

¹⁹ *Soppet*, 679 F.3d at 642.

²⁰ *See generally* Comments of the Consumer Groups, at pp. 7-9.

III. Conclusion

Stopping unwanted robocalls is of great importance to consumers. In 2013 testimony to the Senate, the FTC noted that consumer complaints regarding unauthorized robocalls had increased from 63,000 per month in the fourth quarter of 2009 to 200,000 per month in the fourth quarter of 2012.²¹

Despite ACA's attempts to downplay the impact of the CBA's petition, this "very narrow request" to completely upend the consent defense under the TCPA would have severe, negative consequences for consumers. There is nothing "normal, expected, and desired" about receiving a wrong number debt collection²² or other robocall to which the recipient never consented. For the reasons explained above, we respectfully request that the CBA's petition be denied.

Respectfully submitted,

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²¹ Testimony of Lois Greisman, Associate Director of the Division of Marketing Practices, FTC Bureau of Consumer Protection, before the Senate Committee on Commerce, Science and Transportation Subcommittee on Consumer Protection, Product Safety, and Insurance, July 10, 2013, on "Stopping Fraudulent Robocall Scams: Can More Be Done?," page 9, available at http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-entitled-%E2%80%9Cstopping-fraudulent-robocall-scams-can-more-be/130710robocallstatement.pdf.

²² ACA's argument assumes that consumers—even those to whom the call was *intended* to be made—"expect and desire" its members' business communications. As addressed in our comments to the CBA's petition, this is in line with the "we know what's best for you" position frequently taken by those who make autodialed informational or non-telemarketing calls, regardless of any affirmative expression of consent. The necessity for "prior express consent" is even more clear in the context of debt collection, in which many *intended* recipients face unfair and harassing conduct. *See, e.g.*, 15 U.S.C. § 1692(a) (citing "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors ... contribut[ing] to ... invasions of individual privacy").