Statement of the U.S. Chamber Institute for Legal Reform

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On Behalf of the U.S. Chamber Institute for Legal Reform

ON: **The Telephone Consumer Protect Act of 1991, 47 U.S.C. § 227**

TO: **U.S. House of Representatives Committee on the Judiciary**
Subcommittee on the Constitution and Civil Justice

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Testimony of Becca Wahlquist

On Behalf of the U.S. Chamber Institute for Legal Reform

Regarding the Telephone Consumer Protection Act

Chairman King, Ranking Member Cohen, and distinguished members of the Subcommittee, thank you for inviting me to testify on behalf of the U.S. Chamber Institute for Legal Reform ("ILR"). The U.S. Chamber of Commerce ("the Chamber") is the world's largest business federation representing the interests of more than three million companies of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system. ILR is an affiliate of the Chamber dedicated to making our nation's civil legal system simpler, faster, and fairer for all participants.

I appreciate the opportunity to testify about the impact that the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA") is having on American businesses big and small, in a manner never intended by the drafters of this 26-year-old statute.

The TCPA is a well-intentioned statute that carries forward important policies and established our nation's Do Not Call list. But portions are horribly outdated; in particular, Section 227(b), intended to police cold-call telemarketing systems used in the early 90's, is now being expanded to attach liability to all manner of calls (i.e., transactional), and to encompass new technologies (i.e., text messages) that did not exist when the statute was drafted. Unfortunately, it is American businesses, and not harassing spam telemarketers, that are targeted by these suits. Indeed, businesses reaching out in good faith to customer-provided telephone numbers with non-marketing communications are now the most common target of TCPA litigation. The TCPA has created perverse incentives for persons to invite calls from domestic businesses and then sue for those calls, and for lawyers to avidly search for deep-pocketed defendants calling their potential clients; many individuals and attorneys now make their livings via the TCPA.

As a result, the federal court system is finding itself besieged with thousands of lawsuits alleging TCPA claims, with a good portion brought on behalf of putative nationwide classes. Certainly, so long as uncapped statutory damages are over-incentivizing TCPA litigation, such lawsuits will continue to flood federal courts. Thus, it is long past time for this statute to be revisited, and for it to come into line with the other federal statutes that provide for statutory damages when there is no requirement to show actual harm. While protections should remain for consumers, businesses too need protection from astronomical liability for well-intentioned communications to customer-provided numbers.

In short, TCPA litigation abuse is rampant. Its negative impact on American businesses and its stranglehold on federal court dockets is not what was intended when this statute was passed twenty-six years ago in a different technological era.

A. Background: The Destructive Force Of TCPA Litigation

The TCPA was enacted twenty-six years ago to rein in abusive telemarketers. But in recent years, American businesses have discovered that if they reach out to customers via call, text, or fax for any reason, their company is at risk of being sued under the TCPA. A plaintiff claims that a communication was made without his or her consent using certain technologies, and more often than not, that plaintiff claims to represent a nationwide class seeking the $500 (or $1,500, if willful) statutory damages available under the TCPA for each communication. Thus, the small business that sent 5,000 faxes finds itself being sued for a minimum of $2.5 million dollars; the restaurant that sent 80,000 text coupons is sued for trebled damages of $120 million dollars; and the bank with 5 million customers finds itself staring at $2.5 billion in minimum statutory liability for just one call placed to each of its customers. Further, individual plaintiffs can stockpile calls for years that they believe violate the TCPA and then make demands or sue once they reach critical mass—seeking $20,000 to $60,000 in individual damages, for

example, for 40 unanswered calls a company thought it was placing to its own customer's number over a three-year period. The targeted company must then decide whether to pay plaintiffs' counsel or the complaining individual, or to spend significant money defending an action in which statutory damages can reach into the millions or billions of dollars.

For fifteen years, I have defended various companies sued under the TCPA for a variety of communications made via phone, text, and facsimile. I have witnessed the growing cottage industry of TCPA plaintiffs and lawyers targeting American businesses that reach out to their own customers for any reason (transactional, informational, or marketing), and I can confirm that in the past few years the problems with TCPA litigation abuse have only worsened. Over-incentivized plaintiffs and a growing TCPA plaintiffs' bar, as well as an anti-business July 2015 Order from a three-commissioner FCC majority,[1] have led to an explosion of litigation throughout the country—litigation that is less about protecting consumers and more about driving a multi-million dollar commercial enterprise of TCPA lawsuits.

Indeed, while the TCPA itself does not provide for attorneys' fees, it is clear that TCPA class action lawsuits are a lawyer-driven business, with attorneys' fees awards (pulled from common class funds) dwarfing any recovery for individual consumers. For example, one survey of federal TCPA settlements found that in 2014, the average attorneys' fees payout for a range awarded in TCPA class action settlements was $2.4 million, while the average class member's award in these same actions was $4.12.[2]

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[1] *See In re Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C.Rcd. 7961 (2015) (hereafter, "July 2015 FCC Order"). Various appeals of this Order have been consolidated and are now pending before the D.C. Circuit Court of Appeals.

[2] *See* Wells Fargo Ex Parte Notice, filed January 16, 2015, in CG Docket No. 02-278, p. 19, available at http://apps.fcc.gov/ecfs/document/view?id=60001016697.

And it is not just large companies who find themselves targeted: small businesses throughout the country are finding themselves brought into court when they had no intention of violating any law and had no knowledge of the TCPA. One family-owned company from Michigan, Lake City Industrial Products, Inc. ("Lake City"), struggled for several years to defend a TCPA class action for 10,000 faxes, providing a chilling example of how the risks of unknowingly violating the TCPA can be exacerbated by lead generators who reach out to small companies and promise an inexpensive and legal way to get new businesses. Lake City received a faxed advertisement suggesting a way to generate new business: faxes to be sent to approximately 10,000 targeted businesses, all for the low sending cost of $92.[3] The family-run company believed it was engaging in a legal marketing tactic and worked with the fax advertiser to design the facsimile it would send; on summary judgment, the court found Lake City liable for approximately 10,000 violations of the TCPA for the unsolicited marketing facsimiles, even though Lake City noted that statutory damages of $5,254,500 would force it into bankruptcy.[4]

One company that tracks TCPA litigations reports that between 2010 and 2016, there was a 1,372% increase in case filings. [5] For just one example of how this has impacted the already-crowded federal court system, look to Florida: in 2015, at least 170 TCPA actions were filed in Florida's federal courts, compared with less than 30 such

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[3] *See Am. Copper & Brass, Inc. v. Lake City Indus. Products, Inc.*, 1:09-CV-1162, 2013 WL 3654550 (W.D. Mich. July 12, 2013) (business retained fax blaster to send faxes; no question that the business first inquired whether such faxes were legal and received assurances that they were).

[4] *See id.*at *6.

[5] *See* http://webrecon.com/out-like-a-lion-debt-collection-litigation-cfpb-complaint-statistics-dec-2015-year-in-review/.

federal actions in 2010.[6] Recently, I examined a snapshot of over 3,000 TCPA actions filed in the seventeen months after the FCC's 2015 ruling further wedged open the floodgates: I confirmed that hundreds of different businesses across forty different industries found themselves being sued under the TCPA in this timeframe.[7]

The dramatic increase in TCPA litigation is spurred by multi-million dollar settlements (such as Capital One's $75 million settlement reached in 2014, and Caribbean Cruises' $76 million settlement that received final approval in March of this year), as well as news of individual awards in the hundreds of thousands of dollars for some plaintiffs (such as one New Jersey woman's $229,500 verdict against her cable provider in July 2015,[8] or a Wisconsin woman's $571,000 verdict in 2013 against the finance company calling her husband's phone after she defaulted on car payments[9]). Attorneys have profited, often teaming up to split the costs of "investing" in a TCPA litigation, so that multiple firms split the business risk and share in the reward when companies facing enormous statutory damages end up settling.

Businesses in a wide range of industries and all along the spectrum in size have found themselves defending TCPA litigation and demands. These include social media companies, electric companies, banks, sports teams, schools, restaurants, and pharmacies, as well as a family-owned plumbing company, a ski resort, an accountant, and a local dentist's office. Indeed, now the TCPA not only has become a liability trap, but a

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[6] Source: Bloomberg Law Litigation & Dockets (searched on May 10, 2016 with a search of "TCPA" OR "telephone consumer protection" in the Florida District Courts).

[7] Study of 3,121 TCPA cases; research to be published later this year.

[8] *King v. Time Warner Cable*, 113 F. Supp. 3d 718 (S.D.N.Y. 2015).

[9] *Nelson v. Santander Consumer USA, Inc*., 2013 WL 1141009 (W.D. Wisc., March 8, 2013), a decision later vacated by agreement of the parties as part of a confidential settlement.

vicarious liability trap as well. For example, companies (such as manufacturers) who place no phone calls to consumers are finding themselves defending class action litigation for millions of calls or texts placed by downstream resellers simply because those communications purportedly mentioned their name-brand products. As another example, because the FCC has not been clear about healthcare exemptions to TCPA liability, pharmacies have found themselves targeted by TCPA lawsuits for communications such as flu shot reminders and pharmacy refill reminders, leading to a chilling effect for these important communications.[10] The main goal of TCPA litigation is to force quick and lucrative settlements from such companies, and many businesses do settle (as Walgreens did in 2015, with a $11 million settlement in a TCPA case involving pharmacy refill reminders) because of the *in terrorem* spectre of billions of dollars in potential damages, if a large enough class is certified.

To better explain how all this has come about, Part II of my testimony, below, first addresses the original intent of the TCPA and the language that, in 1991, was designed to target certain abusive and harassing marketing calls, and then explains how the statute has been twisted and expanded without Congress's input to apply to modern technologies. Part III examines the current driving forces behind TCPA cases and the reasons that companies cannot fully protect themselves in particular from suits under Section 227(b), which is at the core of a majority of recent suits. Part IV provides

[10] Adherence to physician-prescribed medication regimes improves health outcomes and reduces costs. Indeed, studies have shown that adherence can impact health care costs by up to $300 billion a year. *See* Aurel O. Iuga & Maura J. McGuire, "Adherence and Health Care Costs," *Risk Management and Healthcare Policy* (Feb. 20, 2014)..

examples of just some of the rampant litigation abuse by both serial TCPA plaintiffs and by attorneys incentivized to bring TCPA lawsuits at an ever-increasing pace.

I conclude in Part V by voicing the hope of the thousands of businesses being sued under the TCPA: that Congress act to update the TCPA in order to provide the greatest degree of clarity and to alleviate the intolerable and unfair burdens that portions of this statute place on businesses. In order to start that discussion, I provide several recommendations that would bring the TCPA's private right of action in line with that of other federal statutes offering consumer remedies and that could help protect American companies and federal courts from the repercussions of TCPA litigation abuse.

II. THE ORIGINAL INTENT, AND CURRENT APPLICATION, OF THE TCPA

The TCPA was enacted during a very different technological era, and is now twenty-six years removed from modern technologies. The telemarketing calls and faxes that the TCPA was designed to curtail were being made by aggressive marketers employing tactics—such as random number generation or sequential dials—that systematically worked through every possible number in an area code, with the hope of getting someone to pick up the phone or look at a fax containing a marketing pitch for a product or service. Facsimile machines required expensive thermal paper and cellular phones were extremely uncommon (and very bulky) with expensive usage costs—thus, special protections were put in place for unsolicited calls made to cell phones and for unsolicited faxes that did not provide an easy opt-out. Caller ID was not in use, and so the only way to know who was calling was to pick up the ringing telephone. Text messages did not exist (indeed, email was still uncommon), and today's smart phones were science fiction fantasies.

An understanding of the technologies available in 1991 is crucial to an understanding of the TCPA's intent: businesses reaching out to their own customers were not doing so through what the statute defined as Automated Telephone Dialing

Systems, "ATDS machines"— systems capable of randomly and sequentially generating and dialing numbers,[11] which were being used by telemarketers who did not care whom they reached, as long as they could get a certain number of people to pick up the phone. Congress was focused on the belief that limiting calls from ATDS autodialers would stop a certain kind of calling technology that "seized" phone lines that had been called at random or sequentially.[12]

The TCPA was designed to address concerns over consumer privacy that was facing serious intrusions from aggressive marketing via fax and phone calls. As the Supreme Court has noted, "Congress determined that federal legislation was needed because telemarketers, by operating interstate, were escaping state-law prohibitions on intrusive nuisance calls."[13] The TCPA set rules about the kinds of consent required to make certain communications to phones and facsimile machines,[14] and further authorized the establishment of a national Do Not Call ("DNC") list that would record consumers'

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[11] *See* 47 U.S.C. § 227(a) "Definitions: As used in this section— **(1)** The term "automatic telephone dialing system" means 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."

[12] *See, e.g.,* Report of the Energy and Commerce Committee of the U.S. House of Representatives, H.R. Rep. 102-317, at 10 (1991) (discussing "Automatic Dialing Systems" as follows: "The Committee report indicates that these systems are used to make millions of calls every day. . . . Telemarketers often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations, as well as unlisted telephone numbers. Once a phone connection is made, automatic dialing systems can "seize" a recipient's telephone line and not release it until the prerecorded message is played, even when the called party hangs up. This capability makes these systems not only intrusive, but, in an emergency, potentially dangerous as well.")

[13] *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 742 (2012).

[14] *See* 47 U.S.C. § 227(b).

requests to not receive any telemarketing calls.[15] The FCC was tasked with interpreting the TCPA and promulgating the regulations that would create the national DNC. Over time the FCC updated its regulations to add new requirements (such as the need for companies to maintain their own internal DNC list for requests to stop telemarketing otherwise permissible because of an Existing Business Relationship ("EBR")).[16]

On the Senate floor, the TCPA's sponsor, Senator Hollings, explained that the TCPA was intended to "make it easier for consumers to recover damages" from computerized telemarketing calls and for consumers to go into small claims courts in their home states so that the $500 in damages would be available without an attorney:

> The substitute bill contains a private right-of-action provision that will make it easier for consumers to recover damages from receiving these computerized calls. The provision would allow consumers to bring an action in State court against any entity that violates the bill. The bill does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine. Nevertheless, it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court. . . .
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> **Small claims court or a similar court would allow the consumer to appear before the court without an attorney**. The amount of damages in this legislation is set to be fair to both the consumer **and the telemarketer**. However, it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages. I thus expect that the States will act reasonably in permitting their citizens to go to court to enforce this bill.[17]

It is clear that the private right of action focused on allowing consumers to sue **telemarketers**. Moreover, it was so clear that TCPA claims were intended to be handled

[15] *See* 47 U.S.C. § 227(c).

[16] *See, generally*, 47 C.F.R. §64.1200.

[17] 137 Cong. Rec. 30821–30822 (1991) (emphasis added).

on an individual basis by consumers seeking amounts of damages that would not exceed a small claims court's jurisdiction that throughout the 1990s, the few early TCPA litigants in many circuits' federal courts found themselves told that there was no jurisdiction in federal court to hear TCPA claims.[18]

There was no real debate over the TCPA at the time of its passage, likely because there was no indication of what the TCPA would grow to become. But now, a statute designed to provide a private right of action so that consumers would have the incentive to pursue their own claims against entities placing intrusive and aggressive cold telemarketing calls, preferably in small claims court and without needing an attorney, threatens to bankrupt not just abusive telemarketers, but any legitimate company placing legitimate business calls, as well as any "deep-pocket" entity that plaintiffs can claim could be vicariously liable for another person's or entity's communications.

The largest driver of TCPA litigation these days is claims of "autodialed" calls or texts to cellular phones placed without prior consent, because so many Americans now use their cell phones as their primary point of contact. As of 2014, 90% of American households had cellular phones[19] and as of December 2016, the majority of American home, 50.8% reported being wireless only.[20] Unlike in 1991, the modern owners of

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[18] The federal question jurisdiction over TCPA claims was only finally resolved by the Supreme Court in 2012 in *Mims*, 132 S. Ct. 740, when the question had essentially been mooted for large TCPA class actions by the earlier Class Action Fairness Act's provision that class actions alleging over $5 million in damages could be removed to federal court.

[19] Pew Internet Project, *Mobile Technology Fact Sheet*, Pew Research Center (2014), *available at* http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/.

[20] ACA International, Unintended Consequences of an Outdated Statute: How the TCPA Fails to Keep Pace with Shifting Consumer Trends (2017), *available at* http://www.acainternational.org/assets/research-statistics/p4-aca-wp-tcpaconsequences.pdf.

cellular numbers often opt to provide those numbers to companies with whom they do business. And unlike in 1991, companies often use computerized systems to efficiently contact these numbers—systems that TCPA plaintiffs argue are "autodialers" subject to the TCPA's restrictions.

As already noted above, the TCPA defines an "autodialed" call as one made on an automated telephone dialing system ("ATDS"), "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."[21] But because "capacity" is not a defined term in the statute, TCPA plaintiffs and their attorneys have argued in lawsuit after lawsuit that if a call was placed with equipment that has even a hypothetical, **future** capacity to store or produce random or sequentially generated numbers (i.e. through reprogramming), that call or text was placed with an ATDS. Further, in an order on appeal to the D.C. Circuit Court, a three-person majority of FCC commissioners agreed in June 2015 that "capacity" to randomly/sequentially dial need not be an operative feature in dialing equipment for the call to be considered "autodialed" and subject to the TCPA's restrictions.[22] (The two dissenting commissioners vehemently disagreed.[23]).

The central problem businesses have with Section 227(b)'s prohibition on "autodialed" calls to cellular phones is that legitimate companies are swept into the strict liability intended for the bad actors who, in 1991, were cold-call telemarketing random or sequential telephone numbers using a specific kind of equipment. No legitimate

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[21] 47 U.S.C. § 227(a)(1) (emphasis added).

[22] *See* July 2015 FCC Order, 30 FCC Rcd. at 7974-7976.

[23] *See also id.*, Pai Dissent, 30 FCC Rcd. at 8074 ("That position is flatly inconsistent with the TCPA. . . .To use an analogy, does a one-gallon bucket have the capacity to hold two gallons of water? Of course not."); *see also id.*, O'Rielly Dissent, 30 FCC Rcd. at 8088-90.

company in 1991 tried to reach its own customers by randomly dialing numbers with the equipment in the marketplace that fit the definition of an ATDS (as it would make no sense to try to reach a customer by dialing random numbers), so as to be subject to $500 or $1500 per call liability for "autodialed" calls. Thus, it makes sense to see no affirmative defenses built into Section 227(b), because no one cold calling random telephone numbers would have a defense for such practices.

On the other hand, many companies in 1991 conducted some form of targeted telemarketing to customers, former customers, or prospective customers, and were bound by Section 227(c) to adhere to all the telemarketing rules established as to the Do Not Call list. The separate private right of action in Section 227(c)(5) gives more protection to legitimate companies that could violate DNC provisions: having exceptions during existing business relationship periods; allowing one free mistake each twelve months per number; setting statutory damages at the less draconian "up to" $500 per communication; and providing affirmative defenses for companies who in good faith work to comply with the law (i.e., by establishing written Do Not Call policies and training employees on such policies[24]). Thus, companies were given all the instructions needed to comply with the DNC section of the TCPA, and would be able to defend themselves in the instances when the inevitable human error, such as a customer representative not accurately recording a do not call request, would occur.

It should come as no surprise that most TCPA litigation is now brought under Section 227(b)'s unforgiving prohibitions on autodialed or prerecorded calls placed to cellular phones without prior express consent. Plaintiffs argue that calls or call attempts

[24] *See* 47 U.S.C. § 227(c)(5) ("It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection.").

were autodialed. While the FCC has opined that "prior express consent" for transactional and informational calls exists when a customer opts to provide his or her cellular telephone number to a company (i.e. on an application),[25] the FCC majority has also now stated that companies are liable (after the first call) to all "autodialed" calls placed to those customer-provided numbers if, unbeknownst to the company, the customer has changed her telephone number or provided a wrong number in the first place.[26] Thus, a company reaching out to a customer-provided number can unknowingly contact a new subscriber to the cellular phone, who then claims calls were made with an autodialer in violation of Section 227(b) without her prior consent.

As further addressed in Part IV below, this has created "gotcha" litigation, where someone signs up for a credit card with a friend's telephone number, and then the friend sues for calls received, or where a spouse who shares a phone brings TCPA claims when she answers a call to that shared phone meant for her husband, or where someone keeps acquiring dozens of new cellular telephone lines in the hopes of "striking it rich" with a phone number receiving calls from deep-pocket companies trying to reach the prior owner of the line.[27] Because the private right of action in Section 227(b)(3) lacks the affirmative defenses that Congress intended legitimate businesses to have access to

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[25] *See In re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 23 F.C.C.R. 559, 564–65 ¶ 10 (F.C.C. Jan. 4, 2008).

[26] *See* July 2015 FCC Order, 30 FCC Rcd. at 8001.

[27]The Third Circuit made such matters worse, in a ten-year battle over a single phone call one roommate picked up on March 11, 200, by ruling in October 2015 that a "habitual user" of a shared telephone such as a roommate was in the "zone of interests protected by the TCPA", and had alleged sufficient facts to pursue a claim under the TCPA if he answered a "robocall" intended for his roommate (who may herself have given prior consent for that call). *See Leyse v. Bank of Am. Nat. Ass'n*, 804 F.3d 316, 327 (3d Cir. 2015).

(whom it was known could be targets of litigation under Secton 227(c)(5), which does have such defenses), TCPA plaintiffs and their lawyers argue that there is strict liability for all calls placed without consent, regardless of the company's good faith belief and adherence to practices meant to comply with the TCPA.

One final note on the 1991 statute and the technology of that time: text messages did not exist twenty-five years ago when the statute was drafted, nor did any phones capable of displaying such a message. However, first courts and now the FCC majority decided that a text message is the same thing as a "call" to a cellular phone, and is subject to the $500 to $1,500 per communication liabilities under the TCPA for autodialed calls (even though Commissioner O'Rielly vehemently dissented to extending the TCPA to text messages).[28] Many recent TCPA litigations focus on text messages—and even though companies ensure that a "STOP" response to a text message will stop all future messages, a consumer has no obligation to ask for texts to "STOP," but instead can simply keep collecting messages until there are enough for his or her lawyer to make a hefty demand. It is difficult to imagine that Congress, had it conceived of text messages in 1991, would not have had separate provisions to address this very different kind of communication that so many consumers welcome for easy and quick delivery of information.

It should be clear that the technological shift since 1991, particularly the advent of cellular phones and now smart phones, should have made portions of the TCPA inapplicable to such new technologies. However, the opposite has happened: while scam

[28] *See* July 2015 FCC Order, O'Rielly Dissent, 30 FCC Rcd. at 8084 ("I disagree with the premise that the TCPA applies to text messages. The TCPA was enacted in 1991 — before the first text message was ever sent. The Commission should have had gone back to Congress for clear guidance on the issue rather than shoehorn a broken regime on a completely different technology.").

foreign-based telemarketers continue to barrage consumers with calls, legitimate domestic businesses find themselves targeted primarily for transactional and informational calls never intended to be subject to the TCPA's restrictions—calls placed via modern technologies not contemplated by the TCPA. Chairman Pai has pointed out, this is something Congress should address:

> Congress expressly targeted equipment that enables telemarketers to dial random or sequential numbers in the TCPA. If callers have abandoned that equipment, then the TCPA has accomplished the precise goal Congress set out for it. And if the FCC wishes to take action against newer technologies beyond the TCPA's bailiwick, it must get express authorization from Congress—not make up the law as it goes along.[29]

But Congress has so far failed to revisit the TCPA to consider whether, and how, new technologies should be encompassed by it.

III. CORE FACTORS DRIVING TCPA LITIGATION AND FILLING UP COURT DOCKETS

For many years, as it was intended to do, TCPA litigation focused primarily on unsolicited marketing facsimile, DNC violations, and prerecorded cold-call telemarketing calls. But around 2010, there was a sea-change in TCPA litigation. I recall that year defending one client sued on a class action basis for fraud alert calls placed to cellular telephones alerting the recipient that he or she might be a victim of identity theft. I thought that as soon as I alerted plaintiff's counsel that she had not received a marketing call, plaintiff would dismiss her lawsuit (as was usual); however, because the TCPA's protections for cellular telephones did not specifically apply to "marketing" calls, and my client was a large and well-funded corporation, the litigation went forward with tens of millions of dollars in statutory damages in play for various fraud alert calls placed in the

[29] July 2015 FCC Order, Pai Dissent, 30 FCC Rcd. at 8076.

previous four years. Plaintiff argued that she had not given her prior consent for a prerecorded message from my client, but only to the credit reporting agency.

We won in summary judgment, with the court recognizing that the plaintiff had requested fraud alert calls to be placed to her cellular phone through an intermediary and that there was indeed "prior express consent" to receive said calls. Unfortunately, that victory required my client to take on the costs of eighteen months of hard-fought litigation. In the end, the plaintiff's counsel walked away to file more TCPA lawsuits, only on the hook for my client's costs (and not for the significant expenditures in attorneys' fees, as a result of the default American rule that leaves companies left holding the bag when a litigation ends).

Before 2010, I defended a few TCPA cases a year; by 2012, a critical mass of plaintiffs' attorneys had discovered the TCPA and its uncapped statutory damages and saw the expansion of TCPA litigation as a legal "gold rush." By that time I was an almost full-time TCPA defense lawyer. Further, around that time, law firms across the country began starting up TCPA defense practice groups, given how much TCPA litigation was being filed against companies nationwide. Now, TCPA litigations consume significant court resources across the country and are brought in almost every state.

A review of electronically filed complaints between August 2015 and December 2016 shows that California federal courts—the Central and Southern Federal Districts in particular—continue to bear the most significant burdens in dealing with TCPA class actions, with over 1,000 TCPA cases filed in California in that seventeen month timeframe.[30] But this is not just a California problem: our review confirmed that judges

[30] Examination of 3,121 sample TCPA cases filed between August 1, 2015 and December 31, 2016; research to be published later this year.

throughout the country have TCPA litigations crowding their dockets, From the 3,121 litigation sample group we reviewed from August 2015 to December 2016, we found TCPA litigations in forty-three different states, including 620 TCPA actions filed in Florida, 111 in New York, 109 in Texas, 262 in Illinois, 144 in New Jersey, 87 in Pennsylvania, 72 in Tennessee, and 234 in Georgia.[31] And to highlight the burdens these cases can place on courts, of the Georgia cases, for example, almost two hundred (199, to be exact) were filed in the Northern District of Georgia, which, per its website, currently has only fifteen (15) judges, five (5) of whom are on Senior status.[32]

A district with very little TCPA litigation can find itself suddenly inundated with TCPA cases, as federal judges in Connecticut recently found out when one plaintiff—Gorss Motels, a company owning a Super-8 motel—brought a flurry of litigation for alleged unsolicited facsimiles it received in the past four years, filing nationwide class actions against more than a dozen companies, with almost every judge in the district now in possession of at least one of these TCPA class action litigations, many of which are based on the receipt of a single facsimile mentioning that defendant's products.[33]

In my experience, TCPA actions have been fueled in the past few years primarily by the following four issues:

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[31] *Id.*

[32] *See* http://www.gand.uscourts.gov/directory-district-judges-and-staff, visited 3/30/17.

[33] Just some of these Gorss Motels cases filed in Connecticut are *Gorss Motels v. Land's End, Inc.*, D. Ct. (J. Eginton), filed 1/4/17; *Gorss Motels v. Sysco Guest Supply*, D. Ct. (J. Bryant), filed 11/18/16; *Gorss Motels v. Schneider Publishing*, D. Ct. (J. Arterton), filed 11/7/16; *Gorss Motels v. Magnuson Hotels*, D. Ct. (J. Meyer), filed 11/7/16; *Gorss Motels v. Otis Elevator Co.*, D. Ct. (J. Bolden), filed 10/27/16; *Gorss Motels v. Sboca LLC*, D. Ct. (J. Shea), filed 9/28/16; *Gorss Motels v. Cetis Inc.*, D. Ct. (J. Chatigny), filed 8/11/16; *Gorss Motels v Commercial Lighting Ind.*, D. Ct. (J. Shea), filed 8/11/16; *Gorss Motels v. G.S. Wilcox*, D. Ct. (J. Underhill), filed 3/1/16.

A. "Capacity" to Autodial Remains Hotly Contested

A debate continues as to whether "capacity," as used in Section 227(b) of the statute, refers to a system's present actual capacity, or includes a system's potential capacity, and the FCC's July 2015 only adds to the confusion. Because of the lack of clarity, any telephone call placed with equipment that is not an old-fashioned rotary dial telephone may encourage plaintiffs' lawyers to take a shot at a TCPA lawsuit.

Some courts have rejected the theory that any technology with the potential capacity to store or produce and call telephone numbers using a random number generator constitutes an ATDS. For example, the Western District of Washington noted that such a conclusion would lead to "absurd results" and would "capture many of contemporary society's most common technological devices within the statutory definition."[34] But other courts have accepted the "potential" capacity argument forwarded by the plaintiffs' bar. One judge in the Northern District of California, for example, held that the question is "whether the dialing equipment's present capacity is the determinative factor in classifying it as an ATDS, or whether the equipment's potential capacity with hardware and/or software alterations should be considered, regardless of whether the potential capacity is utilized at the time the calls are made."[35] But the FCC majority refused, in its July 2015 Order, to find that "capacity" should reflect a system's present and actual abilities, with challenges to that opinion now

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[34] *Gragg v. Orange Cab. Co., Inc.*, 995 F. Supp. 2d 1189, 1192-93 (W.D. Wash. 2014); *see Hunt v. 21st Mortg. Corp.*, No. 2:12-cv-2697-WMA, 2013 WL 5230061, *4 (N.D. Ala. Sept. 17, 2013) (noting that, as, "in today's world, the possibilities of modification and alteration are virtually limitless," this reasoning would subject all iPhone owners to 47 U.S.C. § 227 as software potentially could be developed to allow their device to automatically transmit messages to groups of stored telephone numbers).

[35] *Mendoza v. UnitedHealth Grp. Inc.*, No. C13-1553 PJH, 2014 WL 722031, *2 (N.D. Cal. Jan. 6, 2014).

pending in the D.C. Circuit.

Thus, there is no real clarity for American businesses as to whether the expansion of the ATDS definition advocated by TCPA plaintiffs does indeed cover all modern, computerized systems used to dial telephone numbers or send text messages. A company whose employees dial calls that use any form of a computer in the process might find itself a target in a TCPA lawsuit, even when the calls could not have been placed unless a human representative initiated the one-to-one call. To have uncapped statutory damages available that may or may not apply based on the interpretation of an undefined term in an outdated section of a federal statute is an untenable situation for companies to find themselves in.

B. Calls Made To Recycled Or Wrongly Provided Cell Phone Numbers Are Generating New Suits.

On a daily basis, companies across the country make calls or send texts to numbers provided to them by their customers, and prior express consent should exist for such communications even if they are made to cellular numbers with an "autodialer" or if they provide information via a prerecorded message. However, cell phone numbers are easily relinquished and reassigned without notice to anyone, let alone to the businesses that were provided the number as a point of contact by their customer. Indeed, as of 2015, an an estimated 100,000 cell phone numbers were reassigned to new users every day.[36]

Further, sometimes a customer makes a mistake when providing a contact number, or enters one belonging to a friend or roommate, or in these days of family plans, enters a number for a phone line shared with, or later bequeathed to, another family member. Then, when the company attempts to reach out to its customer at the provided number, it

[36] July 2015 FCC Order, O'Rielly Dissent, 30 FCC Rcd. at 8090.

can unintentionally send communications to a non-customer, i.e., the new or actual owner of the number. This seemingly innocent mistake has become the most significant driver of new TCPA litigations. Indeed, a statute intended to cover abusive telemarketing has morphed into one supporting "gotcha" claims against well-intentioned companies attempting to communicate with their own customers, generally for transactional or informational purposes.

As another example, automated calls set up by a cell phone owner to be sent to his or her cellular phone as a text message (i.e., Twitter notifications, or text alerts that a message is waiting) can be received instead by a new cell phone owner if the prior owner forgets to turn off such requested messages prior to relinquishing a phone line. One California restaurant chain's automated voicemail systems sent 876 food-safety-related text messages intended to reach one of its employees' cell phones, after that employee had set a forwarding feature on his work telephone that was designed to message his own phone. However, after he changed cellular phone numbers, those messages were unintentionally sent to the new owner of that telephone line.[37] That restaurant found itself being sued for over $500,000 in statutory damages, and after a protracted fight, the small restaurant chain ended up settling for an undisclosed amount after hundreds of thousands of dollars in defense costs had been incurred in trying to fight the allegations. Again, it is difficult to believe that Congress intended companies to be sued for "set it and forget it" messaging services set up by the prior owner of a phone line, once that line is recycled to a new owner.

[37] *See* Rubio's Restaurant, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 3 (filed Aug. 11, 2015).

C. Vicarious Liability Theories Are Targeting New Defendants (In Particular, Those With Deep Pockets).

Another driver of TCPA litigation is vicarious liability: it is no longer just the entity placing a call, sending a text, or faxing a document that needs to worry about defending a TCPA lawsuit. In a 2013 order, long-anticipated by the plaintiffs' bar, the FCC opined that vicarious liability could attach under the TCPA to companies who themselves had not initiated the communications in question, so long as the calls were placed "on behalf of" the company, using the federal common law of agency.[38] Thus, a person or company can find itself defending a TCPA lawsuit claiming it is responsible for someone else's decisions to communicate via phone, fax, or text

The FCC's vicarious liability order invites the plaintiffs' bar to reach up the chain, trying to get to the defendant with the deepest possible pocket. This, in turn, has led to a dogpile of lawsuits being brought against security equipment manufacturers for calls mentioning their branded equipment (even when the calls were not made to sell that equipment, but rather the caller's own $39.99 a month monitoring services). Further, lawsuits are brought against major corporations for third-party calls made by independent contractors not authorized in any way to call as, or on behalf of, the company.

In the case of an employee-gone-rogue who violates the TCPA's rules by breaking all of his own company's policies, the company finds itself facing potentially annihilating liability if it loses on vicarious liability grounds and enormous pressure to settle. One insurance company, for example, recently completed a settlement of a $23 million class action brought by the recipient of a facsimile sent *against company policy* by an

[38] *See In the Matter of The Joint Petition Filed By DISH Network, LLC, the United States of America, and the States of California, Illinois. North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules*, Declaratory Order, CG Docket No. 11-50 (issued Apr. 13, 2013).

insurance agent who had contracted on his own with a fax blaster to set up a fax server in his home garage in order to send out facsimiles.

Companies are facing allegations of vicarious liability for calls and texts for which no source can even be ascertained; if a prerecorded marketing message promises a free gift card for a certain retailer, that retailer finds itself facing demands under the TCPA under the argument that it is liable under some ratification or apparent authority aspect of vicarious liability.

D. <u>Revocation of Prior Express Consent Also Driving New Lawsuits.</u>

A fourth breeding ground for modern TCPA litigations is found in situations where a company is calling its customer, at the customer-provided number, but the recipient claims to have revoked consent for further calls. The Third Circuit stood alone in 2013 when it held that the TCPA provides consumers with the right to revoke their prior express consent to be contacted on cellular telephones by autodialing systems.[39] Before this point, there were not revocation-based TCPA litigations; now, with the FCC majority stating in its July 2015 order that prior consent can be revoked at any time and in any manner, claims that consent was revoked has become one of the fastest growing areas of TCPA litigation.[40]

The problem with allowing revocation by any means when larger businesses are making informational and/or transactional calls (sometimes through a variety of vendors) is that TCPA plaintiffs and their lawyers plan to generate suits by "revoking consent" for further calls with an oral statement, in the hopes that the customer representative does not

[39] *Gager v. Dell Financial Services, LLC*, 727 F.3d 265, 272 (3d Cir. 2013).

[40] Commissioner O'Rielly points out that the TCPA itself had no mention of revocation or a means to do so, and that the FCC majority has simply invented a vague and unworkable new "common-law" based rule never vetted by Congress. *See* July 2015 Order, 30 FCC Rcd., O'Rielly Dissent, at 8095.

capture that oral request.[41] Other plaintiffs are sending convoluted text messages that a system might not recognize as a "STOP" message, then claiming consent had been revoked. One demand I dealt with for a client involved someone who never replied "STOP" as the text messages instructed him to do whenever he wanted to opt out of the text reminders. He instead sent a wordy text message "withdrawing permission for future calls to his cellular phone number." The system did not recognize this language, and in any case would only have been able to stop text messages and not phone calls; the determined consumer insisted that he had revoked consent for all communications, and was entitled to tens of thousands of dollars for later calls he received.

Another issue with "revocation" is that the FCC majority implies that it should be instantaneous in implementation, without giving the business time to receive and process DNC requests from its vendors and/or to adjust its outbound calls. (In contrast, a business knows that DNC prohibitions attach to a number 30 days after it is entered into the DNC list.[42]). Thus, claims of "immediate" revocation rights are leading to even more "gotcha" litigation, including claims that a consumer revoked prior consent on a Monday

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[41] For example, in April 2014, the Davis Law Firm of Jacksonville, Florida, posted an article providing 5 steps to "stop calls" from a targeted company and to potentially make money under the TCPA. *See* http://davispllc.com/lawyer/2014/04/16/Consumer-Protection/How-to-Get-DirecTV-to-Stop-Calling-You-_bl12785.htm, last accessed November 6, 2014. Step 2 instructs cell phone owners to say "I revoke my consent for you to call me" and then to hang up. Thereafter, the firm asks the cell phone owner to keep a detailed call log regarding any additional calls to be the basis of a TCPA lawsuit. *See id.*

[42] *See* 47 C.F.R. § 64.1200 ("Persons or entities making calls for telemarketing purposes (or on whose behalf such calls are made) must honor a residential subscriber's do-not-call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date of such request.").

morning but received three more calls over the next few days before all calls stopped – and that $4,500 in willful calling damages for the three calls are therefore owed to that consumer under the TCPA.

Thus, revocation-based claims—like those claims based on "capacity" arguments, recycled or wrongly-provided numbers, and vicarious liability allegations—are certain to continue to increase in number as TCPA litigation continues to grow exponentially throughout the country. Another certainty is that TCPA litigation abuse, too, will spread.

IV. Examples Of TCPA Litigation Abuse

As I mentioned at the start of this testimony, I have been defending various companies facing TCPA claims for my entire career. As a junior associate in 2001, I began working on a then-rare TCPA case in which my client was sued for millions of faxes an affiliated company had sent in a three-day period using a fax blaster service. I was shocked to see a statute (which I had not heard anything about in law school) that could create such staggering statutory liability—my client settled for millions rather than face billions of dollars in statutory liability, and because its insurance policy covered the claims (something that is no longer the case). My introduction to the TCPA was during a time when the few lawsuits being brought still focused on the kinds of unsolicited facsimiles and cold-call telemarketing that the statute was intended to address when it was authored and adopted in 1991.

But now that TCPA lawsuits have proven to be extremely lucrative, various serial TCPA plaintiffs and TCPA-focused attorneys are doing everything they can to find and bring TCPA actions against American businesses.

A. Serial TCPA Plaintiffs

Serial plaintiffs amassing multiple phone numbers at which to receive calls are making a living through TCPA demands and litigation. Some focus on sending copious demand letters to businesses, seeking several thousand dollars from each company in pre-

litigation settlements. An early example of this was a man in San Diego who acquired a telephone number of 619-999-9999, even though such telephone numbers were normally not given out to consumers. This man found out that companies at the time whose systems required some telephone number be entered into a phone number field had set a default of 999-9999 to fill in after an area code, and his number was getting thousands of calls each month from the systems of various companies. As Chairman Pai noted, this man even hired a staff to log every wrong-number call he received, issue demand letters to purported violators, file actions, and negotiate settlements. Only after he was the lead plaintiff in over 600 lawsuits did the courts finally agree that he was a "vexatious litigant."[43] But what Chairman Pai did not know (and I do, as I was brought in to deal with later demands from the phone's new "owner" after this man was barred from his "TCPA business"), is that the man then leased this telephone number to a friend who started up her own business, paying commissions to the owner of the 999-9999 number for the calls she received and acted on with her part-time staff of paralegal support that sent TCPA demand letters to hundreds of businesses. It was only after this contract came to light that her "TCPA business," too, was finally shuttered.

But other consumers in the business of TCPA actions continue to make their living (and a good living, too) through this statute. Craig Cunningham, for example, is a well-known TCPA litigant who has filed a slew of actions involving TCPA claims over the years.[44] Just in 2016 alone, Mr. Cunningham filed TCPA-based litigations against various businesses in federal courts across the country, including in Tennessee, Texas,

[43] July 2015 FCC Order, Pai Dissent, 30 FCC Rcd. at 8073.

[44] *See, e.g.*, 2010 article about Mr. Cunningham's then-new TCPA business in the Dallas Observer, located at http://www.dallasobserver.com/news/better-off-deadbeat-craig-cunningham-has-a-simple-solution-for-getting-bill-collectors-off-his-back-he-sues-them-6419391.

Virginia, Florida, and California.[45] When facing arguments by one defendant in a Virginia action (General Dynamics Information Technology, which defended itself by asserting that Mr. Cunningham provided his prior express consent for the alleged autodialed/prerecorded calls placed to the number Mr. Cunningham elected to provide via an online application for health insurance) he filed a petition with the FCC asking that any such defenses be eliminated.[46]

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[45] *See, e.g., Cunningham v. The Vanderbilt University; Vanderbilt University Medical Center* (Case No. 3:16cv223), filed on 2/16/2016 in Tennessee Federal Court (M.D. Tenn); *Cunningham v. Tranzvia LLC* (Case No. 4:16-cv-905), filed 11/26/2016, Texas Federal Court (E.D. Tex.); *Cunningham v. Nationwide Security Solutions Inc.; Nortek Security & Control LLC; HomePro Inc.; Techforce National LLC* (Case No. 4:16cv889), filed 11/18/2016 in Texas Federal Court (E.D. Tex.); *Cunningham v. Sunshine Consulting Group LLC; Sunshine Consultation Services LLC dba Specialized Consumer Strategies; Donna Cologna; Cologna Building and Ground Services LLC* (Case No. 3:16cv2921), filed11/17/2016, Tennessee Federal Court (M.D. Tenn.*); Cunningham v. Robert Jacovetti; Law Office of Robert Jacovetti PC; Pre-Paid Legal Services Inc. dba LegalShield; Pre-Paid Legal Casualty Inc*. (Case No. 3:16cv2922), filed 11/16/2016, Tennessee Federal Court (M.D. Tenn.); *Cunningham v. Gregory Charles Mitchell; Eastern Legal Services; Paul Hank aka Poul Hank; Karl Kepper* (Case No. 1:16cv1109), filed 8/30/2016 in Virginia Federal Court (E.D. Va.); *Cunningham v. Rapid Capital Funding LLC/RCF; Craig Hecker; GRS Telecom Inc. fka CallerID4U Inc.; Paul Maduno; GIP Technology Inc.; Ada Manduno; Luis Martinez; Merchant Worthy Inc.; Robert Bernstein; Bari Bernstein; Mace Horowitz; Spectrum Health Solutions Inc. dba Spectrum Lead Generation* (Case No. 3:16cv2629), filed on 10/5/2016 in Tennessee Federal Court (M.D. Tenn.); *Cunningham v. Focus Receivables Management LLC* (Case No. 3:16cv1677), filed7/7/2016 in Tennessee Federal Court (M.D. Tenn.); *Cunningham v. Yellowstone Capital LLC; Integrity Capital Solutions Inc*. (Case No. 0:16cv62029), filed 8/23/2016 in Florida Federal Court (S.D. Fl.); *Cunningham v. Nationwide Business Resources Inc*. (Case No. 2:16cv4542), filed 6/22/2016 in California Federal Court (C.D. Cal.).

[46] *See In the Matter of Petition for Rulemaking and Declaratory Ruling filed by Craig Cunningham and Craig Moskowitz,* CG Docket No. 02-278, CG Docket No. 05-338 (filed January 22, 2017).

One New Jersey TCPA plaintiff, Jan Konopca, was recently highlighted in a *Forbes* article: he filed 31 lawsuits in New Jersey federal court under the TCPA, and has made enough money as a professional TCPA litigant that he no longer qualifies for social security disability benefits.[47] Suggesting that this plaintiff may have made as much as $800,000 with his personal TCPA business, the *Forbes* article also notes that he keeps his wife's cellular number (still in her name) despite having been divorced for 10 years, and does not appear to use the phone for outgoing calls—only for collecting inbound calls on which he can bring suit.[48] Also reported on by *Forbes* recently is another repeat TCPA plaintiff, Jason Alan, who has registered more than 20 telephone numbers belonging to him as business numbers for plumbing services, listing them in white pages, so as to encourage calls on which he can base his more than 30 federal TCPA lawsuits.[49]

There are numerous professional TCPA plaintiffs such as those described above, as well as consumers just now learning how to play the TCPA game. Indeed, there are plenty of "do-it-yourself" guides on the Internet advising consumers on how to bring TCPA claims and rake in significant monies in doing so. The consumers abusing the statute to ensure that calls are placed to them, so that they can support themselves with demands and lawsuits filed against American businesses, are bad enough; as detailed below, the tactics of some of the lawyers specializing in TCPA claims are even worse.

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[47] *See* https://www.forbes.com/sites/legalnewsline/2017/05/31/phoney-lawsuits-comcast-fighting-for-access-to-professional-plaintiffs-prior-testimony/#5a9353b5727c.

[48] *See id*., noting that Konopca only used the cellphone in question for an outgoing call in only 10 of 34 months between May 2011 and March 2014 – there were 24,949 incoming calls and 142 outgoing during that time.

[49] *See* https://www.forbes.com/sites/legalnewsline/2017/04/25/phoney-lawsuits-settlement-cancels-fight-against-frequent-tcpa-lawyerplaintiff-combo/#3d041d214fb8.

B. Over-incentivized TCPA Attorneys

As already detailed above, the TCPA (which has no attorneys' fees provision) provides opportunity for hefty enough statutory damages that attorneys are happy to start litigations with the hope of carving fees out of the uncapped statutory damages that are available. One Connecticut-based firm, Lemberg Law, LLC, even came out with a smartphone application, "Block Calls, Get Cash," that potential clients could download so that call data would be available directly to the law firm, which could review inbound calls to look for potential litigation targets.[50] The app's website states that "with no out-of-pocket cost for the app or legal fees, its users will "laugh all the way to the bank."[51] And at least one other firm has followed suit with its own competing application.

In recent litigation with an associate who withdrew to start up her own lucrative TCPA shop, that Connecticut-based firm who came up with the first smart phone application had its business practices revealed: the former associate claims that demands are being sent by Lemberg Law and litigations filed for consumers who have no idea that they have "retained" a law firm to represent them and who were not even consulted about complaints filed on their behalves.[52] In fact, the former associate claims that the first time some of these consumers find out about their own lawsuit is when the firm tries to

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[50] *See* Reply Comments of the U.S. Chamber of Commerce, CG Docket 02-278, at 4 (filed Dec. 1, 2014) (citing *Lawsuit Abuse? There's an App for That*, U.S. Chamber Institute for Legal Reform (Oct. 29, 2014), http://www.instituteforlegalreform.com/resource/lawsuit-abuse-theres-an-app-for-that/).

[51] *Id.*

[52] *See, e.g.,* Amended Answer, Affirmative Defenses, and Counterclaim, Dkt. No. 32, Filed 11/12/15, in *Lemberg Law, LLC v. Tammy Hussin and the Hussin Law Offices, P.C.*, Case No. 3:15-cv-00737-MPS (D. Conn), at ¶¶ 1.k, 1.l, 1.o, and 1.p; *see also* 1.p ("Based on Hussin's belief that her paralegal had confirmed the facts with the new clients, Hussin unknowingly filed complaints on behalf of Californians who were unaware of legal representation.").

contact them about sending the client's portion of a settlement agreement to the client (after accessing the consumer's private phone call information, crafting demands based on calls, and carving out Lemberg's own fees and costs, including a $595 "PrivacyStar" Cost).[53]

The most prolific filer of TCPA litigations between August 2015 and December 2016 was The Law Offices of Todd Friedman, for which we located 263 lawsuits filed against over 200 different companies in that timeframe—and over 200 of those litigations were brought as nationwide class action lawsuits. Again, the burden on courts is tremendous to oversee this onslaught of litigation.

Finally, as just one more example of many, Anderson & Wanca is a Midwest-based firm that has made its living off bringing facsimile actions after getting, in discovery years ago, a roster of clients from a fax-blaster named B2B. In a 2016 decision, the Seventh Circuit upheld $16,000 worth of statutory damages against a small Terra Haute, Indiana, digital hearing aid company for 32 facsimile ads, but noted its distaste in doing so:

> Fax paper and ink were once expensive, and this may be why Congress enacted the TCPA, but they are not costly today. As a result, what motivates TCPA suits is not simply the fact that an unrequested ad arrived on a fax machine. **Instead, there is evidence that the pervasive nature of junk-fax litigation is best explained this way: it has blossomed into a national cash cow for plaintiff's attorneys specializing in TCPA disputes.** We doubt that Congress intended the TCPA, which it crafted as a

[53] *See, e.g., id.* at Affirmative Defenses, ¶¶ 1.f, 1.g, 1.k; *see also* 1.s ("Lemberg insisted on taking a 40% referral fee for new "clients' without even having discussed legal representation with them and without having obtained a signed fee agreement. Upon reaching the new "clients" when Hussin transferred the cases to her firm, most of them had no knowledge of Lemberg's firm and were unaware of legal representation, yet Lemberg insisted on taking a 40% referral fee on said cases.").

> consumer-protection law, to become the means of **targeting small businesses. Yet in practice, the TCPA is nailing the little guy, while plaintiffs' attorneys take a big cut.** Plaintiffs' counsel in this case admitted, at oral argument, that they obtained B2B's hard drive and used information on it to find plaintiffs. They currently have about 100 TCPA suits pending.[54]

As the Seventh Circuit recognized in the decision quoted above, it is a perversion of the original intent of the TCPA to "target small businesses" who are not alleged to have caused actual harm.

V. CONCLUSION AND RECOMMENDATIONS

The TCPA was designed to protect privacy and to stop invasive and persistent telemarketing, primarily of the "cold call" kind that ensues when telemarketers use dialing technology to randomly or sequentially dial numbers. It was not designed to subject companies to claims regarding "autodialed" calls when they reach out to targeted, segmented lists of their own customers who have a common need for information using the telephone numbers (including cellular phone numbers) provided by those customers. It was not intended to apply to text messages, and it was not designed to cover collections calls, which have independent sets of rules that apply to ensure that those calls are not abusive or overly intrusive. But so long as the TCPA continues expanding, unchecked by Congress, federal courts will continue to have their case calendars fill up with TCPA cases that are not about actual injury or harm, but uncapped statutory damages.

Congress needs to take a hard look at updating the TCPA in a manner that provides more certainty and protection for businesses who need to legitimately communicate with their customers and employees, and who strive to comply with the law

[54] *Bridgeview Health Care Center, Ltd. v. Jerry Clark*, 2016 WL 10852333, *5 (7th Cir. Mar. 21, 2016) (emphasis added; internal citations and quotations omitted).

but who, for example, may unknowingly be calling a reassigned number, or have a customer representative err in recording a revocation request. If Congress wishes to pull text messages into the TCPA's protection, then it should assess what rules should apply to them.

In sum, considering the unfair and unintended onslaught of TCPA cases hammering American businesses, the following updates to the statute should be taken under consideration.

Statute of Limitations: The TCPA contained no statute of limitations, and so has fallen into the four-year default, which makes no sense for calls/faxes that are supposedly invasions of privacy that the consumer knows about at the moment they are placed. Class actions reach staggering amounts of damages because class plaintiffs seek four years' worth of calling data and liability. (I defended one putative class action brought against a company for a single text sent three years and ten months before the plaintiff filed his suit.) The TCPA's time to bring suit should be reasonably limited, as is the case with the other federal statutes providing private rights of action for statutory damages.[55]

Affirmative Defenses: As businesses are being targeted for calls under Sections 227(b) and (c) calls that Congress knew could be made by mistake by a business acting in good faith to follow the appropriate policies and procedures (*see* Part II above), the affirmative defenses available in Section 227(c) should also be imported into Section 227(b) to provide protection to businesses working in good faith to comply with the TCPA.

[55] *See, e.g.*, Electronic Funds Transfer Act (15 U.S.C. § 1693), Section 1693(m) (statute of limitations -- 1 year); Fair Debt Collection Practices Act (15 U.S.C. §1692), Section 1692(k) (statute of limitations -- 1 year).

Capacity: The "capacity" of an autodialer should be interpreted for past calls as written in the text of the statute, meaning only those devices that have the actual ability to randomly/sequentially dial telephone calls would be actionable. And if Congress wishes to limit some other sort of calling technologies or text messages, new and more precise language should be drafted, vetted, and implemented after a notice period to companies so that they can be in line with statutory requirements.

Reassigned or Wrongly Provided Numbers: Businesses should not be punished via TCPA lawsuits when they, in good faith, call a customer-provided phone number that now belongs to a new party unless and until the recipient informs the caller that the number is wrong and the business has a reasonable time to implement that change in its records. (If, after that notice and reasonable time the company continues to call, then lack of prior consent would be established for future calls.)

Vicarious Liability: The FCC has interpreted the TCPA to allow "on behalf of" liability for prerecorded/autodialed calls, which was not specifically provided for in the statute. The TCPA should be revised to define any such vicarious liability so that it would exist only against the appropriate entities—those persons who place the calls, or who retain a telemarketer to place calls, or who authorize an agent to place calls on their behalf.

Bad Actors: The TCPA should be reformed to focus on the actual bad actors (i.e. fraudulent calls from "Rachel from Cardmember Services," with spoofed numbers in caller ID fields to hide identity of caller), instead of companies trying to contact their consumers for a legitimate business purposes.

Reconsider the Cell-Phone Carve Out: Now that 90% of Americans own wireless telephones and 58.8% of households are mostly or entirely wireless-only, the special treatment of cellular phones based on the 1991 ideas of added expense for receiving such calls should be revised.

Address New Technologies, Such As Text Messaging: A text message is not the same as a call, and courts are wrong in starting to treat them the same. Should Congress wish to set rules on text messaging within the TCPA, it should do so through the regular channels for drafting, vetting, and implementing new statutory language.

Revocation: If a consumer that has provided a telephone number to a company no longer wishes to be communicated with at that number, there should be a set process (as in FDCPA) on how the business should be told of the revocation, and a reasonable time for the company to implement that change.

Importantly, when considering these changes, Congress should keep in mind what TCPA reform should not include:

- An increase in the number of phone solicitations;
- Encouraging abusive or harassing debt collection practices (which are addressed, in any case, by the FDCPA);
- An end-run around the federal and internal Do Not Call List rules.

The changes discussed above—which would help to protect American companies from expensive and damaging litigation abuse—would not risk any of these repercussions. Congress should consider revisiting the TCPA, now that twenty-six years have passed, to address the TCPA's negative impact on businesses for communications never intended to be addressed by that statute.

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Thank you for inviting me to testify. I am happy to answer any questions you may have.