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Unintended Consequences of an Outdated Statute: How the TCPA Fails to Keep Pace with Shifting Consumer Trends

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Josh Adams, PhD
Director of Research
ACA International
Washington, D.C.

WWW.ACAINTERNATIONAL.ORG



Unintended Consequences of an Outdated Statute: How the TCPA Fails to Keep Pace with Shifting Consumer Trends

Josh Adams, PhD, Director of Research, ACA International, Washington, D.C.

Introduction

The Telephone Consumer Protection Act (TCPA) was enacted in 1991 as a response to the growth in telemarketing calls in an era of limited cellular telephone ownership and usage. While the TCPA's restrictions made sense at the time it was adopted, the TCPA and its regulations have failed to keep pace with changing technologies and consumer adoption of those new technologies over the course of the last twenty-six years. These changes have manifested as differential use of technologies across a range of demographics. As such, contrary to its original intent, current TCPA interpretations are causing harm to consumers, subjecting some consumers to a higher frequency of telephone contacts while simultaneously preventing others from receiving vital information from legitimate businesses.

Executive Summary

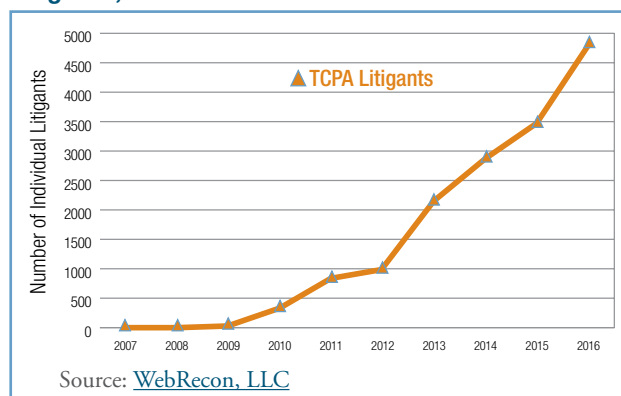
- » The TCPA has failed to anticipate or adjust for changes in communication technologies or consumer use of those technologies. As of December 2016, the majority of American homes (50.8%) report being wireless-only.
- » TCPA litigation has consistently increased year-after-year. Between 2010 and 2016 there was a **1,273% increase in litigants**; between 2015 and 2016 alone the total number of litigants increased 32%.
- » There are dramatic demographic differences in wireless-only households. For example, 72.7% of 25-29 year-olds live in a wireless-only household while only 23.5% of individuals aged 65 and over live in a wireless-only household.
- » 76.5% of individuals aged 65 and over live in households with a landline.

The Role of the TCPA

As noted in prior research by ACA International,^[1] the Federal Communications Commission (FCC) implemented rules under the TCPA that prohibit making a telemarketing call to a residential line with an automatic telephone dialing system (ATDS) or prerecorded voice without prior consent. The TCPA also specifically prohibits making any call – both telemarketing and non-telemarketing – using an ATDS or prerecorded voice to “any telephone number assigned to a ... cellular telephone service ... or any service for which the called party is charged for the call” unless prior express consent is first obtained.^[2, 3]

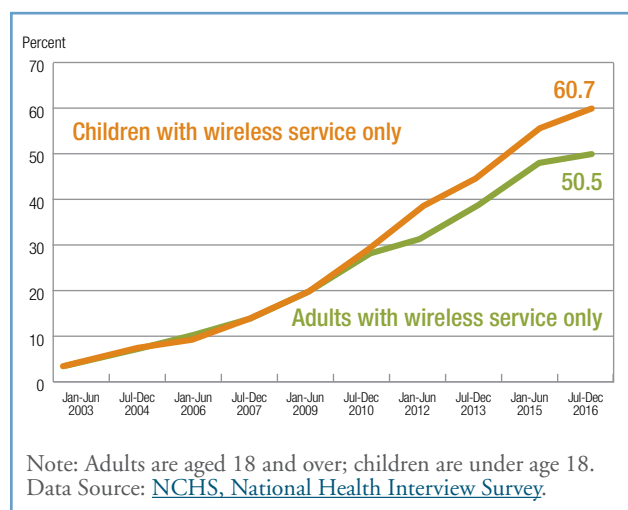
Given the FCC's current expansive interpretation of what constitutes an ATDS under the TCPA, as well as its reading of “prior express consent,” telephone calls made by businesses to individual consumers' cell phones are considered high-risk communications. Indeed, TCPA litigation has become something of a cottage industry, with attorneys' fees for a TCPA class action settlement averaging \$2.4 million in 2014.^[4] Figure 1 shows the total number of unique consumer plaintiffs in TCPA litigation from 2007 through 2016.^[5] Between 2010 and 2016 there was a 1,273% increase in litigants; between 2015 and 2016 alone the total number of litigants increased 32%.

Figure 1. TCPA Litigation by Individual Litigants, 2007-2016.



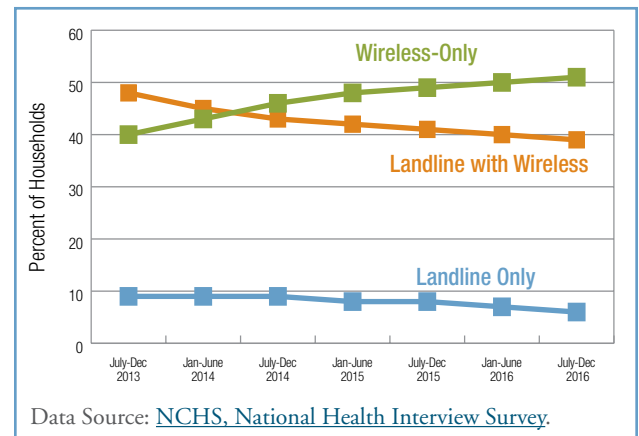
The TCPA has also failed to adjust for dramatic shifts in the availability and adoption of new communication technologies. The National Center for Health Statistics has collected data on wireless use and wireless-only households every six months since 2003. The period of July – December 2016 marked the first time that the majority of American homes (50.8%) report being wireless-only.^[6] This means that a majority of American homes report having at least one wireless telephone and no landline. To illustrate the consistent growth of wireless-only households, Figure 2 shows the percentages of adults and children living in households with only wireless telephone service from 2003 – 2016.

Figure 2. Percentages of adults and children living in households with only wireless telephone service: United States, 2003– 2016.



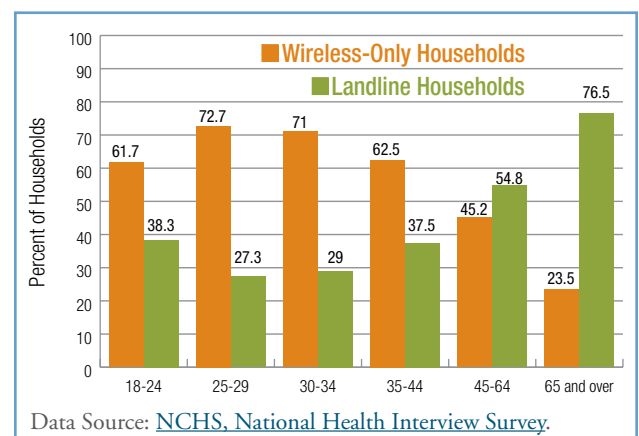
While wireless adoption has been consistently increasing, landline use has been concurrently declining. As of December 2016, only 39.4% of households had a landline in addition to a wireless device; an even smaller 6.5% of households were landline-only. It is reasonable to expect that landline use will continue to decline as wireless-only adoption will continue to increase; these trends speak to the necessity for TCPA modernization. Figure 3 shows the comparative trends in wireless and landline households from 2013 – 2016.

Figure 3. Percentage of Households with Landline-Only, Wireless-Only, and Landlines with Wireless, 2013 – 2016.



Because of the unequal adoption of wireless technologies across age groups, attempted compliance with the FCC’s broad interpretations of the TCPA will likely result in certain consumers receiving a disproportionate number of business-related phone calls while other segments of the consumer population are almost entirely excluded. Specifically, if a company makes the business decision to call only those consumers who possess a landline telephone in an effort to minimize potential TCPA liability, businesses are more likely to contact consumers 65 years of age or older. Figure 4 shows the percentage of adults living in wireless-only and landline households by age as of December 2016.

Figure 4. Percentage of Adults Living in Wireless-Only Vs. Landline Households by Age Range as of December 2016.



At the same time, this means consumers who rely solely on wireless telephone lines are likely to be contacted less. Given the striking demographic differences in wireless-only adoption, this outcome of the FCC's expansive TCPA interpretations is significant. Among 18-24 year-olds, 61.7% live in wireless-only households. That figure jumps to 72.7% for 25-29 year-olds and 71% for 30-34 year-olds. By contrast, 54.8% of 45-64 year-olds live in households that have a landline; for those aged 65 and over, 76.5% live in households with a landline. As such, a business that is trying to minimize its TCPA liability exposure can only reach roughly 29% of 25-34 year-olds, but 76.5% of those ages 65 or older. This not only increases the likelihood that older consumers will be contacted at a potentially higher rate, but also simultaneously decreases the likelihood of contacting younger consumers with important, timely information.

Conclusion

ACA International has previously addressed the limitations of the TCPA, including its limited utility as a consumer protection measure as currently interpreted and its vulnerability to abuse by unscrupulous trial lawyers.^[1] Many of the TCPA's limitations stem from an antiquated and outmoded understanding of technology and a desperate need for modernization. This paper outlines the developing trends in consumer adoption of modern communication technologies. These same trends continue to push the TCPA into a further state of technical obsolescence.

Modernization of the TCPA will ensure consumers are not deprived of normal, expected, and desired information, provide clarity for businesses to engage in targeted, beneficial communication with specific consumers, and free the courts to attend to the needs of real victims of harassment and abuse. However, given present trends in wireless adoption, some consumers may be almost entirely excluded from legitimate business communications, particularly younger consumers who are beginning to gain financial footing. Furthermore, as these wireless-only consumers are excluded from legitimate business communications, older consumers, particularly those over age 65, will be subject to a greater number

of contacts from a range of businesses seeking to minimize exposure to TCPA liability. As such, the current incarnation of the TCPA fails consumers on multiple fronts and impedes legitimate business interactions.

Sources

[1] Adams, Josh. 2016. [The Imperative to Modernize the TCPA: Why an Outdated Law Hurts Consumers and Encourages Abusive Lawsuits](#). ACA International.

[2] [Telephone Consumer Protection Act 47 U.S.C. § 227 of 1991](#).

[3] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227. The FCC's rules implementing the TCPA are located at 47 C.F.R. § 64.1200 et seq.

[4] Squire Patton Boggs. 2015. Notice of Ex Parte – CG Docket No. 02-278 Wells Fargo.

[5] WebRecon. 2017. 2016 Year in Review: FDCPA Down, FCRA & TCPA Up. January 24, 2017.

[6] Blumberg, Stephen J. and Julian V. Luke. 2017. [Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July–December 2016](#). National Center for Health Statistics.