

BLACKEST FRIDAY: How a Federal Agency Just Destroyed Small Business in the Name of Stopping Robocalls—And Why It Won't Work

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Well its black Friday all across the nation and small businesses are doing their best to compete with the big shops and brands for attention.

That struggle just became 10 times harder this week with the Federal Communications Commission (FCC) acting to severely restrict access small businesses access to lead information—the life's blood of many smaller organization's sales apparatus.

This article will walk through the background on the lead generation industry, the Telephone Consumer Protection Act (TCPA), and the FCC's new ruling limiting the ability of lead generators to connect consumers with small businesses.

What is a Lead Generator?

Lead generators operate many different kinds of businesses, all of which are designed to connect consumers who want information regarding products and services they need to businesses—usually small businesses—that can provide those products and services.

One of the most common form of lead generation is online webforms. Most consumers are familiar with Lending Tree or Zillow—who connect consumers with lenders or real estate agents respectively—but tens of thousands of such websites exist. They are usually run by small businesses (publishers) who work with networks (aggregators) that buy large volumes of submissions to create marketplaces where lead buyers can gain access to information for consumers who are interested in their products based upon specific criteria the lead buyer sets.

When done properly lead generation is a wonderful thing. It allows consumers to comparison shop and be connected with small businesses in their exact geographic region that can meet their precise needs based upon their precise circumstances—without having to shop multiple websites. It is good for consumers and serves as an under heralded superpower of the American economy—and hundreds of thousands of small businesses in this nation relay on lead generation as a key driver of their growth and success.

When done improperly, however, it is a key driver of unwanted robocalls (we'll get to that).

What is the TCPA?

The Telephone Consumer Protection Act is the federal government's crown jewel response to the nation's robocall epidemic. It doesn't work—[for various reasons](#)—but it has been on the books since 1991. and Congress just can't seem to move past it.

Under the TCPA calls to cellular phones using certain regulated technologies are illegal without express consent. The FCC has interpreted that to mean express written consent in the context of marketing calls—we'll get to that in a moment.

One of the biggest problems with the TCPA is that its provisions are unclear in many respects and it has not been updated to conform to modern technology. Plus, the TCPA focuses only on callers—it does not apply to domestic carriers that permit illegal traffic. As a result overseas scam artists continue to pick Americans apart.

What the TCPA does do well, however, is drive litigation. It is the biggest cash cow in American history for the Plaintiff's bar who file large dollar class actions against legitimate American businesses—usually over “gotcha” claims like accidental calls to wrong numbers—but not against the real bad guys who are often overseas. The Plaintiff's lawyers often make millions of dollars in these suits while the class members (the folks who received the unwanted calls) usually make \$50.00 or less.

The [Plaintiff's lawyers share some of their proceeds](#) with certain special interest groups—like the National Consumer Law Center—who turn around and lobby to Congress and the FCC for rulings that make it more favorable for Plaintiff's lawyers to bring lawsuits under the TCPA.

What is the FCC's Role Here?

The FCC is the federal agency responsible for assuring a strong and stable telecom infrastructure in this nation. In many ways it has stunningly failed in that mission over the last few years—businesses are moving to so-called OTT services (like WhatsApp) in droves as the FCC has empowered carriers to block and mislabel legitimate calls—censorship—with impunity.

In the FCC's defense, however, Congress has given it only very limited powers to work with. Specifically the TCPA is the only federal law the FCC can use to stop robocalls—and that's not much of an arsenal.

The FCC has responded by not only enabling carrier censorship and labeling but also by making various rulings over the years expanding the TCPA beyond its logical scope in an effort to keep up with the bad guys. Its a bit like stretching a sweater into a blanket—and it has worked about as well.

In its latest ruling the FCC has zoomed in on the definition of “express consent” under the TCPA. As noted, the FCC has already determined that “express consent” must be in writing for marketing purposes. But in its latest ruling the FCC has also acted to limit the ability of intermediaries—i.e. lead generators—to serve as a go between for consumers and small businesses.

What Did the FCC Rule Exactly?

Technically the FCC hasn't finalized its ruling yet—it is set to do so on December 13, 2023. But it looks as if this ruling will pass without modification.

The ruling—[which you can read here](#)— changed the TCPA's current express consent definition from one that was silent on the use of lead generation to a definition that specifically bans it in most circumstances.

Specifically, the TCPA's new rules will now require consent “that clearly and conspicuously authorizes no more than one identified seller” using regulated technology.

This is a major change from the current practice of lead generators and networks working with hundreds or perhaps thousands of (usually) small businesses to find the right fit for a consumer. Under the Commission's new rules, the lead generator will only be able to connect with a single business at a time—entirely wiping out networks and data brokers who currently create digital marketplaces for leads.

How Will This Ruling Harm Small Businesses?

The ruling will be exceptionally damaging for small business in a couple of ways.

First, small businesses operating within the lead generation industry itself are set to be wiped out. While certain large lead generators are likely to survive—we can imagine LeadingTree.com and Zillow rapidly adopting new practices—smaller publishers who rely on networks to survive are likely to diminish quickly. They simply do not have the relationships or infrastructure to survive in the new model. So they will either go out of business or sell their operations to larger players who will gobble of market share. This is a real problem.

The intermediary companies creating digital marketplaces—known as networks or aggregators—are also likely to be put out of business en masse. Now that generators must obtain express consent for only a single entity there is no longer room for companies that worked to connect small businesses with one another as they did under previous rules.

The biggest impact, however, will be on the small businesses that rely on leads to survive. Independent insurance brokers and agents are in particular risk, but so are individuals in innumerable other verticals. These small businesses do not have enough market share to assure they will find their name supplied on any webforms in the new paradigm—so only the big boys will be listed for consumers to see.

It remains to be seen just how devastating this ruling will be, but it is safe to say that tens of thousands will lose their jobs—but likely hundreds of thousands. Worse still—this ruling is highly likely to destroy opportunity for small businesses altogether, creating a crushing marketplace collapse that will benefit only the big players who can afford to supplant lead buying with expensive nationwide marketing efforts.

No good.

Will the FCC's New Ruling Actually Stop Robocalls?

The justification for the FCC's new ruling is that it will stop unwanted robocalls. Unlikely.

In the first place most of the scam calls we hate come from overseas and not from legitimate American businesses.

It is true that some unscrupulous actors in the lead generation industry DO create unwanted robocalls by tricking consumers into filling out forms under false pretenses—and the Federal Trade Commission (the FCC's sister organization) has done an excellent job of targeting these companies recently. But trade organizations like [Responsible Enterprises Against Consumer Harassment \(R.E.A.C.H.\)](#) have arisen to stop the bad practices in the industry and assure self-regulation.

But the FCC did not allow R.E.A.C.H. or the FTC to finish their work and, instead, has moved forward on its own.

The new ruling seems certain to stifle the activities of law abiding companies and create incentives for true bad actors to step in and close the gap—much the way organized crime stepped into to supply booze during prohibition. The need for small businesses to connect with consumers is simply too high to expect demand to disappear overnight. People will fight to keep their businesses afloat, and when legal leads dry up—they will understandably turn to illegal leads to try to stay in business.

We can expect a rise in fly-by-night companies that will bombard people with robocalls and exploit the hopes of legitimate businesses who are trying to survive in the post-FCC ruling landscape. This, in turn, will lead to tighter call blocking and labeling regimes which will further destabilize our national telephone system.

It's not looking good.

If the Ruling Is More Harmful than Good Why Did the FCC Do It?

The FCC is an agency of finite resources and—like other federal agencies—it often turns to outside entities to do its thinking for it.

In this case, it relies on special interest groups like the National Consumer Law Center (NCLC) and Public Knowledge to make recommendations on policy choices and tactics. These organizations are left-leaning groups that purport to represent the interests of consumers but receive [millions of dollars from the plaintiff's bar](#) that brings TCPA lawsuits. Unsurprisingly, they advocate for rulings that expand the TCPA and make it easier for Plaintiff's lawyers to make millions.

The NCLC and Public Knowledge are very powerful with this particular FCC—which is lead by Democrats appointed by U.S. President Joe Biden. When the NCLC and PK speak-this Commission listens.

It was the NCLC and Public Knowledge—joined by 12 Democratic Senators—who urged the FCC to rule as it has. And the FCC has now obliged.

If This is So Bad Why Didn't More American Businesses Weigh In?

In fairness to the FCC, it gave American businesses an opportunity to weigh in and—by and large—they simply didn't take it.

The reasons for the failure of American business to protest this devastating ruling are many, but the simplest and most prevalent reason—they just didn't know about it.

Only a tiny portion of American lawyers even knew this ruling was in the works. Most American small businesses do not have access to sophisticated telecom counsel to assist them on esoteric FCC NPRM proceedings so they had no idea this was coming.

But there was another problem here as well—hubris.

Larger companies—especially those in the lead generation industry—simply believed they were too big and important for the FCC to torpedo them wholesale. So whereas some—like the Czar of the TCPA—warned industry groups that the FCC was likely to act in devastating fashion, the attitude amongst these companies was that major change was highly unlikely.

These companies expected—at worst—that the FCC would impose minor limitations on their industry, not crush it entirely. So they chose NOT to weigh in when the FCC gave them the opportunity to do so.

Their silence was their downfall.

Will the Ruling Apply Retroactively?

That is unclear.

While the FCC has framed its ruling as prospective only, the NCLC and some State AGs have already taken the position that these changes should apply retroactively. We can expect that issue to play out in court.

If the ruling applies retroactively it means tens of thousands of businesses who relied on leads will suddenly find themselves at risk for TCPA lawsuits for activity that was completely legal at the time it was done.

This would be a big win for the NCLC's allied Plaintiff's law firms—and very damaging for American businesses who would face billions (or more) in sudden liability for conduct that was entirely permissible at the time it was taken.

Will Anyone Challenge the Ruling in Court?

Probably.

The FCC's past rulings expanding the TCPA have been met with court challenges and the FCC has seen previous rulings overturned as arbitrary and capricious and inconsistent with reasoned rulemaking.

This ruling too is susceptible to attack—the strictures of the APA were probably not adhered to here, and the massive impact on small businesses also appears to run afoul of Commission rules forbidding market altering rulings like this one.

Further, it is highly unclear the Commission has the ability to “interpret” specific provisions like these into existence out of whole cloth.

Unfortunately, only entities that participated in the Comment process have standing to challenge the ruling under the Hobbs Act. That means there are only about 25 companies/organizations with

standing here.

Whether or not they challenge the ruling will depend on the availability of capital to mount a defense—which will be challenging since most of the businesses hit by this ruling are small businesses who now need to conserve their resources in light of the massive marketplace shift the FCC just ushered in.

In short, we will all have to wait and see whether R.E.A.C.H. or the handful of others with standing to do so proceed to fight in court.

How Will the Ruling be Enforced?

As already mentioned, the TCPA is enforced directly by the plaintiff's bar who is highly incentivized to bring suits against legitimate American businesses.

Leveraging the new ruling we can expect TCPA lawsuits—which are already up double digits this year—to skyrocket over the new few years. This is especially true if the ruling is applied retroactively, but TCPA litigation will increase massively either way.

Under traditional rules of interpretation, FCC rulings are generally applied by the courts unflinchingly. We can expect some courts to push back in applying this ruling pending any appeal of the ruling to the DC Circuit Court of Appeals, however. And some district courts might refuse to apply it altogether as the US Supreme Court more generally challenges the requirements of agency deference altogether.

What's the Bottom Line?

The Plaintiff's bar just became even richer and small business (and consumers who like to shop small) just got destroyed by an obscure ruling that most people will have never heard of until it is too late.

And much like the recent damage done to the First Amendment and the endless desecration of our telecom infrastructure, this was all done in a failed bid to stop robocalls that will not work, and will only make things worse for everyone.

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