

February 18, 2015

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *In the Matter of Petition of the American Association for Justice for Waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules, CG Docket No. 02-278, CG Docket No. 05-338*

Dear Ms. Dortch:

The U.S. Chamber of Commerce¹ in conjunction with the U.S. Chamber Institute for Legal Reform² (collectively referred to as “Chamber”) respectfully submits this ex parte letter in support of the filing of the Petition of the American Association for Justice for Waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules³ (“AAJ Petition”) in the above-referenced docket.

The Chamber strongly urges the Commission to grant the AAJ Petition, as the association, like many other businesses, should be immune from abusive class action litigation that has exploded under the Telephone Consumer Protection Act (“TCPA”). Indeed, the reach of this litigation, which has grown 560% from 2010-2014,⁴ has adversely

¹ The U.S. Chamber of Commerce is the world’s largest business federation, representing the interests of more than three million businesses of all size, 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.

² The U.S. Chamber Institute for Legal Reform seeks to promote civil justice reform through legislative, political, judicial, and educational activities at the global, national, state, and local levels.

³ *In the Matter of Petition of the American Association for Justice for Waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules*, CG Docket No. 02-278, CG Docket No. 05-338 (filed November 26, 2014) (“AAJ Petition”).

⁴ *Debt Collection Litigation & CFPB Complaint Statistics, December 2014 & Year in Review*, WebRecon LLC (Jan. 22, 2015), available at <http://dev.webrecon.com/debt-collection-litigation-cfpb-complaint-statistics-december-2014-and-year-in-review/>.

affected a broad segment of the business community, the federal government, and now the AAJ.

On November 20, 2014, the AAJ was named as a party to a class action lawsuit filed in federal district court by one of its members, alleging the company sent out faxes without an appropriate opt-out notice.⁵ In its defense, AAJ argues that it, in good faith, believed an opt out notice was not required under the TCPA, and thus filed a waiver for retroactive relief from lawsuit with the FCC.⁶

As AAJ points out in its petition, with all of the uncertainty amassed because of inconsistencies with Section 64.1200(a)(4)(iv), a footnote contained in the *Junk Fax Order*, and the notice of the Commission's intent to adopt Section 64.1200(a)(4)(iv), how could it possibly have properly assessed the situation?⁷

The Chamber wholeheartedly agrees that liability under the TCPA should not exist under these circumstances because of the unreasonable burden placed on businesses, and other organizations, to comply with ambiguous statutory language. The language drafted in 1991 for the TCPA does not reflect current technologies and is being interpreted by the judicial system in an over-expansive manner, clearly going beyond the law's original intent of protecting consumers from certain harassing telemarketing calls and faxes that were designed to barrage consumers via cold-calling methods such as random and/or sequential dialing of telephone numbers. Now, much of the litigation involving the TCPA is focused on lawsuits against well-intentioned businesses reaching out to their own customers and/or members.

Similar to the lawsuit against AAJ, Magna Chek, a small family-run business out of Michigan that designed a limited fax campaign to reach out to its customers, was subject to a class action TCPA suit seeking massive statutory damages for failing to include 8 specific words in a fax opt-out agreement to individuals who had consented to receiving faxes from the company.⁸ Even though the October 30th Order addresses this situation, the company presumably accrued thousands of dollars in legal fees, and countless hours of worry about a case that could close the doors of that company, all over the lack of 8 "magic" words.⁹ Litigation under the TCPA has gone beyond its intent of protecting consumers; it is now

⁵ First Amended Complaint, *Blake v. American Association for Justice*, No. 1:14-cv-23781-KING/TORRES (S.D. Fla. Nov. 20, 2014).

⁶ AAJ Petition, *supra* note 2, at 2. The Chamber notes the irony that an association offering dozens of workshops for their member lawyers, instructing them in the best practices of lawsuits in many different types of cases—including how to successfully sue using the TCPA—would be unaware of how to comply with the law.

⁷ *Id.* at 3.

⁸ Significantly, the faxes did contain language notifying recipients they had a right to opt-out of the communication and provided a cost-free method to opt out. However, the opt-out notice did not contain the specific words "failure to comply within 30 days is illegal." *Notice of Ex Parte Presentations*, CG Docket No. 02-278, 05-338 (filed September 15, 2014).

⁹ Any terms of a settlement between the parties were not disclosed in a December 9, 2014, stipulation of dismissal.

being used to harm businesses—both large and small—that are, in good faith, trying to comply with the law.

The AAJ deserves immunity from its inability to comply with ambiguous statutory language. Like many other businesses, it was just trying to contact its customers, presumably with their consent, and it should not be subjected to abusive litigation.

Yet, this is the paradox hundreds, if not millions of American businesses face on a daily basis. It has now become a liability to pick up the phone or send a fax or text to one's customers because of legal uncertainties and over-encompassing circuit court interpretations of provisions of the TCPA, and because of professional TCPA plaintiffs and a TCPA plaintiffs' bar eager to pounce on any communication as a potential violation.

American businesses deserve clarity under the TCPA. They deserve reasonable solutions to stem the tide of lawsuits brought primarily to line the pockets of the TCPA plaintiffs' bar—lawsuits that are harming well-intentioned businesses.

Respectfully Submitted,



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William Kovacs
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