AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

LAWSUIT ABUSE AND THE TELEPHONE CONSUMER PROTECTION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

JUNE 13, 2017

Serial No. 115–21

Printed for the use of the Committee on the Judiciary



Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PUBLISHING OFFICE
29–775 WASHINGTON : 2018

COMMITTEE ON THE JUDICIARY

BOB GOODLATTE, Virginia, *Chairman*

F. JAMES SENSENBRENNER, JR., Wisconsin
LAMAR S. SMITH, Texas
STEVE CHABOT, Ohio
DARRELL E. ISSA, California
STEVE KING, Iowa
TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas
JIM JORDAN, Ohio
TED POE, Texas
JASON CHAFFETZ, Utah
TOM MARINO, Pennsylvania
TREY GOWDY, South Carolina
RAÚL LABRADOR, Idaho
BLAKE FARENTHOLD, Texas
DOUG COLLINS, Georgia
RON DESANTIS, Florida
KEN BUCK, Colorado
JOHN RATCLIFFE, Texas
MARTHA ROBY, Alabama
MATT GAETZ, Florida
MIKE JOHNSON, Louisiana
ANDY BIGGS, Arizona

JOHN CONYERS, JR., Michigan, *Ranking Member*
JERROLD NADLER, New York
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
STEVE COHEN, Tennessee
HENRY C. "HANK" JOHNSON, JR., Georgia
THEODORE E. DEUTCH, Florida
LUIS V. GUTIÉRREZ, Illinois
KAREN BASS, California
CEDRIC L. RICHMOND, Louisiana
HAKEEM S. JEFFRIES, New York
DAVID N. CICILLINE, Rhode Island
ERIC SWALWELL, California
TED LIEU, California
JAMIE RASKIN, Maryland
PRAMILA JAYAPAL, Washington
BRAD SCHNEIDER, Illinois

SHELLEY HUSBAND, *Chief of Staff & General Counsel*
PERRY APELBAUM, *Minority Staff Director & Chief Counsel*

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

STEVE KING, Iowa, *Chairman*
RON DESANTIS, Florida, *Vice-Chairman*

TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas
TREY GOWDY, South Carolina

STEVE COHEN, Tennessee
JAMIE RASKIN, Maryland
JERROLD NADLER, New York

CONTENTS

JUNE 13, 2017

OPENING STATEMENTS

	Page
The Honorable Steve King, Iowa, Chairman, Subcommittee on the Constitution and Civil Justice	1
The Honorable Steve Cohen, Tennessee, Ranking Member, Subcommittee on the Constitution and Civil Justice	2
The Honorable Bob Goodlatte, Virginia, Chairman, Committee on the Judiciary	4

WITNESSES

Rob Sweeney, Founder & CEO, Mobile Media Technologies LLC Oral Statement	6
Becca Wahlquist, Partner, Snell & Wilmer LLP Oral Statement	8
Hassan Zavareei, Partner, Tycko & Zavareei LLP Oral Statement	10
Adonis Hoffman, Founder & Chairman, Business in the Public Interest Oral Statement	11

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Letters Submitted by The Honorable Steve King, Iowa, Chairman, Subcommittee on the Constitution and Civil Justice. This material is available at the Committee and can be accessed on the committee repository at:
http://docs.house.gov/meetings/JU/JU10/20170613/106106/HMTG-115-JU10-20170613-SD002.pdf

Statement submitted by the Honorable John Conyers, Jr., Michigan, Ranking Member, Committee on the Judiciary. This material is available at the Committee and can be accessed on the committee repository at:
http://docs.house.gov/meetings/JU/JU10/20170613/106106/HMTG-115-JU10-MState-C000714-20170613.pdf

LAWSUIT ABUSE AND THE TELEPHONE CONSUMER PROTECTION ACT

TUESDAY, JUNE 13, 2017

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

COMMITTEE ON THE JUDICIARY

Washington, DC

The subcommittee met, pursuant to call, at 2:06 p.m., in Room 2141, Rayburn House Office Building, Hon. Steve King [chairman of the subcommittee] presiding.

Present: Representatives King, Goodlatte, Franks, Gohmert, Cohen, Nadler, and Raskin.

Staff Present: John Coleman, Counsel; Jake Glancy, Clerk; James Park, Minority Chief Counsel, Subcommittee on the Constitution; Matthew Morgan, Minority Professional Staff Member; and Veronica Eligan, Minority Professional Staff Member.

Mr. KING. The Subcommittee on the Constitution and Civil Justice will come to order. Without objection, the chair is authorized to declare a recess of the committee at any time.

We welcome everyone to today's hearing on the lawsuit abuse and the Telephone Consumer Protection Act. And I now recognize myself for an opening statement.

Today's hearing will examine lawsuit abuse of the Telephone Consumer Protection Act, or TCPA as we will likely refer it. The TCPA was enacted in 1991 that established several enforcement mechanisms, including a private right of action for consumers to bring claims for receiving certain auto-dialed calls, prerecorded calls, and faxes they did not consent to receive.

This law also established a private right of action for certain telemarketing calls made in violation of a consumer status on the Federal do-not-call list. At the time of its passage, the TCPA was a sensible legislative response to consumers and businesses who were overwhelmed with unwanted calls and faxes. But with advances in technology, government regulators have struggled to interpret the TCPA's antiquated language to new situations.

An increasing amount of regulations and court interpretations has produced a lack of clarity that is empowering plaintiffs' attorneys to sue companies that are contacting their customers for legitimate reasons. Damages can easily become expotential given that each violation can amount to $500, even if no actual harm to the consumer was caused. Plaintiffs' attorneys are encouraged to

use abusive litigation tactics such as waiting for these violations to pile up.

A lawsuit against Rubio's restaurant provides an unfortunate example of these tactics. Rubio's is a California-based restaurant chain that uses a messaging system to send food safety alerts to its employees. When an employee's cell phone number was reassigned to a person who was not an employee, the messaging system continued sending alerts to that number. The restaurant didn't know that the number had been reassigned, because the telephone company is not required to notify the business. Over time, the person with this phone number waited to accumulate 876 alerts before filing a $500,000 TCPA lawsuit. This is clearly an abuse.

Rubio's restaurant isn't the only business that has been unfairly targeted with TCPA litigation. According to the U.S. Chamber of Commerce's Institute for Legal Reform, American businesses are besieged with lawsuits brought under the TCPA, with many attorneys and individual consumers making their living through suing companies for any text, any call, or any facsimile placed to numbers that had been provided to those companies for such communication purposes.

Indeed, it is not rare for alleged statutory damages for punitive class actions brought under the TCPA to be billions of dollars when large companies with millions of customers are sued.

Small businesses too are finding that their very existence is threatened by the TCPA lawsuits. The Federal Communications Commission, which is tasking—which is tasked with interpreting and enforcing the TCPA, has noted an increasing number of TCPA-related lawsuits in recent years and believes this is due to a lack of clarity in the law's interpretation.

In 2014, Commissioner Michael O'Rielly stated: "Over time, as the FCC and the courts have interpreted the TCPA, business models and ways of communicating with consumers have also changed. As a result, the rules have become complex and unclear."

In addition to prohibiting abusive robocalls and junk faxes, which was the original intent, the rules are creating situations where consumers might not receive notifications and offers that they want and expect and where new and innovative services and applications that help friends and family members communicate with each other could be restricted.

My hope is that today's hearing will explore the unintended consequences of the TCPA and the lawsuit abuse, which has grown into an industry and arisen from it. And although this law may require an update, we must keep in mind the original goal of the TCPA, which is to protect the privacy interests of this Nation's consumers.

I want to thank our witnesses for being here today. I look forward to your testimony.

Mr. KING. The Chair now recognizes the ranking member of the Subcommittee on the Constitution and Civil Justice, Mr. Cohen of Tennessee, for his opening statement.

Mr. Cohen.

Mr. COHEN. Thank you, Mr. Chairman.

This committee today will—subcommittee—consider a topic we have never considered before, which is somewhat refreshing, even

if it is a question which probably shouldn't come here in the subcommittee, because it normally would fit into Energy and Commerce. Somehow it got in Civil Justice and the Constitution, which probably should be dealing with something concerning maybe obstruction of justice or other issues of our democracy.

But we are here with this bill today, by this hearing—this issue, and it would weaken the private right of action under the Telephone Consumer Protection Act, a statute over which this committee has no jurisdiction.

The truth of the matter is, this committee, if it came to the Judiciary Committee, this should be in the Criminal Law Subcommittee, in my opinion, because I think anybody that violates this probably shouldn't be sued and shouldn't necessarily pay civil damages. They should be sentenced to a life in a small room with one telephone that rings constantly with recorded messages.

I detest these calls. And now that we have cell phones, my landline, which resides in Memphis, Tennessee, in my home with my cat, who is probably disturbed as well by the calls that come when I am not there, when I check my service, the only calls I get are from these automatic callers. It is rather inconvenient. And I have to go through and erase them before I might find one constituent.

The TCPA prohibits the use of certain automation technologies, like auto dialers or predictive dialers, to call or fax a person with, allegedly, prior express consent. And sometimes that is pretty loose. And it could be just providing one's phone number to a potential caller, and sometimes you kind of get hooked into that. I might have done that this morning. I hope not. But they said, what is your phone number, and I thought, what business is it of yours. But I decided it would be nice to give them my number. I am sure I will now get phone calls forever from them.

The Act has been rightfully interpreted to cover text messages and calls to cell phones now. So we might get one right here. I should turn my dialer on, alarm. When harmed by violations is the time of injunctive relief and the greater of actual monetary damages or statutory damages of $500 per violation and a strict liability.

For years now, corporate defendants who come before the subcommittee to attack the robust use of private civil litigation to enforce various Federal statutes ranking from civil rights statutes to the False Claims Act to people with disabilities in violations of the disabilities law. These corporate interests seek to paint lawsuits as somehow illegitimate and unfair to well-intentioned businesses that simply made an honest mistake in failing to comply with the law. Yet such arguments ignore the central role that private rights of action play in the enforcement of these type of Federal laws.

Congress' intent and the way this works in structuring the TCPA and these other laws that we had come before us, strict liability, is statutory damages for any violation, which was to put the onus on the business, not the consumers, to comply with the TCPA and to force businesses, not consumers, to bear the risk association—associated with such noncompliance. Indeed, without the incentives contained in the TCPA to bring private lawsuits against violators, there may well be little enforcement.

According to one law review article, private parties have largely been responsible for the enforcement of the TCPA because of the relatively large statutory damages amount, especially when compared to actual harm and the lack of enforcement by government agency. Without this, you really wouldn't have the enforcement, and you would have more and more phone calls and people that did honest—not honestly maybe make a little mistake, like that restaurant, but these other awful people that call you and tell you about getting a—your order for a hearing aid or your monitor to keep depressed when you fall in your home. It is really galling to get those, because they assume that you are going to fall soon, which is certainly something that comes when they find that you are over 65 years of age.

Few would quarrel with or admit to quarreling with the policy goals underlying the TCPA. No one wants to be flooded with hundreds of robocalls and spam text messages. Congress passed the TCPA to protect consumers from extreme nuisance and invasions of privacy caused by such activities.

And while the TCPA enforcement through private litigation has been relatively successful, the Federal Trade Commission still received more than 5 million TCPA-related complaints in 2016, 5 million. It would have been 4 million if I didn't file my complaints, but it was included, so it is 5 million.

So the last thing Congress should be doing is weakening the private right of action. If anything, we should be incurring more, not less, vigorous litigation to enforce the Act, and we should be including criminal damages of being isolated in that room with that one phone that rings every 30 minutes.

I thank our witnesses, and I look forward to today's discussion. And I look forward to the day that there are no automatic phone calls ever again.

I yield back the balance of my time.

Mr. KING. The gentleman makes his point and returns his time.

The Chair now recognizes the chairman of the full committee, Mr. Goodlatte of Virginia, for his opening statement.

Chairman GOODLATTE. Thank you, Mr. Chairman.

The Telephone Consumer Protection Act was enacted in 1991 to stem the tide of unsolicited calls and fax advertisements that consumers were receiving on a daily basis. While well-intentioned, this law, unfortunately, reflects the dangers of legislation with broad intent but narrow application to specific technologies.

One legal scholar has pointed out that a major concern raised during Congress' consideration of this legislation was that fax recipients were bearing the cost of ink and paper for the fax advertisement they received. Indeed, in the early 1990s, three-fourths of facsimile machines in the United States printed faxes on rolls of costly thermal transfer paper. A fax machine that printed on regular copier paper existed but cost over $2,000. Ten years later, the average price of a fax machine that used copier paper dropped to around $100. Today, fax machines are much less frequently used, and many have been replaced with servers that allow recipients to view faxes on computers without printing them at all. Just as technology has changed since the early 1990s, so has litigation surrounding the TCPA.

According to the FTC, an increasing number of TCPA violations involve internet-based calls generated from outside the United States. The FTC has also reported that approximately 59 percent of phone spam cannot be traced or blocked because phone calls are routed through a web of automatic dialers called ID spoofing and Voice over Internet Protocols. In contrast, a report cited in Ms. Wahlquist's written testimony states that between 2010 and 2016, there was a 1,372 percent increase in case filings.

If advances in technology have made it more difficult to find intentionally—intentional violators to the TCPA, then who is being sued? The answer could be U.S. businesses that are not actually violating the law. In many cases, TCPA litigation is arising from a lack of clarity in the law's application, which is being exploited by attorneys seeking big payouts. Unfortunately, the TCPA neither anticipates the effects of new technology nor these emerging legal trends.

I hope that today's hearing sheds some light on the lawsuit abuse of the TCPA and what Congress can do to modernize and improve it. We must protect consumers from being forced to foot the bill for unsolicited advertisements, and we must also ensure that the law is not abused by a cottage industry of overaggressive trial lawyers seeking to line their own pockets.

I want to thank all the witnesses for testifying today, and I looked forward to their testimony.

Mr. Chairman.

Mr. KING. I thank the gentleman of Virginia, and the gentleman returns his time.

The Chair would now recognize the ranking member for a request.

Mr. COHEN. Thank you, Mr. Chair. I would like to request to enter the statement of the ranking member of the committee, Conyers, on this subject.

Mr. KING. Without objection, so ordered. His statement will be entered into the record.

[The information follows:]

CONYERS STATEMENT

Ranking Member Conyers statement submitted byd by Mr. Cohen of Tennessee. This material is available at the Committee and can be accessed on the committee repository at: *http://docs.house.gov/meetings/JU/JU10/20170613/106106/HMTG-115-JU10-MState-C000714-20170613.pdf*.

Mr. KING. And I now—without objection, other members' opening statements will be made a part of the record.

Okay. And by request of staff, before I introduce the witnesses, I would like to enter into the record a letter from trade associations and business groups representing hundreds of thousands of U.S. companies in support of this hearing: a letter from the Credit Union National Associations; the written statement of Richard Worick, President and CEO of the MSR Group based in Omaha, Nebraska; a statement from the American Association of Healthcare Administrative Management; and a statement from the Electronic Privacy Information Center.

I request to enter it into the record.

Hearing no objection, so ordered.

KING INTRODUCED LETTERS

Letters from various Trade Associations submitted by Mr. King of Iowa. This material is available at the Committee and can be accessed on the committee repository at: *http://docs.house.gov/meetings/JU/JU10/20170613/106106/HMTG-115-JU10-20170613-SD002.pdf*.

Mr. KING. And now I would like to introduce the witnesses. Our first witness is Mr. Rob Sweeney. He is the founder and CEO of Mobile Media Technologies LLC.

Mr. Sweeney.

And our second witness is Becca Wahlquist, a partner at Snell & Wilmer LLP. And our third witness is Hassan Zavareei, a partner at Tycko & Zavareei LLP. And our fourth witness is Adonis Hoffman. And Mr. Hoffman is the founder and chairman of Business in the Public Interest, Incorporated.

Each of the witnesses' written statements will be entered into the record in its entirety. I ask that each witness summarize his or her testimony in 5 minutes or less. To help you stay within that time, there is a light in front of you. And the light switch will turn from green to yellow, indicates you have a minute left. We would ask you to summarize your statement at that point. When the light turns red, it indicates that the witness's 5 minutes have expired.

Before I recognize the witnesses, it is the tradition of this subcommittee that you all be sworn in. So please stand to be sworn in.

Do you swear that the testimony you are about to give before this committee is the truth, the whole truth, and nothing but the truth, so help you God?

Thank you. You may be seated.

Let the record show that all the witnesses responded in the affirmative.

And now, I would like to recognize our first witness, Mr. Sweeney. Please turn on your microphone, and we will be happy to hear your testimony.

TESTIMONY OF ROB SWEENEY, FOUNDER AND CEO, MOBILE MEDIA TECHNOLOGIES LLC; BECCA WAHLQUIST, PARTNER, SNELL & WILMER LLP; HASSAN ZAVAREEI, PARTNER, TYCKO & ZAVAREEI LLP; AND ADONIS HOFFMAN, FOUNDER AND CHAIRMAN, BUSINESS IN THE PUBLIC INTEREST

TESTIMONY OF ROB SWEENEY

Mr. SWEENEY. Chairman King, Ranking Member Cohen, members of the subcommittee, I am grateful for the opportunity to address you today and tell you my story about how the TCPA has deeply harmed my business.

I am an entrepreneur. I am a small businessman. I had an idea, 2003, to invent a permission-based mass text messaging solution—I did so—primarily for noncommercial messages to be sent by schools and hospitals, TV stations, newspapers, just nonprofit organizations. And they would send the content out to people who would opt in. And the process they used to opt in we refer to as

a two-step out-of-band authentication process. It is probably a process you have all used at some point in your life. It includes opting in, having a code sent to your phone, and then entering that code back into a website.

That is what we used to enable web-based opt-in for our clients. That process is part of the patent that I was issued in 2007. It is also the process used by the wireless carrier CTIA Mobile Marketing Association's best practices for web-based opt-in.

A little bit about TextCaster and who uses us. Like I said, schools use us. If you have children in school and there is an issue or emergency, it would be used to communicate that to the parents and to other members.

TV stations use it to send out weather alerts and breaking news. If about 11 o'clock at night and you are in bed and there is a tornado warning, and you are opted into your TV station or newspapers news alerts, you are going to get a message that is going to wake you up. You have opted in. You have gone through that two-step process and authenticated yourself as who you are, and you have control of that phone number.

The TCPA declaratory ruling order in 2015 included some language that was onerous, it was very broad, about the ability to opt out using any reasonable means. Well, one lawyer, one plaintiff, decided to opt into 99 of our clients. And when they would get the first message, they would revoke consent by replying "stop." Now, we didn't support the stop request at that time because we didn't need to. The carriers didn't require it. And so they just kept going and going and receiving these.

And by the way, when they opted in, they opted in and immediately opted out. So this was nothing more than a manufacturing scam to create potential lawsuits.

Well, that person that did that used six different numbers under six different names and, basically, was—when the attorneys got ahold of this, they decided to send out threat letters to our—to our customers demanding payments into the millions.

And we had been working on the stop request, but I am a little company, and I have got 120 wireless carriers that I have got to work with, and I had a plan to support stop long before the DRO was issued in July. So it took us 120 days. In the meantime, the threat letters started coming in.

We recognized the threat letters as serious. We hired counsel, very competent counsel, to help us address the issue. Developed—our counsel developed six defense points, shared them with the counsels of our media properties who were being sued. Our media properties were getting these demand letters, and these demand letters were into the millions of dollars, all by a shakedown. That is what was happening.

At the end of the day, no lawsuits have been filed. One customer chose to settle a $1 million demand for $15,000. My company lost $300,000 a year in business from media clients who did not want to wade back into this because of an onerous statute. I have incurred over $100,000 in legal expenses, and I have had a reduction in force to deal with this.

You know, to the lawyer, it is all about money. To me, it is about my livelihood. It is about my livelihood for the—for the employees

who work for me. To our customers that were getting these messages, they are not getting them anymore because their media properties choose not to participate anymore.

So I am just asking you to consider and be thoughtful of the kind of language that is used when you are putting this into place and putting small businesses like us at risk to perform a service that, again, I would bet that all of you and your families have probably used at some point or other.

Thank you.

Mr. KING. I thank the gentleman for his testimony.

And now recognize the gentlelady, Ms. Wahlquist, for her 5 minutes.

TESTIMONY OF BECCA WAHLQUIST

Ms. WAHLQUIST. Thank you.

Good morning, Chairman King, Ranking Member Cohen, members of the subcommittee. My name is Becca Wahlquist. I am a partner at Snell & Wilmer. I am chair of the firm TCPA defense practice group. I am honored to represent the U.S. Chamber Institute for Legal Reform and testifying before you today.

For over 15 years now, I have defended various companies sued under the TCPA for a variety of communications made via phone, text, or facsimile. So I have been a firsthand witness to the growing cottage industry of TCPA plaintiff lawyers and plaintiffs targeting American businesses. I can confirm that in the past few years, the problems with TCPA litigation abuse do continue to worsen.

TCPA litigation is booming. It is less about protecting consumers and more about driving a multimillion dollar commercial enterprise of TCPA lawsuits using the statute's private right of action.

Indeed, the lawsuits filling up our court dockets, for the most part, are not even about the spammed marketing calls that Mr. Cohen mentioned that annoy and harass persons with marketing messages and with spoofed caller IDs in a manner that flouts all regulations. Those are the overseas-based aggressive spam robocallers. That is what is causing most of the complaints to the FCC. That is not what is being targeted in the many thousands of TCPA actions brought in our courts every year.

Instead, the primary targets of the TCPA litigation are legitimate American businesses trying to comply with the law and to contact their own customers in a matter consented to by that customer. The lawsuits are frequently about informational and transactional calls, not marketing: flu shot reminders, credit card reject notifications, suspensions of account warnings, not marketing calls for the most part.

It takes just one text or call or fax to form the basis of a nationwide class action lawsuit alleging damages on behalf of millions of people for potentially billions of dollars.

Every 10,000 communications alleged to violate the TCPA puts $5 million of statutory damages at issue. Not great news for one restaurant that I work with who sent text messages only to people who went through the double opt-in process described by Mr. Sweeney, who wanted to get notifications and coupons and, hey, here is a deal at the restaurant today, and they signed up for this text program.

There was an issue where the vendor who had been handling the program was losing the business, a new vendor was going to be coming in. The old vendor, angry, one would have guessed, that he was losing his business, provided the list of members. Here is the text club members, but it was an inaccurate list. And so unknown to this company, they sent one text message to what is alleged to be 64,000 people in that group who had not—should not have been on the group, and now they are facing themselves for one text message that one person complained about a lawsuit alleging $32 million of statutory damages.

And that is just one example. My testimony speaks of others.

The problem is that there is no cap on TCPA damages, as with all the other consumer private right of action statutes that don't require any kind of actual damages. And so with that uncapped damages available, you just find lawsuits being brought against very well-intentioned companies that, as with the restaurant example I gave you, you know, one complaint, one mistake, $32 million in allegations.

And there are multiple law firms that are joining up, often, to bring these lawsuits against the deeper pocket companies. So TCPA class actions are driven by the desire for attorneys' fees awards that will be pulled from common class funds, and these attorneys fees dwarf the recovery for individual consumers.

And in my written testimony I speak of the statistics about the average cost member recovery versus the millions of dollars recovered by the attorneys.

Importantly, it is not just large companies that find themselves targeted. Businesses of all sizes have—I have worked with in my TCPA defense work: social media companies, electric companies, banks, sports teams, pharmacies, plumbing companies, ski resorts, accountants, school boards, local dentists office, a blood bank, they have all found themselves defending against TCPA litigations and facing potentially annihilating statutory damages.

The TCPA, importantly, is not just a liability trap but a vicarious liability trap as well, as I discuss in my statement. Lawyers on the TCPA front do tend to sue the deepest pockets. So companies who never sent or retained anyone to send a text message or a call find themselves being sued potentially because their product was mentioned in a communication sent by someone else. And when they get these lawsuits, the pressure to settle is enormous, even without—even if you have a meritorious defense, because there are potentially billions of dollars of statutory damages that could be in play.

So TCPA litigation is not decreasing. My statement highlights that it continues to pick up steam year after year, and more people are catching on to funds that could be sought through TCPA litigations.

So I cover most of this in my written testimony and would be happy to answer any questions later on in the proceeding.

Mr. KING. Thank you. The gentlelady's time has expired.

The Chair now recognizes the gentleman, Mr. Zavareei, for his 5 minutes.

TESTIMONY OF HASSAN ZAVAREEI

Mr. ZAVAREEI. Chairman King, Ranking Member Cohen, and members of the subcommittee, thank you for inviting me to testify here today. I am the founding partner of Tycko & Zavareei LLP, which is a private-public interest law firm that represents small businesses, consumers, and whistleblowers.

Before founding Tycko & Zavareei, I worked for years at Gibson, Dunn & Crutcher representing corporate clients. Since then, I have litigated class actions and individual actions in State and Federal court across the country.

I would like to begin by addressing why we are here today. Ostensibly, this hearing is about lawsuit abuse, but we must ask, what constituents are complaining about this supposed abuse? Are constituents, in fact, calling your offices and complaining that they want to receive more robocalls and more unsolicited text messages?

I submit to you that the reason we are here is because there is a powerful business interest in opening up the floodgates to our last bastion of privacy, which is our cellular telephones. The TCPA has succeeded in keeping invasive telemarketing at bay, and some businesses don't like that. The real question is, do American people want Congress to make it easier for businesses to flood their cell phones with telemarketing calls and text messages?

The most commonly abused trope of opponents to the TCPA is that the TCPA is being abused to inhibit the actions of legitimate businesses. We have already heard that today. But the TCPA is not concerned with the legitimacy or illegitimacy of the business. The TCPA is concerned with the legitimacy or illegitimacy of the conduct. Legitimate businesses can and do engage in illegitimate communications, and legitimate businesses are not prohibited from engaging in legitimate communications. All they need to do is obtain consent, and that is not too much to ask.

Moreover, exceptions do exist for almost every important communications. There is an exception for medical messages. There is an exception for school closings. There is an exception for emergencies. There is an exception for utilities who want to notify constituents about power outages. There is an exception for fraud verification. Quite simply, this is a narrow statute.

As you consider tinkering with the TCPA, I ask you to imagine a world where our cell phone privacy has no protections. Imagine your cell phone ringing with calls from banks, cable companies, phone companies, gyms trying to sell their goods and services. Imagine calls from businesses you have no relationship with. Imagine text messages from every company you ever thought about doing business with, and then imagine more calls and text messages from companies you never, ever thought of.

Now, imagine the calls from your constituents about their cell phones, which have now become virtually useless because you removed the protections of the TCPA.

The TCPA has protected cell phones as the last bastion of privacy since their introduction into society. Relaxing those restrictions would turn this personal space into nothing more than a nonstop advertising nuisance. Congress deliberately crafted a free-market approach to curtail runaway telemarketing, and private enforcement is working.

Yes, the numbers of suits are, in fact, going up, but that is not because of bad actors or abuse by plaintiffs, as the opponents would have us believe. It is because of the skyrocketing numbers of robocalls and text messages. It is true that there were 4,800 suits in 2016, but that is only .1 percent of the over 4 million complaints to the FTC and the FCC in the same time period.

Yes, there are bad actors, but there are ways to control that, and courts have addressed these. Courts have sanctioned bad actors. They have dismissed their claims from the very beginning, and they found that they are inadequate to be class representatives.

I want to just give one example of how TCPA class actions actually do work. A lawsuit was brought by two law firms against Caribbean Cruise, which is a legitimate business, which began making phone calls to people that—whose phone numbers they obtained, robocalls where they pretended, falsely, to be engaging in a survey. And once people—and promising a free cruise if they engaged in a survey. This was a fraudulent practice. I got the text messages—I got the robocall, and I imagine—Mr. Cohen is indicating he received it. I imagine many others received that same text message. Fifty million calls made by that company.

That company was sued. It took 4 years to bring that company to justice. Those attorneys expended over $5 million in attorneys' fees without any guarantee of compensation before finally obtaining a settlement in the amount of 56—a minimum of 56 million with a maximum of $76 million. The class members from that settlement will receive $135 per call.

The TCPA is not perfect, but the free market private enterprise mechanism works. If Congress fiddles with it, it risks removing the best and last line of defense of one of our few remaining realms of privacy.

I thank you for the opportunity to testify, and I look forward to answering any questions you may have.

Mr. KING. Thank you, Mr. Zavareei.

And I now recognize Mr. Hoffman for his 5-minute testimony.

Mr. Hoffman.

TESTIMONY OF ADONIS HOFFMAN

Mr. HOFFMAN. Good afternoon, Mr. Chairman and members of the committee. I appreciate the opportunity to appear before your subcommittee to discuss the important issues surrounding lawsuit abuse and the TCPA.

I am here today in my individual capacity, although I serve as chairman of Business in the Public Interest, and teach as an adjunct professor at Georgetown. I am not representing any company, client, firm, organization, trade association, or entity concerning this issue, and I have not received any compensation from anyone concerning this matter, nor am I arguing for or against any specific legislation that is pending before Congress.

It is a special honor for me to return to these hallways. I spent several years as a legislative director, committee counsel, and subcommittee staff director in the House during the 97th, 98th, and 102nd Congresses. Serving during those times changed my life and my career, and I have the greatest affinity and highest regard for this institution and the work that you do.

In addition to Congress, I spent 30 years as a lawyer in Washington, D.C., working in private practice at a policy think tank and as in-house counsel for a trade association. But most relevant to this hearing, I recently served as chief of staff and senior legal adviser to FCC Commissioner Clyburn from 2013 to 2015 during the pendency in consideration of the TCPA.

In 2015, I coined the phrase, "TCPA, total cash for plaintiffs' attorneys." It was a little flippant remark, but it signified to me what the TCPA has come to—come to signify under its current interpretation.

In 2015, the FCC noted that it has sought to reasonably accommodate individuals' rights to privacy as well as a legitimate business interest of telemarketers and other callers. But all is not well. Somewhere along the line, the balance that was originally intended shifted from business concerns and consumers into the hands of plaintiffs' lawyers.

I met with dozens of interested parties as part of the FCC review of petitions. We heard from banks, credit agencies, debt collectors, educational institutions, financial institutions, healthcare providers, insurance companies, retailers, service providers, utility companies, and other commercial entities. We also heard from trade associations representing numerous industries. And last but not least, we heard at the FCC from attorneys and law firms representing classes of consumers suing under the TCPA.

The business voices told the—told us that the TCPA was harming business because it paralyzed their ability to communicate effectively and efficiently with consumers and customers by telephone. The consumer voices told us what Mr. Zavareei has said.

Let me give you the names of a few companies that might be household names for you: Capital One, $75 million settlement; ATT Mobility, $45 million settlement; SiriusXM, $35 million settlement; JPMorgan Chase, 34 million; Bank of America, 32 million; MetLife, 23 million; Wells Fargo, 16 million; Papa John's Pizza, 16 million; Walgreens Pharmacy, 11 million, and scores of others below.

These are not bad companies. They were not doing, necessarily, anything consciously incorrect or unlawful. In fact, most of these companies came to the FCC to say, we want to comply with the TCPA, but we don't know how because it is so ambiguous. The least misstep can lead us to strict liability.

The proliferation of class-action lawsuits under TCPA has been tracked and well documented by others at the Institute for Legal Reform. I pointed out in a recent article in The Wall Street Journal, the average recovery for a consumer in TCPA class-action settlement was $4.12, $4.12. You can't even get Starbucks for $4.12. Their lawyers, by contrast, received an average of $2.4 million. Something is wrong with this picture.

As a lawyer, as a consumer, and as a citizen I think that the system needs to be adjusted. We tend to focus on the sensational settlements reached by big companies, as well as we should—as we should, but there is another dimension of the TCPA, and that has a potentially devastating effect on a small—on small, minority, and community-based businesses. For these organizations, a TCPA claim could mark the end of their existence due to the strict liability mandate, which can mean millions of dollars or hundreds of

thousands of dollars in fees for their companies that can least afford it.

Let's be honest, nobody here likes robocalls. None of us relish intrusive calls from telemarketers, even if their data show that we might be interested in what they have to say. But on the other hand, there is a valuable function and utility to allowing companies to communicate with their customers, their clients, their patients, or patrons without fear of costly legal action. In essence, business should be able to talk to the people they serve.

In summary, Mr. Chairman, members of the committee, I would recommend the Congress has the authority to end this burden on American businesses large and small. There are three things that you can do to change what is a growing problem for U.S. companies under the TCPA: One, impose a liability cap on TCPA awards; amend key provisions of the TCPA; and, three, provide a safe harbor for substantial compliance.

I appreciate the opportunity to talk with you and stand ready to answer any questions.

Mr. KING. Thank you, Mr. Hoffman, and all the witnesses for your testimony.

The Chair will now recognize himself for my 5 minutes. And I appreciate your recommendations on what we should do. And I will try to circle back to you at the end of my time here.

I first wanted to turn to Ms. Wahlquist and ask you if you have any data or you can give us, this committee, a sense of how many of these cases that are filed actually go through the full litigation, and what percentage of them dollarwise or plaintiffwise or attorneywise are settled out of court.

Ms. WAHLQUIST. The problem is—the problem is that that kind of data doesn't really exist. I am working on putting together an analysis of about 3,000 filed litigations that were filed in a 17-month period. And I speak about some of the early findings in my testimony and will have more information later this year. But the prelitigation demands aren't reported anywhere.

I know from clients that I have and some of the bigger companies, they are receiving anywhere from 20 to 50 letters a month saying, you have called me. I have a TCPA cause of action. And, again, these are calls that are made with what the company believes to be the prior consent. So it might be someone saying, I revoked. Might be somebody saying, my number is a new number, and you were trying to reach someone else. But there is significant amounts of demands.

Something else that is hard to track that plays into what companies are dealing with are arbitrations. And I have one company that is a bank that is, right now, dealing with over 120 individual arbitrations. So that is not anything that is tracked in the court system as well. And many companies that have arbitration clauses are dealing with their TCPA litigation there.

Mr. KING. Then could I just ask you, what is your judgment on this? I mean, is it a number over or under 50 percent? What is your—if I picked a number, can you give me which side you would be on for over or under on this? As I am listening to your testimony and the balance of the testimony that is here, I get the sense that a lot of this is settled out of court. And if that is the case, I am

going to follow up with a question of why don't we have more people fighting this more?

Ms. WAHLQUIST. I can tell you there is only one company that I am aware of that, after a class was certified, went to trial on TCPA litigation, and it didn't settle. So pretty much everyone settles. The one company that did go to litigation was Dish Network, and it went to litigation on a small group of only 51,000 calls. And with the trouble damages it just got from the jury verdict, it just got hit with $61 million on 51,000 calls. And so——

Mr. KING. Are you aware, is there any professional liability insurance that a company can buy to protect themselves from this?

Ms. WAHLQUIST. One massive problem with the TCPA is that as soon as these litigations really started being brought in 2001 to 2004, almost every insurance policy started putting specific carve-outs in their insurance policies for TCPA. So many companies that come to me are clients who are like, I have got this lawsuit. Can I turn this into insurance? I say, give me your insurance policy. We look at it, specific carve-outs, the insurance companies don't want to touch these.

Mr. KING. The answer is, is that insurance that did exist is disappearing as more of this accelerates?

Ms. WAHLQUIST. Exactly. And the problem with that is that companies who believe that they would have coverage for something like a mistake, or let's say like the MetLife settlement you were discussing, where you have one agent who has gone rogue and is sending out facsimiles in violation of company policy, you know, you end up in a settlement of $23 million.

Mr. KING. Thank you.

My clock is ticking, and I wanted to make sure I give Mr. Sweeney an opportunity to vent himself a little bit more.

I want to propose an idea to you, and I will do it in a quick form. But what if you had an opportunity, if someone filed, say, a $10 million claim against you, if you had an opportunity to recover that from the other side, would that make it more interesting to——

Mr. SWEENEY. I would do it in a heartbeat.

Mr. KING. And any——

Mr. SWEENEY. Quite interested.

Mr. KING. And in your case, it is settled?

Mr. SWEENEY. We were never sued. Our customers were sued. But in the data that we have pulled from our—from—from the one person and the one attorney, we feel pretty strongly that there might even be a claim for some civil RICO in here on how the collusion went down to go against our customers, significant dollars.

At the end of the day, I am the one that has lost the most money. So, you know, I would welcome that opportunity.

Mr. KING. And just it is so often I see that—the reason I ask the insurance question is so often the insurance company will come in and advocate for a settlement and then just adjust their premiums accordingly, and the insured professional is, essentially, out the equation, except for the premiums they get charged.

So it doesn't quite apply in this case, but I have in the past drafted a legislation, not introduced here in this Congress, that would allow the subject of litigation to post a bond for the claim and recover that off of their insurance company if the insurance company

decided to settle. But that is getting narrower, and that won't solve this problem.

I see that my clock has run down. I thank all the witnesses. And I wish I had a little more time.

I would recognize the ranking member from Tennessee for his 5 minutes—from New York now. The gentleman from New York, Mr. Nadler.

Mr. NADLER. No one has ever suggested before that I was from Tennessee. Nothing wrong with Tennessee, but not as good as New York. Thank you.

Mr. Zavareei—I hope I pronounced it right.

Mr. ZAVAREEI. Zavareei.

Mr. NADLER. Mr. Zavareei. I am sorry. We have heard the criticisms of the burden this places on businesses. I presume—let me just say, Mr. Hoffman complained that in a lot of cases the average recovery is $4.12, and the attorneys made a lot of money. Let me just say that that doesn't impress me, even if true, because the aim is not to recover the $4.12. The aim is to stop the conduct. And if a class action suit in which lots of $4.12 claims, which no one is going to pursue through the courts as a class action can be pursued and stop the conduct, which is annoying thousands and millions of people, that is well worth it.

Would you comment on that, Mr. Zavareei?

Mr. ZAVAREEI. Yes. I agree completely that the primary purpose here is deterrence, and that is working. I would also take issue with the statistic, which dates back to a letter drafted by a law firm. And when you go back to the source of that statistic, there is no data to support it. It covers 1 year. It only includes class actions, and it is—I believe it is just, frankly, untrue.

And class actions only account for 24 percent of all cases. So it doesn't include settlements that are individual cases. It is just—it is a—it is a number that keeps being thrown about that has zero basis.

Mr. NADLER. Thank you.

Ms. Wahlquist, you have been quite eloquent about some of the problems here. But I gather that your solution is to repeal the law, stop the class actions, and subject Americans to all the problems that cause the enactment of the law in the first place, namely, the millions of robocalls.

What do you think specifically should be done, briefly, in a way that wouldn't undo the purpose of the law?

Ms. WAHLQUIST. Yes. I think that some of the main things that need to be put into place would be a damages cap of some sort, because there is no other consumer statute like this with a private right of action, no actual damages, and no damages cap. There should be affirmative defenses put into the statute for companies that are trying to comply with the law, have policies and procedures to comply——

Mr. NADLER. Wait a minute. Cap on damages, affirmative defenses.

Ms. WAHLQUIST. Then the statute of limitations should be put into the statute. The problem was there was none put in, so the default of 4 years has been applying. I have cases that have been

brought 3 years and 11 months after a call or a text message, and that is——

Mr. NADLER. You think 3 years and 11 months is unreasonable. What would you say about a reasonable statute?

Ms. WAHLQUIST. I think most other statutes of this kind have a 1-year statute of limitations. So a statute of limitation would make a big difference. I have in my written testimony about nine suggestions at the end.

Mr. NADLER. Okay.

Ms. WAHLQUIST. We don't want to change and make this a giant——

Mr. NADLER. Thank you.

Mr. Zavareei, would you comment on the impact of what Ms. Wahlquist just said, should we enact that?

Mr. ZAVAREEI. First, with respect to a cap on damages, what you end up with is, basically, it becomes a cost of doing business. And a cap on damages would basically just be an, essentially, an annulment of the statute. It is the risk of——

Mr. NADLER. Why would it be an annulment of the statute?

Mr. ZAVAREEI. Because it is the risk of getting hit hard that makes these companies pay attention and do the right thing. That is the only thing that keeps them in the guardrails.

The second thing, with respect to these affirmative defenses, what they are basically talking about is defenses that would swallow the entire rule. She is saying cell phones, in her paper, that cell phones should be exempted. I mean, that is the whole kit and caboodle.

And then with respect to a 4-year statute of limitations, there is no reason to change the statute of limitations.

Mr. NADLER. I agree. It is certainly——

Let me ask, what would be the effect, Mr. Zavareei, on the consumers if Congress altered the private right of action and limited the ability in any of the ways that are being suggested?

Mr. ZAVAREEI. I think it would be the wild west. I think our cell phones would become virtually unusable. There would be—there is almost no government enforcement. It is the—it is deliberately set up for private enforcement, and without private enforcement, it would cause an amazingly negative impact on the economy, our privacy, and our ability to conduct private and personal affairs on our phones.

Mr. NADLER. And would you comment on Mr. Sweeney's predicament?

Mr. ZAVAREEI. Look, I think that is awful. But I would note that he was not sued. And I would note that it appears to be one bad actor. And he has already expressed that he does have a means of redress that he is already considering, which is a RICO action. I do not in any way condone what happened to Mr. Sweeney, but I do believe that there are avenues in the law to deal with that.

Mr. NADLER. And do you believe that Rule 11 is one of those avenues?

Mr. ZAVAREEI. Absolutely.

Mr. NADLER. Thank you very much.

I yield back.

Mr. FRANKS [presiding]. Is the gentleman from Texas prepared? If not, I can go ahead and go from here.

Okay. Thank you.

Thank you all for being here. I will now recognize myself for questions.

Mr. Hoffman, there are apps, I understand, that can be downloaded to your smartphone that completely automate the lawsuit process. They let the user select any incoming calls to be sent to the sponsoring law firm. And the following is from one of the app websites and it says, quote, "If you receive a robocall, a telemarketing call, or a debt collection call, the app is ready. When you respond to a few quick prompts, the app creates a legal documentation of the call," unquote.

And then the call—and the law firm reviews the call log, quote, The firm evaluates the documentation for violation of the Telephone Consumer Protection Act. If there is a violation of the law, you take the caller to court for up to $1,500 per call. And remember, this is zero out-of-pocket costs to you to bring this TCPA claim, because even the app is free.

So I guess I would ask you, do you think the TCPA creates incentives for attorneys to prey on the very people they claim to seek to protect? And how can well-intentioned businesses be protected from those such claims?

Mr. HOFFMAN. Thank you, Mr. Franks, for that question. I just would like to pick up just for a moment to the previous answers.

If this is not about money, then why has the—why has there been such a proliferation of sort of entrepreneurial and sort of enterprising, not only attorneys, but others seeking to really leverage the TCPA in the last 5 to 10 years—5 years or so, since there has been such an ambiguity in the interpretation of the TCPA?

We have a cottage industry, Mr. Chairman, that has sprung up, essentially, helping to inform otherwise individuals to come into the fold of enterprising plaintiffs attorneys. There is now, if you go online, there is a how-to—a how-to manual on how to successfully bring a TCPA action and reap hundreds of thousands of dollars.

Clearly, this is not what Congress intended in 1991 to guard against telemarketers. And so I would suggest that the committee and Congress, this committee and the committee of jurisdiction, the Energy and Commerce as well, look at—look at these abuses of the statute and to seek some sort of measure to adjust what really has been abuse.

It is quite ingenious what lawyers have done. They have used now social media. They are using technology to leverage the loopholes within TCPA. Not necessarily—again, my—my primary issue, Mr. Chairman, is that this is not inuring to the benefit of consumers. You know, if this were—if this statute was being used to, you know, fight against the big bad corporations who were harming consumers and really making those consumers whole, that is a whole different story. But what we have is a small group, growing group of plaintiffs lawyers—and I have nothing against lawyers. I happen to be one and I married one. But the fact of the matter is these guys are getting rich using this statute that was intended for something else all together.

Mr. FRANKS. Thank you, sir.

Ms. Wahlquist, do you have any thoughts that you might want to add to that?

Ms. WAHLQUIST. You know, that——

Mr. FRANKS. Get that microphone on.

Ms. WAHLQUIST. Thank you.

The app that you are talking about is used by a firm, in particular, that is very active in the TCPA front. And it has been interesting to watch as the head of that firm and one of the associates have been in a lawsuit with each other and the disclosures they are talking about in some of the pleadings that they are bringing lawsuits on behalf of people who might not even know that they are in a lawsuit. And, you know——

Mr. FRANKS. That really is automation, isn't it?

Ms. WAHLQUIST. I am sorry?

Mr. FRANKS. That really is automation, isn't it?

Ms. WAHLQUIST. And sometimes they find out that they have sued a company when they find out that there is a settlement to be had. So it is not inuring to the benefit, really, of those consumers who use the app.

But more than the apps, I mean, generally, that firm brings a lot of individual actions. It is the class actions that get to the point where, as soon as you have a big enough company with a big enough bulk of calls, it almost doesn't matter if they have a good defense, unless they are willing to just dig in and fight, which I have had some clients that do, and then you have to go all the way through summary judgment or class certification. The settlements just roll through and happen.

And I do want to point out that the Caribbean Cruise settlement that Mr. Zavareei talked about, I don't know if those numbers were adding up, because it was a $76 million settlement involving 50 million calls. I don't think that is really $135 per person.

So I get the point that maybe the individual per-person damages doesn't matter as much as deterrence, but the issue here is that what these lawsuits can't deter, unless you just stop all communications with customers and your clients, and especially necessary communications that they need. If you want to keep communicating about things that need to be communicated, you are at risk of a TCPA lawsuit.

Mr. FRANKS. Well, thank you all.

I am going to go ahead now and—let's see—I guess this is the third ranking member we have had here today.

So I now recognize Mr. Raskin for 5 minutes.

Mr. RASKIN. Mr. Chairman, thank you very much and thanks to all the witnesses. I just want to ask a couple of general questions just to see what the realm of consensus is on the panel.

Does everybody still agree that unwanted robocalls and text messages constitute an invasion of privacy? Is there anybody that disagrees with that?

Ms. WAHLQUIST. I think it depends on what—when you say "unwanted," if somebody has signed a contract with a company and said, you can contact me if I am behind on my bills, or—and then they get the text message, and at that point they say, I didn't want this, that is a different thing, because then they should be able to communicate and say, now I don't want anymore——

Mr. RASKIN. Okay. How about unauthorized and unwanted?

Ms. WAHLQUIST. Unauthorized and unwanted, I am okay.

Mr. RASKIN. Okay. And does everybody agree that businesses should not be able to send telemarketing robocalls and texts to the cell phones of people who have not authorized it and with whom they are not in a business relationship? Does everybody agree with that?

Mr. SWEENEY. Agree.

Ms. WAHLQUIST. Yes.

Mr. RASKIN. Okay. And does everybody agree that a business should not be able to robocall or text someone if the person has revoked consent and then said, I don't want to receive texts or calls? Everybody agrees to that? Okay.

So I suppose, then, the question is whether or not we have sufficient authority within the courts to handle abusive litigation practices. You know, when—Ms. Wahlquist, when you say that, you know, there are cases of lawyers bringing lawsuits on behalf of people who don't even know the litigation exists, I mean, that is outrageous. But isn't that already a violation of legal ethics for a lawyer to purport to represent someone who's not engaged the person in a retainer agreement, engaged a lawyer in a retainer agreement?

Ms. WAHLQUIST. I mean, I think the problem is that a litigation can get really far down the road before that comes out. So just a couple of weeks ago, there was a big class action kind of victory on the defense side where a class was denied certification because the main plaintiff was not an adequate representative because of not really knowing what the litigation was about and so forth. But to get to that point you had to go through so much costs of defense, that that is the problem with TCPA, that even if you think you have a good claim, that the plaintiff is maybe abusing the system, there is so much money at stake that the temptation to settle becomes so enormous that it just keeps feeding the beast.

Mr. RASKIN. I mean, there is one case that I see here from, actually, February of this year in the Southern District of California, where a plaintiff brought a TCPA claim alleging unauthorized text messages after purportedly opting out, and then it turned out that the person had not opted out but had kind of arranged in such a way that there would be a lawsuit, a cause of action. And the court rejected it, and the court said that is not what the meaning of the statute. We are trying to go after real abuses, and we don't want this to be, you know, a trap for the unwary business any more than we want millions of people to have their privacy and their solitude invaded by the robocalls.

Ms. WAHLQUIST. I would say if all courts were like that court, we probably wouldn't be here. But the problem is that most courts—I have been defending these for more than a decade and more than 15 years, and most courts do not take that stand when things have been raised about the plaintiff.

Mr. RASKIN. So let me just pursue it with you then. Is it your contention, after spending a lot of time doing these cases, that there really are no more abuses going on, that when we look out on the landscape of the country, the real abuses are taking place

by lawyers and plaintiffs? It is no longer taking place by businesses that are engaged in robocalling?

Ms. WAHLQUIST. There are definitely abusive businesses involved in calling. I have stayed home from work and gotten the phone ringing all day, and I know what is going on there. Those are not the companies that are being sued. Those aren't the companies that I am representing. Those are the generally overseas-based, spamming kind of calls that are happening that I don't see anybody going after or trying to stop through our court system. I mean, I think everyone is being driven crazy by those kinds of calls.

Mr. RASKIN. Why are they not the subject of litigation?

Ms. WAHLQUIST. I don't think the money is there to sue after it. It is hard to find out who is making the calls. They are spoofed.

I can tell you who does get sued for those calls sometimes. If the call uses a brand name, for example, GE, when they are trying to sell some things, then GE will find itself getting demands, and saying, we are going to sue you under the TCPA for calls that had nothing to do with, but the calls are mentioning its brand name.

So I think the problem is there are these spam calls, but the identity of who is calling, and it is very hard to trace, and it is not where the abuse of the litigation is coming from.

Mr. RASKIN. Thank you very much.

I yield back, Mr. Chairman.

Mr. FRANKS. I thank the gentleman.

I now recognize the gentlemen from Texas, Mr. Gohmert, for 5 minutes.

Mr. GOHMERT. Thank you, Mr. Chairman. And I appreciate the witnesses being here. It is an interesting subject.

Until I was preparing for this hearing, I didn't realize that this had been a source of great litigation. It surprised me. I have gotten a message from my eye doctor, I haven't been in a number of years, and they say, hey, it is really time you come back. I am glad they let me—I hadn't even thought about it.

So when it comes to healthcare-related communications, that can really be a great help to get notices like that. So I am wondering, for anybody, how can the FCC be more clear that healthcare-related communications, though they technically may not have been requested or may fill out—we may not have—I don't know if I filled out anything indicating I am open to getting notices of the need for appointments. But how can they make it more clear that that would be an exception and be okay, for anybody?

Ms. WAHLQUIST. I can tell you, the problem is that there are a few exceptions that were listed in 2015 related to healthcare, but they are very narrow exceptions.

Mr. GOHMERT. And they are specifically listed.

Ms. WAHLQUIST. They are specific. So the problem is when Walgreens settled for $11 million recently, as Mr. Hoffman noticed, that was for flu shot reminder text messages. I am sorry. No, that was prescription refill reminder text messages. Rite Aid right now is being sued for flu shot reminders.

I have worked with various people in the medical profession who want to do as your eye doctor did and send text messages, and are so nervous to do it because of the TCPA and the litigation that can ensue. I have represented a blood bank that had people sign up to

get text messages every time you were available again, and then that phone number was provided for a relative and not the person who was actually signing the form. And then the relative said, now I am going to sue you because I am not one who said tell me when I can deliver blood again.

Mr. GOHMERT. So what would be the remedy to making clear that these should be exceptions?

Ms. WAHLQUIST. That it is not marketing calls. That when they are about health and reminders and something to do with your health process, that it shouldn't be covered in here. And, of course, people can always retain the ability to opt out if they don't like those messages. So you could have replied stop to that, and at that point it becomes a different ballgame.

Mr. GOHMERT. As we are talking, I am wondering if plaintiffs might have a claim—plaintiffs who get the flu because they didn't get notices because the plaintiff's firm sued, if they might have a claim against the plaintiff's firm because if the plaintiff's firm hadn't sued they would have gotten a flu shot notice, they would have gotten a shot, and wouldn't have gotten the flu. Anyway, just thinking out loud.

Should the FCC release some kind of information to indicate existing emergency exemptions are available to allow communications for those emergency situations? Do you think that would be helpful?

Mr. HOFFMAN. Mr. Gohmert, you put your finger on two of the big issues that surround this TCPA matter altogether. One is the ambiguities that exist with the statute. And two is, how do you really put into policy some common sense?

So you are talking about the ability to have your eye doctor or some healthcare provider contact you with a very reasonable, legitimate purpose. Mr. Sweeney talked about his capacity to provide emergency information to his clients. These are all basic fundamental functions of what we want. I mean, when we sign up for things, we can certainly opt out, but we want that information.

I think with respect to the FCC, I am no longer there, so I am not speaking on their behalf, but just based on my short time there, I would suggest that this line of inquiry is ripe for further review by the Commission as it looks at TCPA another time, the second time around. We are waiting for a circuit court opinion, as you know, to come out. And I think that given a newly constituted FCC, there may be a different approach. So I would suggest that any encouragement that you might provide this body to that independent agency.

Mr. GOHMERT. And you want the FCC to clarify?

Mr. HOFFMAN. Absolutely, sir. I think the FCC should do so. I think it is given the authority under the statute to promulgate the rules and the regulations.

Mr. GOHMERT. So that's something you'd like to see.

Mr. HOFFMAN. Yes, sir.

Mr. GOHMERT. Thank you. I appreciate your being here. Thank you.

I yield back.

Mr. FRANKS. I thank the gentleman.

The Chair now recognizes the distinguished chairman of the full committee, Mr. Goodlatte.

Chairman GOODLATTE. Well, thank you, Mr. Chairman. I appreciate your holding this hearing. I am fascinated by it. I certainly am one of those who complain about unwanted phone calls coming into my home. When the Caller ID says Unknown Name, I turn to my wife and say, well, if they don't know their name, why are they calling me?

But it is very frustrating, and I am not opposed to trying to have a Federal remedy for this. But I am very disturbed about what I perceive to be a consequence of this, which is that important information going out to people that may need to have it, sometimes commercial information, sometimes noncommercial, but important information is going to be increasingly discouraged if these lawsuits can arise and the size of the damages that seem to come down in some of these cases can occur with a legitimate company that simply wants to remind you that you need to have your prescription refilled. That cost them $11 million.

Mr. Hoffman, what were some of the other ones you cited, the large damage amounts?

Mr. HOFFMAN. Give me a moment, sir. So we have—this is, I think, going back to about 2012—Capital One for $75 million, AT&T Mobility for $45 million, Sirius XM for $35 million, JPMorgan Chase for $34 million, Bank of America for $32 million, MetLife, an insurance company, for $23 million.

Chairman GOODLATTE. That is enough. Let me just ask you, what did these companies do that caused them to deserve a $34, $35, $45, $75 million judgment against them?

Mr. HOFFMAN. Mr. Chairman, I am going to punt to Becca over there who probably has a better recollection.

Ms. WAHLQUIST. I was working on a couple of those. There is only, of the ones that he just listed, there were only two that involved marketing calls or marketing communications. One that he mentioned, MetLife, was, as I already said, it was one agent in an office in Florida who knew that he wasn't supposed to send marketing faxes, and set up a fax server in his garage and managed to send millions of faxes, because he was on a commission basis and wanted to encourage that. So it was a one-person thing.

With Sirius XM, that was also a telemarketing, where they were calling people who had gotten the free trial when you get a new car, to see if they wanted to continue their service, and they were sued by somebody who said, I gave the number to the dealer, but I didn't tell the dealer——

Chairman GOODLATTE. So why did that cost them $35 million? What was the calculation behind why asking, if you have got a service in your car, do you want to continue it or not, because it is going to automatically terminate if you don't, so we are calling you to remind you, why would that cost them $35 million?

Ms. WAHLQUIST. These settlements are all just indicators of the potential size of the class and the value at which——

Chairman GOODLATTE. Why wouldn't a judge just say, what is the big deal here? We are sorry. Maybe that is technical violation of this law, but it is not worth $35 million.

Ms. WAHLQUIST. Unfortunately, all the violations of this law for the most part are technical violations because you don't have to have any actual damages.

Chairman GOODLATTE. Okay. So let me ask you about that. The court determines—or there is a settlement, I don't know which one—a $35 million payment. How much of that money actually reaches the hundreds of thousands or millions of plaintiffs in that class action lawsuit who had no idea that this was even going on?

Ms. WAHLQUIST. It depends on the take rate for the settlement. So the attorneys will usually ask somewhere between 25 or 30 percent of that fund, which is——

Chairman GOODLATTE. That they get for attorneys' fees?

Ms. WAHLQUIST. For attorneys' fees, even though the statute doesn't have an attorneys' fees provision.

Chairman GOODLATTE. Nine or 10 million dollars? Did they put $9 or $10 million worth of legal work into doing that? It sounds like a lot of money for people who are going to get—and what did the people who got—what did the people who were Sirius XM customers, I assume they continue to, in many instances, to be customers?

Ms. WAHLQUIST. I could find out and report back to you the exact amount that people that ended up sending in claims got from that settlement, because I'm not sure offhand. But I know that there is a—depending on how many—what percentage of the class members turned in forms, they would have gotten a different amount of money.

Oftentimes, a lot of settlements that I have been involved with, the ending result, if everyone would have turned in their forms, would be somewhere between like $3 and $12, but then, because maybe only 8 percent of the people turn in their forms, they get a larger chunk. It just depends.

Chairman GOODLATTE. Why would they get a larger chunk? There is a certain amount of damage that occurred to them, and that presumably was the basis for the overall settlement or the overall judgment. Why would they get a larger piece of the pie if other people said, I'm not going to bother with that?

Ms. WAHLQUIST. Because the way you are doing the settlements for the most part is, here is the big amount of money that we are going to give you to buy ourselves out of this litigation, and that is it. And so it is just going to be pro rata split up.

Chairman GOODLATTE. This whole litigation wouldn't exist if this statute were clearly drawn to acknowledge that there are different kinds of phone calls, both commercial and noncommercial, legitimate purposes and nonlegitimate purposes, and so on, and fraud or not fraud. I mean, the ones who are actively—the ones that bother me the most, both faxes and telephone calls, are the people who are obviously trying to commit fraud.

Frankly, I don't see as much of that, particularly on the fax machine, as I used to. I used to file these complaints myself with the government.

But it disturbs me that we would think that this law should be used to stop people from attempting to communicate for legitimate purposes. If that purpose is one that somebody doesn't want to have, yes, there should be some kind of penalty for that. I don't dis-

agree with that. But enormous judgments or forced into settlements because they are going before some judge or jury that is not recognizing the importance of communications in our society, that really bothers me. I don't know what the solution is at this point, but I think we ought to try to find one.

Ms. WAHLQUIST. I can tell you, in the recent Dish order that came out of Illinois with the judge, this is an action—because regulators do bring actions under the TCPA from time to time. And she said that the amount of damages, looking at the amount of allegations, that the damages would have been $8.1 billion just for the TCPA claims alone, and then carved it down into the hundreds of millions instead, adding everything up.

But you really can get to billions of dollars. I have several cases I am on where the actual damages would be billions of dollars.

Chairman GOODLATTE. Actual claimed damages?

Ms. WAHLQUIST. The actual claimed damages are billions of dollars.

Chairman GOODLATTE. Not actual lost—I don't know what the lost value of my annoyance and inconvenience of picking up the phone or looking at my Caller ID and not picking up the phone but hearing the phone ring is, but I don't think it is worth some of the risks that we take by discouraging communications like this.

My time is greatly expired. So I thank you, Mr. Chairman, for your forbearance.

Mr. FRANKS. And I thank the gentleman. And I would thank the witnesses for attending today. I thank the audience and the members. And this concludes today's hearing.

Without objection, all members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

And with that, this hearing is adjourned.

[Whereupon, at 3:20 p.m., the subcommittee was adjourned.]

○