

Moving the Metal — Dialing In: The TCPA and Auto Finance**Hosts: Brooke Conkle and Chris Capurso****Recorded: March 31, 2025****Aired: April 8, 2025****Brooke Conkle:**

Welcome to *Moving the Metal*, the premier legally focused podcast for the auto finance industry. I'm Brooke Conkle, a partner in Troutman Pepper Locke's Consumer Financial Services Practice Group.

Chris Capurso:

And I'm Chris Capurso, an associate in Troutman Pepper Locke's Consumer Financial Services Practice Group.

Brooke Conkle:

Today, we're going to talk about the Telephone Consumer Protection Act, the TCPA, where it's been, where it's going, and how it impacts the auto finance industry. But before we jump in, let me remind you to please visit and subscribe to our blogs. We have two great ones that may be of interest to you, [TroutmanFinancialServices.com](https://www.troutmanfinancialservices.com) and [ConsumerFinancialServicesLawMonitor.com](https://www.ConsumerFinancialServicesLawMonitor.com).

Also, we have a bevy of other podcasts that you might find interesting. We have [The Consumer Finance Podcast](#), which, as you might guess, is all things consumer finance-related. [The Crypto Exchange](#) devoted to trends, challenges, and legal issues in bitcoin, blockchain, fintech, and regtech. [FCRA Focus](#), a podcast dedicated to all things credit reporting. [Unauthorized Access](#), a deep dive into the personalities and issues in the privacy, data, and cybersecurity industry. Finally, [Payments Pros](#), a great podcast focused exclusively on the payments industry. All of these insightful shows are available on your favorite podcast platform, so check them out.

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Today, as I previously mentioned, we'll be discussing the current state of the TCPA and the danger zones for auto finance companies. Chris, do you remember a glorious time when you had not heard of the TCPA?

Chris Capurso:

Yes. Yes. I can, childhood. You know, those carefree days where I didn't have to worry about receiving random text messages or phone calls. It was a time of innocence, Brooke.

Brooke Conkle:

It's true. It was a long time ago, wasn't it?

Chris Capurso:

Too long ago.

Brooke Conkle:

Well, let's level set a little bit. What is the TCPA, and what does it regulate? We have sort of kind of buckets that the TCPA is interested in. First, it's interested in technology and specifically two kinds of technology; an ATDS, an automatic telephone dialing system, and two, prerecorded messages. Then once you sort of take those buckets, it's also interested in two specific types of communications; informational messages and telemarketing messages. For today's purposes, we're going to leave out healthcare messages. There are specific exceptions for those, but those usually don't come into play for the auto-finance industry.

But one of the things that makes the TCPA so particularly dangerous are the statutory damages associated with the statute. A single violation can run between \$500 and \$1,500 for a single telephone call or text message, as we'll talk about, and ATDS incorporates both telephone calls and text messages. The statute does not provide for attorney's fees, but that has not prevented it from being a real target for a lot of plaintiff's lawyers, especially in the days coming out of the Great Recession where a number of consumers were getting inundated with calls, whether, frankly, they were usually collections calls. The dispute over how to define an ATDS really drove a lot of that litigation.

As I mentioned, no attorney's fees provision in the TCPA and yet plaintiff's lawyers were getting massive class settlements, just because calls to cellular telephones was such a prevalent and frankly kind of new thing in the industry, where collections calls were being made specifically to cell phones rather than to landlines. Chris, tell us a little bit about kind of where the TCPA. Where does it rear its head for dealers and for auto finance companies.

Chris Capurso:

Yes. Like you said, hopefully, it's not the healthcare messages. If you are interested in healthcare messages under the TCPA and you're listening to this podcast, that means you've got an interesting hobby in auto finance, and also you should probably be listening to some different types of podcasts, at least if it's for professionalism. Of course, we wouldn't drive anybody away from listening to this. If this is your true passion, listening to auto finance, speak.

But the TCPA comes in. Obviously, we talk a lot about dealers and finance companies. The TCPA is going to affect both of them in some way. With a dealer, you're probably talking about marketing messages. You're probably talking about – I would assume most people listening to this have received something like that where your oil change is due or come in for an inspection, come in for this, come in for that, some kind of marketing message. But going off of that first one that I mentioned, it could also be more of an informational like, "Oh, you have service due. You have something like that."

This creates a bit of a quandary under the TCPA because if an informational message has even a tinge of marketing in it, it's going to be a marketing message. I don't want to use the word tainted, but it is what it is. If there's a little bit of marketing in there, it becomes a marketing message. The informational character, even if it's 99% of the message, it really doesn't matter. That one percent of marketing is going to rule the day as far as what it's considered. Dealers have to be careful about if I say you may be due for an oil change.

Obviously, we're not going to get into the specifics because this is a very fact-intensive law. As Brooke can probably attest with litigation and plaintiff's attorneys coming up with all sorts of theories, it's going to be very detail-oriented as to what the message is about and what its character is. But if you said, "Come in for an oil change and save \$30," or something like that, then you're probably crossing into the marketing realm. That's something dealers have to be specifically careful about.

With auto finance companies, the auto finance company is obviously not the one selling the car. They're not the one selling the services, so maybe less risk on the front end. You're probably thinking of fraud alerts, account messages, things like that that are truly informational. It could cross into the realm of marketing if, say, the finance company offers a REFI program or something like that and they're like, "Hey, the rates are down," which in this case will probably be, what, 2035 when you start receiving these messages. But maybe they say the rates are down, and you can refinance your contract or something like that. That could be marketing. Marketing shouldn't be seen as just a product like, "Hey, I'm going to go sell you a tire or oil," or something like that. It could be a financing product, too. Auto finance companies do need to think about that. But more likely than not, the messages that an auto finance company is sending are probably going to be of the informational variety.

Brooke Conkle:

That's exactly right, Chris. The reason we're sort of drawing this distinction between informational messages and marketing communications is because that is a distinction that's recognized under the TCPA, but also because the statute requires different levels of consent for each sort of category of messages. For an informational message, you just need prior express consent, so an express communication from the consumer indicating that they are providing their consent to be contacted at that telephone number. Telemarketing and marketing communications, there's a higher level. It's prior express written consent that requires certain disclosures indicating that the consumer is not required to provide written consent in order to engage in a transaction.

But before we get ahead of ourselves, one question that we hear a lot specifically related to the TCPA is, guys, pump the brakes. Didn't the Facebook decision, didn't that kill the TCPA? The

answer, of course, like a lawyer, is it depends. The Facebook decision came out April Fool's Day 2021, a big day for all TCPA litigators. In that decision, the Supreme Court really narrowed down the definition of an ATDS, really pulled it to the statutory text itself. A lot of telephone systems that could have been considered ATDS systems, automatic telephone dialing systems before 2021 suddenly really are not falling within that statutory definition anymore.

But as we mentioned at the top of the show, prerecorded messages are still part of the TCPA, and the Facebook decision only dealt with the definition of an ATDS. Prerecorded messages still remain extremely dangerous, and also there's a new frontier in the TCPA of calls to the Do Not Call Registry. If you send a telephone solicitation to a consumer who is registered on the Federal Do Not Call Registry, then that message can violate the TCPA. Chris, level set with us a little bit on where are we now? What does the regulatory landscape look like for the TCPA?

Chris Capurso:

Sure. Before getting into that, you just brought to mind a great point. Two things I want to mention is, first, there is another rule applicable to marketing, the Telemarketing Sales Rule, which we're not going to cover here. But that is a marketing-specific rule that the FTC promulgated. We're talking Federal Trade Commission there as opposed to Federal Communication Commissions here with the TCPA.

The second thing to note is also that states regulate this type of stuff. We're not going to get into that on this, but they have different definitions for what a dialer is. They have different requirements based on – as Brooke said, it's still kind of this, definitely the informational versus marketing kind of idea. But there could be different requirements. It could apply differently because the technology is different. There could be more prerecorded voice type requirements. We're even seeing more AI type requirements. Those are just two things to keep in mind. Obviously, this is TCPA focus but something to keep in mind.

Where are we? In early 2024, the FCC ran rampant. They dropped all sorts of regulations. The first was the one-to-one telemarketing consent rule, and they publicized this as closing the lead gen loophole. The basic just is pre this rule and currently, which we'll get into, you could get prior express written consent for a group of potential callers. After this rule, it has to be one-to-one consent. You can only give that prior express written consent for one caller in one consent, so obviously a big sea change. Lead gen firms, anyone doing marketing like that who was depending on an initial consent that could cover a whole bunch of people are all of a sudden shut out of that avenue. Now, if they want to be able to send something that's a TCPA-covered communication, they're going to need their own consent. This rule had the potential up in an industry, which is why it was challenged.

In the 11th Circuit, the case was Insurance Marketing Coalition Limited or IMC versus the FCC. They heard oral arguments in December, and the case challenged this rule, specifically the one-to-one consent portion of the rule because – we haven't gotten into it, but that rule included other ancillary things. I mean, it was mainly focused on lead gen, as it was called, the closing lead gen loophole. But they heard oral argument in December. At those oral arguments, the 11th Circuit judges did express some skepticism about the justification for the new rule. Sure enough, in January of this year, a unanimous three-judge panel issued its decision vacating that part of

the rule, and they made several notes. They noted that the TCPA only requires prior expressed consent, not prior expressed consent, plus, with my quotation fingers that you cannot see.

The court essentially said this part of the rule exceeds authority. The FCC didn't have the authority to do this, so it is vacated. Nearly immediately after that decision, the FCC issued a stay of its own, saying that compliance with that rule would be stayed for the earlier of a year or publishing of public notice. Even more recently, a bipartisan group of State Attorneys General signed an effort to get the 11th Circuit to actually rehear this challenge to the one-to-one consent rule.

Much like everything with the federal government, this is in flux. But for right now, as far as the folks we're talking to, the one-to-one consent portion of this rule is not currently in effect. It's not being enforced, and it's got a compliance deadline that is down the road at the latest until next January. It's something to be mindful of on the horizon. But as of the time of this recording and sure enough, a day from this being recorded, there's going to be some enormous sea change because that's the way everything's going. But as of the time of this recording, it is not currently affected.

That's not all. As I said, there was a flurry of activity last year. First was the one-to-one consent rule. The second was what is being called the revocation rules. Unlike the one-to-one consent rules, the revocation rule has not been stayed. I shudder even saying this. It's supposed to become effective April 11th. Who knows? Again, spoiler, we've recorded in the past. This is also an enormous sea change. This rule really set down guidelines for how companies are supposed to deal with revocation requests, those being a consumer has previously agreed to a prior express consent or prior express written consent.

Now, it's thinking otherwise. It doesn't really want to be looped in on all these communications and says, "I want out. I want to revoke that consent." The rule actually puts in quite a few guidelines about that consent. Specifically, if you have a text message replying certain words to a text message as long as it allows a reply, it constitutes definitive revocation, and it's per se revocation. Using the words stop, quit, end, revoke, opt out, cancel, unsubscribe. Any of those types of words is a definitive revocation request from the consumer in response to a text.

Using a website or telephone number designated by a caller to revoke. If you say click here or press this number or anything like that, that's also going to be considered definitive revocation of consent. The rule also provides that if they use words other than that in a text message, treat that as a valid revocation request, if a reasonable person would understand it to have conveyed a request to revoke consent. Then beyond all of that, if they use some other means such as sending an email or leaving a voicemail or something like that, absent evidence to the contrary, that should also be treated as a revocation request. That's a totality of the circumstances test to figure out is that actually a valid revocation.

The very tricky part about all this is the FCC and the rulemaking has specifically said that the revocation applies to the number, not to the method. If you text somebody stop, at least the prior FCC's view was that's going to stop calls and texts to that number. If you email, "I don't want to be called again at this number," that could mean the same thing. While it sets down some very strict guidelines, it also leaves open this kind of gray area. Obviously, like I said, the rules – well,

as of the time this is actually going to be played, potentially the rules are effective. But there's obviously not a bedrock of case law on this.

Some of this is very much in the gray area, and we're not entirely certain how plaintiff's attorneys are going to view some of these things. Well, we could be relatively sure how they're going to view them, but we're not sure how courts are going to view them. We're also not sure how the FCC is going to view them, especially since this rule was promulgated by a prior FCC. This is similar to the lead gen rule where it has the potential to upend procedure that has been in place for quite some time. Unlike the lead gen rule, this looks like it's going to be going into effect. It's a very interesting time, as if I need to tell that to everybody. You've listened to our podcast, but it's a very interesting time in TCPA world.

Brooke Conkle:

It is indeed. What are the danger zones? What do you need to be on the lookout for? For dealers, really it's about shoring up the kind of consent that you need to talk with consumers. That's making sure that you are getting prior express written consent for marketing messages and prior express consent for informational messages. Just as Chris mentioned earlier, if you have any sort of message that shades close to marketing, you make sure you have that prior express written consent.

Then for auto finance companies, really the issues are, frankly, going to be collection calls and how do you communicate with consumers who are in distress. We have two options there. You've got calls, either telephone calls, text messages. Then within telephone calls, you have live operator calls, and you have prerecorded messages. Prerecorded messages right now are some of the riskiest options, frankly, under the TCPA. But it may be the only option for your auto finance company if you are low on human resources, frankly, if you don't have the calling capacity to be able to get in touch with your customers and to do that with a live voice operator, the prerecorded messages, though, as we mentioned, mentioned can be risky. What we see a lot of our clients moving towards is text messages.

As Chris mentioned, those revocation rules, we believe, are going into effect, and implementing that is all going to be about automation and doing so with telephony that is the lowest risk on the TCPA scale. There's always risk in the TCPA. But the lowest level of risk is communicating with text messages. As our good buddy, Tom Kline, likes to say, problems come on two legs, customers and employees. By using text messages and letting the system automate messages and revocations, it takes that human element out of the equation. If you get one of those automatic response that immediately triggers a revocation, stop, quit, end, revoke, opt-out, cancel, or unsubscribe, then the text messaging system itself can automate that process. It's one fewer compliance burden for you to have to worry about.

Chris Capurso:

With that, that'll wrap it up for today's podcast. Thank you to our audience for tuning in. Don't forget to check out our blogs where you can subscribe to the entire blog or just the specific content you find most helpful. That's the ConsumerFinancialServicesLawMonitor.com and the TroutmanFinancialServices.com blogs. While you're at it, why don't you head on over to troutman.com and sign up for our Consumer Financial Services mailing list so that you could

stay abreast of current issues with our insightful alerts and advisories and receive invitations to our industry insider webinars?

Of course, please mark your calendars for this podcast, *Moving the Metal*, which will be releasing every two weeks in 2025. That will be generally on the second and fourth Tuesdays of each month, which I today had to try to figure out when our podcast's release, even though I say it every single time. As always, if you have any questions or if we can help in any way, please reach out to us. Until next time.

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