UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

NO. 12-3891

MELISSA THRASHER-LYON, on behalf of herself and a class similarly situated, *Plaintiff-Appellee,* vs. CCS COMMERCIAL LLC, d/b/a Credit Collection Services Commercial, *Defendant-Appellant.*	On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 11 C 4473 Judge John J. Tharp, Jr.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT CCS COMMERCIAL LLC

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RULE 26.1 DISCLOSURE STATEMENT

1. The full name of every party that the attorneys represent in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

CCS Commercial LLP, d/b/a Credit Collection Services Commercial

2. The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Hinshaw & Culbertson LLP

3. If the party or amicus is a corporation:

(i) identify all its parent corporations, if any:

The parent corporation of CCS Commercial LLC is CCS Financial Services, Inc.

and

(ii) list any publicly-held company that owns 10% or more of the party or amicus' stock:

No publicly-held company owns 10% or more of the stock of CCS Commercial LLC.

/s/ Joel D. Bertocchi

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JURISDICTIONAL STATEMENT

Jurisdiction of the District Court. The complaint and amended complaint in this case (ECF Doc. #s 1, 48) alleged violations of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227.[1] Accordingly the District Court had jurisdiction under 28 U.S.C. § 1331.

Jurisdiction of the Court of Appeals. The District Court issued its opinion and order denying Defendant's motion for summary judgment and granting Plaintiff's motion for summary judgment on September 4, 2012. ECF Doc. #s 84, 85; App. A1-A11. On September 14, 2012 Defendant filed both a motion to reconsider that order and, in the alternative, a motion requesting certification of the order for immediate appeal under 28 U.S.C. § 1292(b). ECF Doc. #s 89, 90. On November 2, 2012, the District Court denied the reconsideration motion and granted the motion for certification under § 1292(b). App. A12-A21.

On November 13, 2012, Defendant filed in this Court a petition for leave to appeal pursuant to § 1292(b) and Fed. R. App. P. 5. Under § 1292(b) that petition would have been due on November 12, 2012, within 10 days of the District Court's certification order; however, because November 12 was a legal holiday (Veterans' Day), it was timely filed on the next day (November 13). See Fed. R. App. P. 26(a)(1)(C) and (a)(6)(A). This Court granted that petition on

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[1] Citations to documents included in the Appendix to this Brief will take the form "App. __." Citations to other documents in the District Court record will take the form "ECF Doc. # __," listing the District Court docket number (and page number(s) and/or paragraph number(s) where applicable).

December 17, 2012. Accordingly this Court has jurisdiction under § 1292(b).

ISSUE PRESENTED

The Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227, prohibits the placing of calls dialed by automatic dialing equipment to a person's cell phone number unless that person has provided their "prior express consent," but does not otherwise define or limit that term. See 47 U.S.C. § 227(b)(1)(A). The issue presented in this appeal is: Does the "prior express consent" exception require that a person who has consented to be called on her cell phone about a specific issue expressly consent to receive such calls when dialed by automatic dialing equipment in order for that consent to be effective under § 227(b)(1)(A)?

STATEMENT OF THE CASE

On July 6, 2011, Plaintiff Melissa Thrasher-Lyon ("Plaintiff") filed a class action complaint in the District Court alleging violations of the TCPA and other statutes. Appellee CCS Commercial LLC ("CCS") and Illinois Farmers Insurance Company ("Farmers") were named as defendants. Plaintiff alleged, *inter alia*, that CCS had used automatic dialing equipment to place calls to her cell phone seeking to collect money Farmers and its insured driver had paid to make repairs to the driver's car in connection with an accident Plaintiff had caused. ECF Doc. # 1.

CCS and Farmers moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6). ECF Doc. #s 21, 25. The District Court dismissed Farmers from the case and dismissed some of Plaintiff's claims against CCS. ECF Doc. #s 45, 46. Plaintiff was granted leave to amend her remaining claims, ECF Doc. # 45, and

did so on September 30, 2012, alleging violations of the TCPA, see ECF Doc. # 48. Defendant filed an answer and affirmative defenses, which included the assertion that Plaintiff had consented to receive automatically dialed calls on her cellular telephone regarding the accident. ECF Doc. # 50.

After written discovery and depositions conducted under Fed. R. Civ. P. 30(b)(6), the parties filed partial cross-motions for summary judgment on the consent issue. ECF Doc. #s 56, 58, 71. The District Court granted Plaintiff's motion and denied CCS's. App. A1-A11. CCS moved for reconsideration of that ruling, and in the alternative asked the District Court to certify it under § 1292(b). ECF Doc. #s 89, 90. The District Court denied reconsideration but granted the request for certification. App. A12-A21.

STATEMENT OF FACTS

Late on the night of April 8, 2011, Plaintiff was riding her bicycle home from her birthday party when she ran a red light and collided with a car that belonged to Charles Ferguson ("Ferguson"). ECF Doc. #s 48 ¶ 5, 50 ¶ 5, 59-4 ¶ 2, 59-8, 64-1 ¶ 2. Ferguson's vehicle was damaged by the collision. At the scene of the accident, Plaintiff provided her cell phone number to Ferguson and to a police officer. ECF Doc. #s 59-4 ¶¶ 3-4, 59-8, 64-1 ¶¶ 3-4. The officer recorded Plaintiff's number on an accident report. ECF Doc. #s 48, 50, 59-4 ¶ 4, 59-5, 59-8, 64-1 ¶ 4. Plaintiff and Ferguson called and texted each other several times to discuss issues related to the accident, with Ferguson using the cell phone number Plaintiff had provided. ECF Doc. #s 59 ¶ 9, 59-4 ¶ 5, 64-1 ¶ 5, 82-1.

Ferguson also gave Plaintiff's cell phone number to his insurance company, Farmers. ECF Doc. # 48 ¶ 6, 50 ¶ 6, 59 ¶ 12, 69. Farmers paid Ferguson for the damage Plaintiff had caused to his vehicle, less his deductible, and proceeded to try to recover those amounts from Plaintiff. ECF Doc. # 59-7. On April 13, 2011, Tricia Bangar of Farmers telephoned Plaintiff at the cell phone number to discuss the accident. After obtaining Plaintiff's consent, Bangar recorded a statement from Plaintiff. In that statement Plaintiff said that her cell number was her only telephone number and agreed that Farmers could call her at that number. Plaintiff also admitted that she had caused the accident. ECF Doc. #s 59 ¶¶ 14, 16, 59-8 pp. 1-2, 60.

Farmers sent Plaintiff several letters seeking payment of its subrogation claim. ECF Doc. #s 48, 50, 59-7. Plaintiff ignored those letters. Receiving no response, Farmers turned the matter over to CCS and provided CCS with the information Plaintiff had provided, including her cell phone number. ECF Doc. #s 69 ¶ 19, 82.[2] CCS placed several calls to Plaintiff at the cell number she had provided, using equipment that automatically dialed her number before connecting it to a live CCS employee. ECF Doc. #s 48 ¶ 12, 50 ¶ 12, 70 ¶ 1, 82 ¶ 1.

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[2] CCS collects amounts based on a variety of kinds of claims, including commercial insurance accounts (*i.e.*, collecting on earned insurance premium balances) and uninsured motorist accounts wherein a CCS client has determined that it is entitled to seek recoveries for their own payments. CCS employs around 20 people to collect amounts owed on commercial insurance accounts, while 180 employees work on collecting on subrogation accounts. CCS also performs first and third party, banking and student loan collection functions. ECF Doc. #s 59 Ex. 3 pp. 7-8, 91 p. 11-12.

SUMMARY OF THE ARGUMENT

There is no dispute that Plaintiff expressly consented to receive calls on her cell phone regarding the accident she had admittedly caused by providing her cell number to the driver she hit, his insurer and the police. But Plaintiff argues, that the District Court erroneously agreed, that Plaintiff's consent was ineffective under the TCPA because she had not expressly consented to receive calls dialed by a machine instead of by someone's finger. A plain reading of the TCPA, though, does not require any more than the consent Plaintiff gave by providing her cell phone number in connection with the accident. The "prior express consent" language contained in 47 U.S.C. § 227(b)(1)(A) does not itself define "consent" to include or require addressing automatically dialed calls; instead that language modifies the receipt of a "call" rather than the manner in which a call consented to was dialed. Moreover, the "prior express consent" exception to the automatic dialing provision of the TCPA is not limited in application to calls to cell phones; instead, it applies to calls to a long list of kinds of phone numbers. For many of these types of numbers, requiring express consent to receive automatically dialed calls would make no sense. Accordingly the District Court erred in ruling that Plaintiff's consent did not satisfy the TCPA because she did not expressly agree to receive calls that had been automatically dialed.

The Federal Communications Commission ("FCC") also reads the statute differently than the District Court, and has twice rejected the contention that the "prior express consent" exception in § 227(b)(1)(A) requires anything more

than providing one's cell number in connection with some event or transaction. The District Court acknowledged the FCC's differing view and recognized that District Courts are bound to defer to the FCC's reading of the TCPA, but it declined to do so in this case because it wrongly believed that the relevant FCC orders applied only to consent provided in the context of a "debt" or a "creditor-debtor relationship." Nothing in those orders suggests that the FCC intended such a limitation, or that it wanted different "consent" rules to apply to different kinds of obligations or different kinds of parties seeking to collect them. Rather, the FCC ruled that the prior consent provision exempts "normal business communications" from liability without regard to the context in which they arose. CCS's calls to Plaintiff plainly fell into that category; indeed, the policies that underlie the FCC's reading of the statute apply with equal or greater force to this case than they would to one involving a traditional creditor and debtor.

ARGUMENT

I. STANDARD OF REVIEW.

A district court's ruling on cross-motions for summary judgment is reviewed on appeal *de novo,* construing all inferences in favor of the party against whom the motion under consideration is made. *E.E.O.C. v. Thrivent Financial for Lutherans*, 700 F.3d 1044, 1046 (7th Cir. 2012); *Porter v. City of Chicago,* 700 F.3d 944, 950 (7th Cir. 2012); *CE Design v. Prism Business Media, Inc.*, 606 F.3d 443, 446 (7th Cir. 2010).

II. PLAINTIFF'S UNDISPUTED "PRIOR EXPRESS CONSENT" TO RECEIVE CALLS ON HER CELL PHONE ABOUT HER ACCIDENT INCLUDED HER CONSENT TO RECEIVE CALLS THAT HAD BEEN DIALED AUTOMATICALLY.

The District Court ruled that a cell phone user must expressly consent to receiving calls that have been initiated by automatic dialing equipment in order to provide "prior express consent" under 47 U.S.C. § 227(b)(1)(A). That ruling represents an illogical and incorrect reading of § 227(b)(1)(A).

A. The Statute And The District Court's Ruling.

Plaintiff alleged that Defendant violated the TCPA's limitations on the use of automatic dialing equipment. That provision states, in part, that:

> It shall be unlawful for any person within the United States... to make any call (*other than a call* made for emergency purposes or *made with the prior express consent of the called party)* using any automatic telephone dialing system or an artificial or prerecorded voice... (iii) *to any* telephone number assigned to a paging service, *cellular telephone service,* specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call[.]

47 U.S.C. § 227(b)(l)(A) (emphasis added). As the emphasized language indicates, a call placed to a cell phone by an automatic dialer violates the TCPA unless it is either made for emergency purposes or "made with the prior express consent of the called party."

The District Court framed the issue before it as follows:

> Here, §227(b)(1)(A) carves out an exception to its broad prohibition on robocalls to cellular phones for those calls made with the recipient's "prior express consent." The question requiring interpretation is: "consent *to what?*" CCS argues that the recipient need only give "general unrestricted permission and consent to be called at the subject number," which [Plaintiff] Thrasher-Lyon concedes she gave. Thrasher-Lyon, on the other hand, contends that the exception is triggered only by explicit consent to receive robocalls,

> which CCS agrees that she did not give. CCS argues that the weight of case law as well as binding rulings of the FCC favor its interpretation. Thrasher-Lyon relies on the language and purpose of the TCPA, and she maintains that the FCC opinions do not foreclose her interpretation because they expand the definition of consent only in the context of creditor-debtor relationships.

App. A5 (emphasis in original). The court held that the TCPA requires that a person expressly consent to be called by means of automatic dialing equipment. Its construction of §227(b)(1)(A) was premised on the notion that, because the parenthetical exception for calls made with "prior express consent" was set out within what the court described as a prohibition on "contacting cell phone subscribers" using automatic dialing equipment, App. A5, the consent exception was "similarly limited," that is, it also incorporated the reference to automatically dialed calls. App. A6. The District Court noted that the FCC had read § 227(b)(1)(A) differently, and acknowledged that it was required to defer to the FCC's rulings, but declined to apply the relevant FCC orders to this case because it believed they only applied to cases in which someone provided their cell phone number in the course of a traditional debtor-creditor relationships, such as in an application for an extension of credit. App. A7.

B. A Plain Reading Of § 227(b)(1)(A) Demonstrates That "Express Consent" To Receive Cellular Calls Is All That Is Required.

The District Court read § 227(b)(1)(A) to require that "prior express consent" must include an express reference to automatically dialed calls. It did not cite any language to that effect in the statute, and there is none; nowhere in § 227(b)(1)(A) is "prior express consent" defined, much less defined to require any mention of automatic dialing. Rather, the court read the statute that way be-

cause it characterized the consent provision as a parenthetical exception to "a broad prohibition on *contacting cell phone subscribers* using 'any automatic telephone dialing system.'" See App. A5 (quoting § 227(b)(1)(A); emphasis added). In the District Court's view, because the statute banned all calls *to cell phones* placed by automatic dialing equipment, any consent provided *by a cell phone user* had to expressly reflect the same qualification. Bit that is not what the statue says, nor is there any reason to read such a requirement into it.

As an initial matter, the District Court's reading of the statute was inconsistent with a "plain English" reading of the statute, and ignored common principles of grammar. In § 227(b)(1)(A), the parenthetical phrase "made with the prior express consent of the called party" immediately follows and modifies "any call," thus: "to make any call (other than a call... made with the prior express consent of the called party)". As a rule, a modifying phrase should appear next to (or as close as possible to) the word it is modifying. More to the point, where a modifier appears in a sentence can change the meaning. Here, by placing the modifying phrase "prior express consent" immediately after "any call," Congress limited application of the TCPA to "any call" except those for which consent had been provided. The use of parenthesis, and the repetition of the word "call" within them, stops the reader and highlights to the reader the important limit that is being placed on "any call." By reading the following reference to automatic dialing equipment into the exception, though, the District Court essentially plucked the parenthetical out of its original location and moved it to the end of the sentence to supposedly require explicit reference to

"automatic telephone dialing system" in the "prior express consent." Had Congress intended the required "consent" to include direct reference to "automatic telephone dialing system," it could have easily done so by, for example, tying the consent language to the use of such equipment by, for example, putting the "consent" parenthetical immediately *after* the reference to automatic dialing, rather than after the reference to a "call."[3]

Moreover, the District Court's reading does not accord with the actual scope of § 227(b)(1)(A). As noted above, the District Court read the consent requirement to be "similarly limited" to the overall ban, which it thought to be a prohibition on "contacting cell phone subscribers." App. A6. In this way the District Court misread § 227(b)(1)(A), which in fact goes beyond cell phones to regulate automatically dialed calls to a laundry list of kinds of phone lines, including emergency lines to a hospital or to fire or law enforcement agencies (§ 227(b)(1)(A)(i)), lines used in hospital patient rooms or health facility guest rooms (§ 227(b)(1)(A)(ii)), and "any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call" (§ 227(b)(1)(A)(iii)). See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 F.C.C.R. 14014,

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[3] For example, Congress could have written, but did not write: "It shall be unlawful to make any call using automatic dialing equipment (other than a call made with the prior express consent of the called party) to any telephone number assigned to a... cellular telephone service...."

14092, 2003 WL 21517853, at **46 (July 3, 2003) (hereinafter "*2003 TCPA Order*") (TCPA prohibits dialing technologies "from dialing emergency numbers, health care facilities, telephone numbers assigned to wireless services, and any other numbers for which the consumer is charged for the call").

Because the TCPA's ban on automatically dialed calls extends well beyond cell phones, the District Court was wrong to read the "prior express consent" provision as an *exception* to a prohibition on automatically dialed calls to cell phones; it is instead an exception to a much broader provision that addresses calls made to a variety of kinds of lines, including but hardly limited to cell phones. That list includes a number of kinds of recipient phone lines for which a requirement that consent expressly address automatically dialed calls makes no sense. While it is theoretically possible for "consent" to be given with respect to any telephone line, a requirement of express consent to receive calls dialed by automatic equipment would be meaningless in the context of several of the types of telephone lines listed in § 227(b)(1)(A), including "911" lines or emergency lines at hospitals, fire departments or law enforcement agencies. Because the consent exception applies equally to those types of lines, though, reading it to require express consent to receive a call that was dialed automatically—that is, reading it as if it only applied to a subset of the calls it actually addresses (*i.e.*, calls to cell phones)—would not be in accord with the structure or text of the statute. See *Square D Co. v. C.I.R.*, 438 F.3d 739, 745 (7th Cir. 2006) (statute should not be read to render any clause "superfluous, void or insignificant"). Viewed in this way, it makes no sense to read into the

consent exception a requirement of express consent to receive automatically dialed calls that is not set forth in the statutory text.

C. The District Court's Interpretation Of The Consent Exception Is Inconsistent With The Purposes Of Both The TCPA And The Consent Exception Itself.

The District Court's reading of the "prior express consent" exception is also inconsistent with the policy concerns that animate the TCPA, including some the court expressly took into account. As a result, its decision attaches liability to calls that do not implicate the abuses the TCPA was enacted to address.

First, as the FCC has noted, Congress banned automatically dialed calls to the kinds of lines listed in § 227(b)(1)(A)(i)-(iii) (including cell phones) because those calls would "threaten public safety *and inappropriately shift marketing costs from sellers to consumers.*" *2003 TCPA Order*, 18 F.C.C.R. at 14092, 1003 WL 21517852, at **46 (emphasis added). Neither concern applies to the calls CCS made to Plaintiff. Those calls posed no threat to public safety. more to the point, CCS was not trying to sell Plaintiff anything; instead, it was contacting her uniquely about a specific event in which she had been a participant, using a number she had given out in order to be contacted for just that reason.

The District Court itself also noted that, according to Congressional findings that accompanied its passage, the TCPA was aimed at mitigating the "nuisance" and "invasion of privacy" caused by "automated calls and prerecorded messages." App. A6, citing Pub. L. 102-243, § 2, ¶¶ 5-6, 9-10, 13-34,

105 Stat. 2394 (1991) (internal quotation marks omitted). Here again, no such concerns were raised by CCS's calls to Plaintiff, which were merely *dialed* mechanically but did not involve any prerecorded messages and which could not reasonably be said to invade the privacy of a person who had undisputedly consented to be called at that number about their subject matter. Plaintiff would have received the same calls from CCS about the same issues whether CCS had used automatic dialing equipment or not.

Second, the District Court's reading also runs afoul of the specific purpose behind the consent exception. Congress enacted the consent exception to keep the TCPA's ban on automatically dialed calls from interfering with "normal business communications." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 F.C.C.R. 559, 564 ¶ 9, 2008 WL 65485, at **3 (Jan. 4, 2008) ("*2008 TCPA Order*"). The latter description accurately describes the calls made to Plaintiff by CCS. Those calls did not address Plaintiff as one of a host of like recipients or seek to present a prerecorded message or a sales pitch; instead they sought to communicate with her based on her involvement in a specific and singular event. For that reason, the District Court's refusal to apply the exception to those calls contravened the exception's purpose as well.

III. THE DISTRICT COURT WAS REQUIRED TO APPLY BINDING FCC ORDERS THAT HOLD THAT THE "PRIOR EXPRESS CONSENT" EXCEPTION DOES NOT REQUIRE EXPRESS REFERENCE TO AUTOMATIC DIALING.

In both its opinion on summary judgment and its order certifying the case for appeal, the District Court acknowledged that the FCC read the consent exception in § 227(b)(1)(A) the same way CCS does. See App. A7, A19. The District Court's decision not to apply the relevant FCC orders was error.

The District Court in fact recognized that it was generally bound to follow FCC orders under the Hobbs Act. App. A7, A16.[4] And it did not disagree that the FCC's interpretation of § 227(b)(1)(A) was in accord with that of CCS (though it termed both "tortured," App. A19), or that Plaintiff's providing her cell phone number to Ferguson and Farmers would otherwise have evinced adequate consent under the FCC's reading. But the District Court declined to apply the relevant FCC orders in this case because it thought they only applied to consents provided in the context of relationships between creditors and debtors in which, in the court's view, "providing a phone number 'reasonably evidences' express consent to be called, even with automated equipment, *about a debt.*" App. A7 (emphasis in original).

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[4] The Hobbs Act (see 28 U.S.C. § 2342; 47 U.S.C. § 402(a)) "vests the courts of appeals with exclusive jurisdiction to review certain orders issued by the Federal Communications Commission(.]" *Illinois Bell Tel. Co. v. F.C.C.*, 740 F.2d 465, 467 (7th Cir. 1984); see also *Indiana Bell Tel. Co., Inc. v. McCarty*, 362 F.3d 378, 389 n. 13 (7th Cir. 2004). As it properly recognized, then, the District Court was thus required to follow relevant FCC rulings as binding precedent.

In so holding the District Court misread the applicable FCC orders in at least two critical respects. First, the District Court improperly limited the application of the two relevant FCC orders. Although the *2008 TCPA Order* arose as a result of a petition to the FCC made by a debt collection trade association, the language in the order was not so limited; moreover, the 1992 order on which it directly relied was primarily addressed to issues raised by telemarketing. Contrary to the District Court's view, *see* App. A5, A7, there is no FCC "carve-out" from TCPA liability for "the creditor-debtor relationship." Instead, in both its 1992 and 2008 orders the FCC said just the opposite: that consents provided by debtors to creditors fall within, but do not cabin, a generally applicable "carve-out" that extends to "normal business communications" of all kinds. And second, the facts of this case demonstrate the existence of an ongoing "normal business" relationship between CCS and Plaintiff that fell well within the parameters contemplated by the FCC and that was not significantly different than what the District Court viewed as a traditional debtor-creditor relationship, especially with respect to the issue of Plaintiff's consent to be contacted on her cell phone.

A. The 1992 And 2008 FCC Orders Were Not Limited In Application To Calls From Creditors To Debtors.

In issuing its 2008 order the FCC relied extensively on an order it had issued in 1992, in the immediate wake of the passage of the TCPA. See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 F.C.C.R. 8752, 1992 WL 690928 (Oct. 16, 1992) ("*1992 TCPA Order*"). It thus makes sense to begin with the earlier order.

The FCC first tackled implementation of the TCPA in the *1992 TCPA Order*, which was issued approximately 10 months after the TCPA was passed. That order addressed a number of provisions of the TCPA, including the prohibition on automatically dialed calls to specified kinds of phone numbers (including cell phones). Addressing the "prior express consent" exception in § 227(b)(1)(A), the FCC focused on what the called party had provided to the calling party, rather than on how the call was dialed:

> If a call is otherwise subject to the prohibitions of [47 C.F.R.] § 64.1200, persons *who knowingly release their phone numbers* have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.

1992 TCPA Order, 7 F.C.C.R. 8752, 8769 ¶ 30, 1992 WL 690928 at **11 (emphasis added). (Section 64.1200 of 47 C.F.R. adopted the restrictions of § 227(b)(1)(A) almost verbatim.) The Commission thus ruled that nothing more was required to establish consent under § 227(b)(1)(A) to receiving calls placed by automatic dialing equipment than "knowingly releas[ing] [one's] phone number[]." And nothing in this passage or anywhere else in the *1992 TCPA Order* suggested that the FCC intended to limit its holding to any particular context, much less to the context of creditors and debtors. Indeed, the only attention the FCC devoted to them specifically was to rule that an exemption for creditors calling debtors—just the sort of exemption the District Court thought the *2008 TCPA Order* provided—was actually unnecessary "because such calls are adequately covered by exemptions we are adopting here for commercial calls which do not transmit an unsolicited advertisement and for established

business relationships." *1992 TCPA Order*, 7 F.C.C.R. at 8773 ¶ 39, 1992 WL 690928 at **14.

Even before it had the occasion to consider the *scope* of prior express consent, then, the FCC declined to read § 227(b)(1)(A) differently for creditors, or for any particular kind of caller. Instead the *1992 TCPA Order* simply conformed the TCPA's restrictions to a called party's expectations; a called party could expect to be called about a transaction at a cell phone number that he or she had provided in connection with that transaction, regardless of whether the transaction involved a "debt." The scope of the *1992 TCPA Order* is broad, and nothing in it excluded subrogation claims or "normal business" dealings of any kind.

In the *2008 TCPA Order*, the FCC reaffirmed the broad scope of its prior ruling. It reviewed that earlier ruling, and in doing so described the nature of the "exemption" embodied in the prior express consent language in § 227(b)(1)(A) in terms not limited by any particular business context:

> In the *1992 TCPA Order*, the Commission concluded that an express exemption for debt collection calls to residences was unnecessary as such calls fall within *the exemptions adopted for commercial calls which do not transmit an unsolicited advertisement and for established business relationships.*

2008 TCPA Order, 23 F.C.C.R. at 561 ¶ 4, 2008 WL 65485, at **1 (emphasis added). At the outset, then, the FCC rejected the notion, resurrected by the District Court in this case, of a "carve-out" from TCPA liability for calls from creditors to debtors. Instead the FCC confirmed that it had rejected as unnecessary just such a special exemption for creditor calls in 1992 because they

already fell "within" a broader exception to liability. According to the FCC, that exception was defined not by any specific kind of business relationship but instead by two criteria: that the call in question did not involve unsolicited advertising or that it arose from an "established business relationship." Of course, CCS's calls to Plaintiff involved none of the former and were, as more fully explained below, a part of the latter. Although the request that led to the issuance of the *2008 TCPA Order* came from a group that represented creditors, the FCC's initial response was to reiterate that creditors did not require the sort of special treatment the District Court thought they had actually received.

Only after reaffirming the broad and general application of the consent exception did the FCC go on to consider the request from the debt collection association for "clarification" of the application of its prior rulings to calls from creditors to debtors. Given what it had already said about the general application of the consent exception, the Commission made short work of that request, although in doing so it still did not exclude other contexts or otherwise limit the application of that exception outside the creditor-debtor context:

> Because we find that autodialed and prerecorded message calls to wireless numbers *provided by the called party* in connection with an existing debt are made with the "prior express consent" of the called party, we clarify that such calls are permissible. We conclude that the provision of a cell number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding that debt.

2008 TCPA Order, 23 F.C.C.R. at 564, ¶ 9, 2008 WL 65485, at **3 (emphasis added). The controlling factor thus remained the prior providing of the called party's number, rather than the nature of the business relationship between

caller and called or the manner in which the call was dialed. Again reaffirming its 1992 ruling, the FCC went on to cite legislative history of the TCPA that was also not limited in its scope to any particular kind of call or business relationship:

> In the *1992 TCPA Order*, the Commission determined that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." The legislative history in the TCPA provides support for this interpretation. Specifically, the House report on what ultimately became section 227 states that:
>
> > [t]he restriction on calls to emergency lines, pagers, and the like does not apply when the called party has provided the telephone number of such a line to the caller *for use in normal business communications.*

23 F.C.C.R. at 564 ¶ 9, 2008 WL 65485, at ** 3 (quoting House Report 102-317, 102nd Cong, 1st Sess., at 17; emphasis added). And the FCC concluded that even " autodialed and prerecorded message calls to wireless numbers that are provided by the called party to a creditor in connection with an existing debt are permissible *as calls made with the "prior express consent" of the called party*.... 23 F.C.C.R. at 568 ¶ 17, 2008 WL 65485, at **5 (emphasis added).

The point the FCC made in both 1992 and 2008 was thus exactly contrary to the District Court's positing of an FCC "carve-out" from TCPA liability for calls placed by creditors to debtors. In 1992 the Commission expressly *declined* to create such an exception because the existing statutory exception in § 227(b)(1)(A) was already more than broad enough to encompass calls to debtors from creditors. And in 2008 the FCC restated that broad interpretation, merely clarifying for debt collectors that calls they made to debtors who had provided

their cell phone numbers fell not within some contextually limited "carve-out," but instead within an exception that applied generally to "normal business communications" that were part of "established business relationships." Placing creditor-debtor calls within a broader exception was thus exactly the opposite of the "carve-out for the creditor-debtor relationship" the District Court contemplated (see App. A5, A7).

Although the FCC addressed the status of calls from creditors to debtors in the *2008 TCPA Order*, understandably in light of who was asking for clarification, it made no distinction between "creditors" and collectors of other payments, or even those calling for other business reasons, in addressing the broad contextual scope of the consent provision. Accordingly the 2008 TCPA Order was not intended to provide, and did not provide, the narrower exception found by the District Court.

B. CCS's Calls To Plaintiff Were Excepted From Liability As "Normal Business Communications" Under The FCC's Binding Construction Of The "Prior Express Consent" Exception.

Because the District Court did not think the FCC orders applied to this case, it did not directly address whether CCS's calls to Plaintiff fell within the "prior consent exception" as interpreted by the FCC. Nonetheless, this Court can readily determine that they did, and that they constituted just the sort of "normal business communications" to which, in the FCC's view, that exception properly extends.

CCS's calls to Plaintiff arose in the context of a subrogation claim. CCS's client, Farmers, and Farmers' insured, Ferguson, had paid to repair the

damage Plaintiff had admittedly caused to Ferguson's vehicle. Farmers, and then CCS, sought to recover those funds from Plaintiff, using the cell phone number she had provided. Calls like these, seeking to collect funds arising out of a claim for damage following (and resulting from) a distinct and specific event, are at least as "normal" a form of "business communications" (to which, in the FCC's view, the prior express consent exception extends) as calls from a creditor to a debtor would be. While a call from a creditor to whom a debtor had provided a cell phone number when applying for a loan might concern the loan itself or some other arguably related matter, CCS's calls to Plaintiff were much more specific to the unique transaction—the car accident—in which Plaintiff had been a participant. The pursuit of a subrogation claim against one who has caused injury to an insured falls well within the broad concept of a "normal business communication."

Although the District Court did not, as noted above, directly address the applicability of the FCC orders to this case, it did opine, in distinguishing them, that CCS's attempts to collect funds from Plaintiff did not involve "a debt." See App. A7-A10. The District Court was wrong for two reasons. First, as explained above, those orders were not limited in their applicability to calls about "debts"; rather, they extended the consent exception to any "normal business communications." Moreover, even if they were, the term "debt" is itself broad enough to encompass subrogation claims, and the distinction the district court drew between a "debt" and a subrogation claim is not supported by recognized definitions of those terms.

Courts frequently look to dictionaries to determine the plain meaning of words. See, *e.g., Cler v. Illinois Educ. Ass'n*, 423 F.3d 726, 731 (7th Cir. 2005). Considering the meaning of the two terms places a subrogation claim well within the definition of a "debt." A "claim" has been defined as:

> 1. The aggregate of operating facts giving rise to a right enforceable by a court . . . 2. The assertion of an existing right; the right to any payment or to an equitable remedy, even if contingent or provisional.

Black's Law Dictionary, at 281-82 (9th ed. 2009). The term "debt" refers to:

> 1. Liability *on a claim*; a specific sum of money due by agreement *or otherwise* . . . 2. The aggregate of *all existing claims* against a person, entity or state.

Id. at 462 (emphasis added). As this definition makes clear, a "debt" need not be reduced to a judgment, or even to writing; instead it can be based on a mere "claim." Accordingly the District Court's preoccupation with whether the amount Plaintiff owed as a result of causing the accident had been reduced to a judgment, and its consequent suggestion that such formality was necessary to trigger application of the FCC orders (see App. A9), was misplaced. Neither Plaintiff nor the District Court cited any authority for the notion that the consent exception in the TCPA is limited in application to debts that have been so formalized, and Defendant knows of none. (More to the point, of course, calls in which a caller asserts a right to collect funds based on a legally recognized claim like subrogation plainly represent "normal business communications," regardless of whether the underlying claim has been formalized.)

The District Court ruled that the facts of this case did not give rise to the sort of "creditor-debtor relationship" to which it thought the FCC Orders only applied:

> What we have here is different. Plaintiff's claim does not involve a debtor-creditor or other relationship where providing a phone number 'reasonably evidences' express consent to be called, even with automated equipment, *about a debt.* This is obvious with respect to [Plaintiff's] provision of the number to [the driver of the car] and the police at the scene of the accident; *she would have had no reason to believe that debt collection would be an outgrowth of those interactions.*

App. A7-A8 (initial emphasis in original; second emphasis added). The District Court's distinction makes no sense under the facts of this case. Indeed, it is hard to imagine what else Plaintiff would have reasonably expected to be the "outgrowth" of providing her cell phone number to the driver of a car she had damaged, and then to the driver's insurance company, other than receiving calls at that number about "a claim" of financial responsibility for the accident she had admittedly caused, that is, about "debt collection."

The District Court was thus wrong when it said that Defendant called Plaintiff based only on "Farmers' opinion that [Plaintiff] was responsible for the accident and [the driver's] expense," App. A9, which "opinion" the District Court did not find adequate to create a "debt" or trigger application of the consent exception. Farmers' subrogation claim sought to collect funds from Plaintiff in connection with a recognized form of "debt," which is what CCS was also doing when it called her. For that reason, CCS's calls to Plaintiff fell within the prior express consent exception under either the District Court's reading of the FCC orders or under a correct one: they concerned a "debt" (even though they

did not need to) and they were, in any event, plainly "normal business communications." Accordingly the District Court should have applied the FCC orders and found that Plaintiff's consent insulated CCS from TCPA liability.

CONCLUSION

CCS requests that the Court reverse the District Court's ruling and direct that judgment be entered in its favor.

March 18, 2013

Respectfully submitted,

/s/ Joel D. Bertocchi

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Certification Of Compliance With Fed. R. App. P. 32(a)(7)

The undersigned hereby certifies that this reply brief complies with the type-volume limitations set forth at Fed. R. App. P. 32(a)(7)(B)(ii), in that it contains 6,258 words as counted by the word-counting function of the Microsoft Word word processing system used to prepare the brief.

/s/ Joel D. Bertocchi

Circuit Rule 30(d) Statement

All materials required by Circuit Rule 30(a) and (b) are included in the Appendix bound with this brief.

/s/ Joel D. Bertocchi

CERTIFICATE OF SERVICE

The undersigned certifies that on March 18, 2013, he filed the foregoing Brief And Appendix Of Defendant-Appellant CCS Commercial LLC with the Court using the ECF electronic filing system, which will cause it to be served electronically on all counsel of record.

/s/ Joel D. Bertocchi

APPENDIX

APPENDIX

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United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	John J. Tharp Jr.	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	11 C 04473	**DATE**	9/4/2012
CASE TITLE	Thrasher-Lyon vs. CCS Commercial, LLC		

DOCKET ENTRY TEXT

For the reasons set forth in the accompanying Memorandum Opinion and Order, the Court GRANTS the plaintiff's motion for partial summary judgment [Doc. 71] and DENIES the defendant's motion for partial summary judgment [Doc. 56]. ENTER MEMORANDUM OPINION AND ORDER.

■ [For further detail see separate order(s).] Notices mailed by Judicial staff.

Courtroom Deputy Initials:	

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MELISSA THRASHER-LYON, *on behalf of herself and a class of others similarly situated,* Plaintiff,	)	
v.	)	No. 11 C 04473
CCS COMMERCIAL, LLC, Defendant.	)	Judge John J. Tharp, Jr.

MEMORANDUM OPINION AND ORDER

In this putative class action brought pursuant to the Telephone Consumer Protection Act, the named plaintiff, Melissa Thrasher-Lyon, alleges that Credit Collection Services Commercial ("CCS") unlawfully placed robocalls[1] to her cellular telephone in connection with an insurance subrogation claim that Farmers Insurance referred to CCS for collection. As an affirmative defense, CCS pleaded that it had Thrasher-Lyon's prior express consent to receive its calls on her cell phone. *See* 47 U.S.C. § 227(b)(1)(A)(iii). Both parties have moved for partial summary judgment on this affirmative defense.

The parties agree on the basic facts. On April 8, 2011, Thrasher-Lyon crashed into a car while riding her bicycle. At the scene, she gave her cellular telephone number to the car's driver, Charles Ferguson, and to the Chicago police officer who responded the to the scene and wrote up an incident report. Illinois Farmers Insurance Company, Ferguson's insurer, contacted Thrasher-Lyon at that phone number days after the accident and recorded her statement. In response to the

[1] The Court uses the shorthand "robocall" to refer to calls restricted pursuant to 47 U.S.C. § 227(b)(1)(A), namely, those employing "any automatic telephone dialing system or an artificial or prerecorded voice."

agent's question about the best way to reach her, Thrasher-Lyon stated that the number the agent had just called, which was her cellular phone number, was her only contact number.

Based on its investigation, Farmers paid Ferguson the amount of his loss, minus his deductible, and then notified Thrasher-Lyon of its subrogation claim. Farmers sent Thrasher-Lyon a couple of letters seeking payment of $3,240.19, which it called the "amount owed." After the letters went unanswered, Farmers referred the (unadjudicated) subrogation claim to CCS for collection. Thereafter, CCS placed one or more calls to Thrasher-Lyon's cellular telephone, using technology that, for purposes of the pending motions, the parties agree falls within the TCPA's definition of "automated telephone equipment."

CCS had no direct contact with Thrasher-Lyon before placing the calls. It did not determine whether the number it used was for a land line or a mobile phone, nor did it take steps to discern whether Thrasher-Lyon had consented to receive robocalls. When CCS receives contact information from a subrogation client, CCS assumes[2] that prior express consent was given to the client by virtue of obtaining the information. Farmers did not request or obtain Thrasher-Lyon's express consent to receive robocalls when it confirmed her contact information, nor, in CCS's understanding, would such a practice be typical among its subrogation clients.

Thrasher-Lyon sued CCS and Farmers (which is no longer a defendant), alleging that CCS's robocalls to her cell phone violated the TCPA, which provides:

> It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States . . . to make any call **(other than a call . . . made with the prior express consent of the called party)** using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service . . . .

[2] CCS denies that it "simply assumes" consent, but it admits that, after receiving contact information from a client such as Farmers, it does not take any steps to investigate or verify whether express consent was given. The Court does not discern any material distinction between CCS's admitted practice and "simply assuming" consent.

47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added). CCS maintains that it had Thrasher-Lyon's prior express consent because she voluntarily disseminated her cellular telephone number to (1) Ferguson; (2) the police; and (3) Farmers; and, furthermore, because she admitted to Farmers that it is her only contact number. Thrasher-Lyon argues that she did not expressly consent to receiving robocalls about Farmer's subrogation claim just by giving out her number in connection with the accident. Both parties now request partial summary judgment on the issue of whether Thrasher-Lyon gave "prior express consent" within the meaning of the statute.

Summary judgment will be granted when the moving party shows that there is no genuine issue as to any material fact and that it is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a); *Davis v. Ockomon*, 668 F.3d 473, 477 (7th Cir. 2012). The Court construes all facts and draws all reasonable inferences in favor of the nonmoving party. *Davis*, 668 F.3d at 477. When cross-motions for summary judgment are being resolved together, this same standard applies in favor of the party against whom the motion under consideration is made. *Edwards v. Briggs & Stratton Ret. Plan*, 639 F.3d 355, 359 (7th Cir. 2011).

At issue is a pure question of statutory interpretation. Interpreting a statute begins, and should usually end, with the language of the statute itself. *Emergency Services Billing Corp., Inc. v. Allstate Ins. Co.*, 668 F.3d 459, 465 (7th Cir. 2012) ("When interpreting any statute, we begin with the statutory language itself and assume that the plain meaning, if easily ascertained, adequately expresses the intent of the legislature."); *River Road Hotel Partners, LLC v. Amalgamated Bank*, 651 F.3d 642, 649 (7th Cir. 2011) ("If we find that the language in a statute is unambiguous, we will not conduct further inquiry into its meaning and enforce the statute in accordance with its plain meaning."); *Precision Industries, Inc. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 543-44 (7th Cir. 2003). Identifying the plain meaning of statutory language

involves "reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *River Road Hotel Partners*, 651 F.3d at 649. Ambiguous statutory language triggers a broader inquiry. "When the plain meaning of a statutory term is unclear, outside considerations"—for example, legislative history or reference to the same term's use in other statutes—"can be used in an attempt to glean the legislative intent." *ESBC Inc.*, 668 F.3d at 465.

Here, § 227(b)(1)(A) carves out an exception to its broad prohibition on robocalls to cellular phones for those calls made with the recipient's "prior express consent." The question requiring interpretation is: "consent *to what*?" CCS argues that the recipient need only give "general unrestricted permission and consent to be called at the subject number," which Thrasher-Lyon concedes she gave. Thrasher-Lyon, on the other hand, contends that the exception is triggered only by explicit consent to receive robocalls, which CCS agrees that she did not give. CCS argues that the weight of case law as well as binding rulings of the FCC favor its interpretation. Thrasher-Lyon relies on the language and purpose of the TCPA, and she maintains that the FCC opinions do not foreclose her interpretation because they expand the definition of consent only in the context of creditor-debtor relationships.

The Court concludes that the statutory language is not ambiguous and that Thrasher-Lyon's interpretation adheres to the plain language of the provision, consistent with its purpose and the context of the overall statute. The exception for "prior express consent" appears parenthetically within a broad prohibition on contacting cell phone subscribers using "any automatic telephone dialing system or an artificial or prerecorded voice." *See* § 227(b)(1)(A). Thus, the sentence in which the exception appears applies specifically, and *only*, to calls made with robocall technology. Because the prohibition applies only to robocalls, the exception is

similarly limited; otherwise the statute would exempt a broader class of calls than it bans in the first place. Other textual indicators confirm this reading. Notably, § 227 is titled, "Restrictions on the use of telephone equipment," and subsection (b) is called "Restrictions on use of automated telephone equipment." These descriptive headings underscore that the statute regulates only the use of robocall technology, not calls in general. An exception based upon generic consent to be contacted, rather than consent to "use of" the technology, would be anomalous in this context.

If there were any doubt on this score, interpreting "prior express consent" to require consent to robocalls, not just consent to receiving telephone calls, is also consistent with the Congressional findings accompanying enactment of the TCPA. In particular, the findings state that automated calls and prerecorded messages are a "nuisance," an "invasion of privacy," and "when an emergency or medical assistance telephone line is seized, a risk to public safety." *See* Pub. L. 102–243, § 2, ¶¶ 5-6, 9-10, 13-14, 105 Stat 2394 (1991). Moreover, "[t]echnologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer." *Id.* ¶ 11. At bottom, then, the TCPA bans calls using automated technology to protect consumers, placing the burden on the technology users rather than the consumers, who are ill-equipped to mitigate the nuisance. *See Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d 999, 1011 (N.D. Ill. 2010) ("[T]he TCPA serves a significant government interest of minimizing the invasion of privacy caused by unsolicited telephone communications to consumers."). This protective purpose, and its implementation by way of restricting the use of certain technology, further supports the view that the consumer must give "prior express consent" to robocalls—not to telephone calls in general—if they are to receive the automated calls that the legislature deemed invasive.

CCS's arguments to the contrary are unpersuasive. First, the Court rejects CCS's contention that this case is squarely addressed by FCC rulings that this Court cannot revisit pursuant to the Hobbs Act, which reserves to the courts of appeals the power to enjoin, set aside, suspend, or determine the validity of final FCC orders. *See* 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a); *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 446 (7th Cir. 2010). The Court acknowledges, and does not attempt to review or alter, the FCC's ruling that "prior express consent" is provided when a debtor gives contact information to a creditor in the course of the transaction giving rise to the debt. *See In Re Rules and Regulations Implementing the TCPA of 1991*, 23 FCCR 559, 2008 WL 65485, at *3 (Jan. 4, 2008). In that context, the FCC concluded that providing "a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt." This builds from the FCC's earlier determination that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." *In Re Rules & Regulations Implementing the TCPA of 1991*, 7 FCCR 8752, 1992 WL 690928, at **11 (Oct. 16, 1992). The Court does not quibble with the FCC's carve-out for the creditor-debtor relationship; Congress specifically anticipated that the FCC would "design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy." *See* Pub. L. 102–243, § 2, ¶13,105 Stat 2394 (1991).

What we have here is different. Plaintiff's claim does not involve a debtor-creditor or other relationship where providing a phone number "reasonably evidences" express consent to be called, even with automated equipment, *about a debt*. This is obvious with respect to Thrasher-Lyon's provision of the number to Ferguson and the police at the scene of the accident; she

would have had no reason to believe that debt collection would be an outgrowth of those interactions. Nor was her interaction with Farmers (in whose shoes CCS now stands) sufficient to reasonably evidence express consent to be robo-called about a subrogation claim. Thrasher-Lyon did not voluntarily provide her number to Farmers in the first instance, let alone for the purposes of receiving a loan or other service. She simply verified that the number Farmers already had obtained from the police report (and already used) was the "best" ,and only, number at which to reach her. Missing from this case are any facts from which it could be inferred that Thrasher-Lyon's verification of her phone number was tantamount to giving permission to being robocalled about a purported debt—one she didn't even know about at the time she disseminated or confirmed her number. This is in marked contrast to the 2008 FCC ruling and the creditor-debtor cases on which CCS relies.

A common theme of those cases is the plaintiff's provision of contact information in connection with the knowing creation of a debt by voluntarily opening an account or otherwise contracting to pay for some service. *See Osorio v. State Farm Bank, F.S.B.*, --- F. Supp. 2d ---, 2012 WL 1671780 (S.D. Fla. May 10, 2012) (number provided on credit card application); *Cavero v. Franklin Collection Serv., Inc.*, No. 11–22630–CIV, 2012 WL 279448 (S.D. Fla. Jan. 31, 2012) (number listed on an account for telephone and internet service); *Mitchem v. Ill. Collection Serv., Inc.*, No. 09 C 7274, 2012 WL 170968 (N.D. Ill. Jan. 20, 2012) (billing number provided to doctor when receiving treatment); *Adamcik v. Credit Control Servs., Inc.*, 832 F. Supp. 2d 744, 748 (W.D. Tex. 2011) (number provided with student loan application); *Greene v. DirecTV, Inc.*, No. 10 C 00117, 2010 WL 4628734 (N.D. Ill. Nov. 8, 2010) (number provided to fraud alert service); *Cunningham v. Credit Mgmt., L.P.*, No. 09-CV-1497, 2010 WL 3791104, at *5 (N.D. Tex. Aug. 30, 2010) (number provided in connection with internet services account).

Under the FCC's reasoning, consent to be contacted about a debt or bill can be reasonably inferred from the provision of contact information in connection with the voluntary establishment of a commercial relationship by means of a transaction creating a debt..

Here, however, it would be a stretch to call Farmers a "creditor" of Thrasher-Lyon, and stranger still to view getting into a car crash as the equivalent of applying for a loan or contracting for services. Thrasher-Lyon did not affirmatively make contact with Farmers or CCS in order to obtain a service and provide her number as part of the process and sought no relationship with either company. She did not give up her phone privacy in exchange for a benefit such as a loan or cable television. Moreover, there is no evidence in the record that Thrasher-Lyon had incurred a debt to Farmers at the time she gave out her number or when the robocalls were placed. Evidence that Farmers paid Ferguson's claim does not suffice. Farmers did not reduce its subrogation claim to judgment, so when CCS began dunning her with robo-calls, it was on the basis of nothing more than Farmers' opinion that Thrasher-Lyon was responsible for the accident and Ferguson's expenses. Farmers might be correct, but that remained to be determined at the time the robocalls began and provides no basis from which consent to be robo-called can be inferred.

The FCC's creditor rule, which goes beyond the plain language of the TCPA to mitigate a burden on creditors that was likely not intended by the statute, is binding on this Court, but CCS seeks to expand the FCC's ruling well beyond its moorings in a voluntary transaction giving rise to a debtor-creditor relationship. The Court rejects CCS's argument that it can avail itself of the FCC's creditor rule before a debt even exists. CCS's argument is inconsistent with the rationale behind the 2008 FCC order that envisions an individual who voluntarily makes contact with a provider of services, whether medical, financial, or otherwise, and takes on debt as a result.

Nothing in the FCC's rulings suggests that it was intended to apply outside the context of a debtor-creditor relationship. Accordingly, the Court does not find the FCC's creditor rule, or the cases applying it, applicable or instructive in the very different factual context of this case.

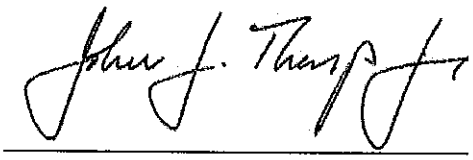
CCS insists that it would be "bizarre" to interpret the statute to require "elaborate" consent using "magic words," but there is nothing bizarre about giving effect to all of the words in the statutory language. It is what courts are required to do. Bizarre would be to read "express consent" as "implied consent." In ordinary parlance, there is no such thing as "implied express consent"—that is an oxymoron. Giving out one's phone number, at least outside of the special relationship sanctioned by the FCC, is not "express" consent to besiegement by automated dialing machines. One "expresses" consent by, well, expressing it: stating that the other party can call, or checking a box on form or agreeing to terms of service that explicitly permit automated telephone contact. *See Satterfield v. Simon & Schuster*, 569 F.3d 946, 955 (9th Cir. 2009) ("Express consent is consent that is clearly and unmistakably stated.") (citation omitted). "Express" connotes a requirement of specificity, not "general unrestricted permission" inferred from the act of giving out a number, as CCS urges. Agreeing to be contacted by telephone, which Thrasher-Lyon effectively did when she gave out her number, is much different than expressly consenting to be robo-called about a debt she did yet know Farmers believed she owed.

"When a text can be applied as written, a court ought not revise it by declaring the legislative decision 'absurd.'" *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637, 642 (7th Cir. 2012). No doubt CCS and other robo-callers think it unduly burdensome to obtain advance express consent to receive robocalls, given the modern proliferation of cellular phones and the decreasing incidence of grounded residential telephone lines. But it is not this Court's prerogative to amend the statute to conform to changing times or to attempt to improve it. *See id.*

In any event, and as explained above, there is nothing absurd about Congress's determination to require express consent before subjecting telephone consumers to a barrage of automated phone calls or prerecorded messages. As the statute's title advertises, it was enacted for the benefit of telephone consumers and, accordingly, Congress required consumers to opt *in*—expressly—to robocalls than to take steps to opt out or to expressly limit the scope of their consent any time they disseminate their phone numbers, as CCS would have it. The language of the statute makes consent the exception, not the default.

CONCLUSION

For all these reasons, the Court concludes that, as to Thrasher-Lyon, CCS cannot avail itself of the statutory exception for robocalls placed with prior express consent. As a matter of law, Thrasher-Lyon's provision of her telephone number to the Ferguson, the police, and Farmers was not prior express consent to receive CCS's robocalls on her cellular phone. Moreover, CCS has failed to establish with admissible evidence that at the time of the robocalls, Farmers was Ms. Thrasher's creditor for purposes of the FCC's creditor-debtor rule, which therefore does not apply here. Accordingly, the Court GRANTS the plaintiff's motion for partial summary judgment and DENIES the defendant's motion for partial summary judgment.



Date: September 4, 2012

Honorable John J. Tharp, Jr.
U.S. District Judge

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	John J. Tharp Jr.	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	11 C 04473	**DATE**	11/2/2012
CASE TITLE	Melissa Thrasher-Lyon v. CCS Commercial LLC		

DOCKET ENTRY TEXT

For the reasons set forth in the accompanying opinion, the Court DENIES the defendant's motion to reconsider [89] and GRANTS the defendant's motion to certify the court's partial summary judgment ruling for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) [90]. CCS has 10 days from entry of this order to petition the court of appeals for review. If the case is accepted for interlocutory appeal, proceedings in this Court will be stayed.

■ [For further detail see separate order(s).] Notices mailed by Judicial staff.

	Courtroom Deputy Initials:	

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

MELISSA THRASHER-LYON, on behalf of herself and a class of others similarly situated,	)	
Plaintiffs,	)	
v.	)	No. 11 C 04473
CCS COMMERCIAL LLC, d.b.a. Credit Collection Services Commercial,	)	Judge John J. Tharp, Jr.
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Defendant CCS Commercial LLC ("CCS") moves the Court to reconsider its ruling of September 4, 2012, denying CCS's motion for partial summary judgment and granting the named plaintiff's.[1] CCS alternatively requests that the Court certify its decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Named plaintiff Melissa Thrasher-Lyon opposes both motions. For the reasons that follow, the Court denies the motion to reconsider and grants the motion to certify.

A. Motion to Reconsider

The September 4 decision did not terminate the action and therefore is "subject to revision at any time." Fed. R. Civ. P. 54(b); *see Galvan v. Norberg*, 678 F.3d 581, 586-87 (7th Cir. 2012). The Court has broad discretion—"sweeping authority"—to revisit its interlocutory decisions, subject to the caveat that issues already decided should not be revised without good reason. *Galvan*, 678 F.3d at 587 & n.3. Here, CCS argues that the Court should reconsider

[1] This opinion assumes the reader's familiarity with the September 4, 2012, decision in which the Court held that, as a matter of law, Thrasher-Lyon did not give "prior express consent" to receive automatically dialed telephone calls or prerecorded messages on her cellular phone when she disseminated the number to certain individuals after a bicycle-car collision. *See* Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(b)(1)(A)(iii).

because its decision was based upon errors of law and perhaps a misapprehension of CCS's arguments. The Court addresses the arguments in turn.

First, CCS contends that the Court failed to address a 1992 FCC Order that held that giving out a telephone number is consent to be contacted. *In Re Rules & Regulations Implementing the TCPA of 1991*, 7 FCCR 8752, 1992 WL 690928, at **11 (Oct. 16, 1992) (explaining that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary"). This argument fails for at least two reasons. First, the Court cited, and recited the holding of, the 1992 Order in its September 4 ruling. Memorandum Opinion and Order, Dkt. 86 at 6. The decision assumes, consistent with the 1992 Order, that disseminating one's contact information to others is agreement to be contacted by those individuals. Indeed, the Court made it clear Thrasher-Lyon consented to receive telephone calls from the individuals to whom she gave her contact information. *Id.* at 9 ("Agreeing to be contacted by telephone, *which Thrasher-Lyon effectively did when she gave out her number*, is much different than expressly consenting to be robo-called") (emphasis added). CCS is really just taking issue with the Court's distinction between consent to be contacted and consent to be contacted through the use equipment regulated by the TCPA. However, as the opinion explains, that distinction is required by the plain language of the TCPA, unless the FCC's creditor-debtor rule applies. Here, it does not. Another problem with CCS's reliance on the 1992 Order as independent grounds for a favorable decision is that Thrasher-Lyon never gave her telephone number (and thus, her consent) *to Farmers*, in whose shoes CCS now stands. She gave the number at the scene of the crash to the driver and a police officer; Farmers obtained the phone number from one of them, not from Thrasher-Lyon. She merely confirmed the contact information when Farmers called her with

contact information it obtained *from a third party*. CCS is therefore off-base both in suggesting that the Court failed to acknowledge the 1992 Order and that it clearly requires judgment for CCS.

CCS's second argument, that the Court violated the Hobbs Act, also relies on the demonstrably incorrect statement that the Court somehow "ignored" or failed to heed the 1992 Order. As explained above, the summary-judgment decision in fact relies upon the 1992 Order's statement that giving out contact information is consent to be contacted. The Court simply declined to equate consent to be contacted generally with consent to the use of the equipment expressly prohibited by the TCPA, unless there is a creditor-debtor relationship established at the time the equipment is used. Again, a more careful reading of the Court's opinion would have shown CCS that the Court acknowledged the binding nature of *both* the 2008 and 1992 FCC Orders. *See* Mem. Op. & Order, Dkt. 86, at 6 ("[T]he Court rejects CCS's contention that this case is squarely addressed by FCC *rulings* that this Court cannot revisit pursuant to the Hobbs Act") (emphasis added). The Court agreed that it lacks jurisdiction to modify or reject those rulings, but disagreed with CCS that the rulings required judgment in its favor.

CCS's third argument, that the Court erroneously determined that Farmers (and therefore CCS) was not a creditor within the meaning of the 2008 FCC Order, does not point to any error of law or fact. CCS simply expresses disagreement with the Court's application of the creditor-debtor rule. CCS presents nothing new that it didn't argue already in its summary-judgment briefs, and the Court declines to revisit those arguments again.

Finally, CCS advises that the Court "may compel the parties to ask the FCC to clarify the 2008 Order." The Court is not inclined to do so. In the Court's view, the 2008 Order requires no clarification: it applies to communications between creditors and debtors. Here, there was no

"debt" or "transaction" as those terms are used in the 2008 Order or the many cases that the Court cited. *See* Mem. Op. & Order, Dkt. 86 at 7-8. As the Court explained, Thrasher-Lyon's conduct in giving her number to third parties in connection with the accident did not reasonably evidence consent to be contacted by Farmers or its successor, CCS, through the use of auto-dialers and prerecorded messages.

For these reasons, the Court will not reverse its ruling on the parties' cross-motions for partial summary judgment. The motion to reconsider is denied.

B. Motion to Certify for Interlocutory Appeal

Turning now to CCS's alternative request, an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) can be taken when the district court and the appellate court agree that "the ruling decides a controlling issue of law and immediate resolution of the issue would expedite the litigation." *In re High Fructose Corn Syrup Antitrust Litig.*, 361 F.3d 439, 440 (7th Cir. 2004). CCS's somewhat cursory motion argues that these criteria are met, while Thrasher-Lyon insists that they are not.

On the first question, the Court concludes that its ruling decided two issues of law that are controlling: the interpretation of "prior express consent" and the scope of the creditor-debtor rule. These surely are pure "questions of law." *See Ahrenholz v. Board of Trustees of University of Illinois*, 219 F.3d 674, 676 (7th Cir. 2000) ("'question of law' in section 1292(b) refers "to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine rather than to whether the party opposing summary judgment had raised a genuine issue of material fact"). A harder question is whether they are "controlling." "A question of law may be deemed 'controlling' if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so." *Sokaogon Gaming Enterprise Corp. v. Tushie-*

Montgomery Associates, Inc., 86 F.3d 656, 659 (7th Cir. 1996). As to Thrasher-Lyon's individual claim the issues were decisive (unless there is another defense of which neither the Court nor, apparently, the parties, are aware). Thus, reversal of the Court's ruling would end the case, as far as she is concerned. And if the Court's ruling stands, it certainly will color how the remainder of the case will proceed as it now enters the class-certification stage. The scope of the class, if there is to be one, will likely be circumscribed by the Court's interpretation of "prior express consent" and the creditor-debtor rule. By the same token, CCS might argue that the Court's ruling requires denial of class certification, for example because of individualized issues that might be raised. Certainly the Court's own view of class certification is affected by whether it correctly interpreted the TCPA exception and the FCC's 2008 Order.

Next, the Court recognizes that its interpretation of "prior express consent" presents "substantial ground for difference of opinion," *see* 28 U.S.C. § 1292(b). A "'substantial ground for a difference of opinion' must arise out of a genuine doubt as to whether the district court applied the correct legal standard in its order." *Consub Delaware LLC v. Schahin Engenharia Limitada*, 476 F. Supp. 2d 305, 309 (S.D.N.Y. 2007). This could mean that there is conflicting authority on the issue, or that the issue is particularly difficult and of first impression. *Id.*; *see Brown v. Mesirow Stein Real Estate, Inc.*, 7 F. Supp. 2d 1004, 1008 (N.D. Ill. 1998) (considering whether "controlling court of appeals has decided the issue").

Here, there is not abundant authority for either side's position on this issue. The Court has identified two decisions consistent with its own holding: *Leckler v. CashCall, Inc.*, 554 F. Supp. 2d 1025 (N.D. Cal. 2008) and *Edeh v. Midland Credit Mgmt, Inc.*, 748 F. Supp. 2d 1030 (D. Minn. 2010). The Court agrees with both of these decisions insofar as they require "express consent" to be explicit and not implied. Yet the Court finds no strength in numbers. The *Leffler*

court retreated from its holding, later finding it to be barred by the Hobbs Act because the case clearly involved a consumer loan (and so fell within the debtor-creditor context of the FCC's Orders). *See Leckler v. Cashcall, Inc.*, 2008 WL 5000528 (N.D. Cal. Nov. 21, 2008). And in *Edeh*, there is no indication that the creditor-debtor rule was ever invoked (although it appears it could have been), so the district court did not confront the issue before this Court.

On the other hand, many a TCPA class action has been quashed by application of the "creditor-debtor" gloss on "prior express consent." In its September 4 decision, the Court found those cases to be distinguishable, but the primary question on appeal would be whether the distinction is based on sound interpretation of the TCPA and the 1992 and 2008 FCC Orders. CCS's arguments against the Court's ruling are "substantial." They are based upon statutory interpretations that the Court views as somewhat tortured—however, so are the FCC rulings concluding that "express consent" can sometimes be implied. And this Court, unlike the Court of Appeals, is not empowered to question those rulings. Because CCS's statutory interpretation is plausible (particularly in light of the FCC's infidelity to the plain language of the statute), and the Seventh Circuit has not addressed the question, the Court finds that there are substantial grounds for difference of opinion.

Finally, the Court turns to the closest question—whether this litigation is likely to be expedited by an immediate appeal of the summary-judgment ruling before the class certification stage proceeds. "[A]ll that section 1292(b) requires as a precondition to an interlocutory appeal, once it is determined that the appeal presents a controlling question of law on which there is a substantial ground for a difference of opinion, is that an immediate appeal *may* materially advance the ultimate termination of the litigation." *Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 536 (7th Cir. 2012) (emphasis in original). The Court asked for and now has the

benefit of the parties' oral arguments on this subject, and it concludes that an immediate appeal might materially expedite this case.

The parties both admit (plaintiff more reluctantly) that additional discovery will be needed for class certification. Plaintiff foresees a straightforward inquiry into whether CCS's insurance subrogation clients—either two dozen or about six, depending on which party is correct—obtain express permission to contact individuals using automated equipment. But this question begets many others: whether such consent is always, sometimes, or rarely sought; how the consent is requested; whether there is a system for keeping track of consent given or denied. All of these questions and more will be relevant to the makeup of any class. And even if the scope of the discovery is as limited as plaintiffs suggest, it involves a number of non-parties and is therefore certain to require some time—more than plaintiff acknowledges—to complete. The Court is also reluctant to needlessly impose costs on non-parties, which is distinctly possible if ultimately it is wrong that obtaining consent *to automated calls* is required to satisfy the statutory exception. (On the other hand, the Court is not swayed by CCS's concerns about its client relationships or business prospects—these issues are unrelated to any potential efficiency gains.)

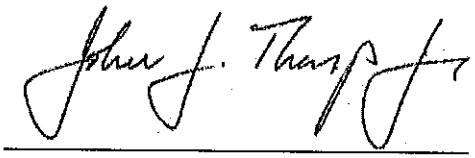
It is not just pre-certification discovery that would be averted if the Court's interpretation of the statute were reversed. The whole case would evaporate. Obviously Thrasher-Lyon's individual claim would be extinguished, because the defendants will have shown that they had her consent. And if Thrasher-Lyon gave "prior express consent," it is difficult to imagine a plaintiff who did not, given that she did not even provide her telephone number to Farmers in the first instance and did not have a conventional consumer "debt" to Farmers. Thus, reversal could effectively terminate this entire case without any need to complete briefing on class certification.

For that reason, an appeal of a class certification ruling pursuant to Rule 23(f) is not an efficient alternative to an interlocutory appeal now.

If the Court's summary-judgment ruling is upheld, on the other hand, there will be other efficiency gains. The remaining class discovery will be smoother with a clearly defined universe of what evidence is required and relevant. The scope of any Rule 23(f) appeal from a class certification decision would be narrowed if the applicable substantive law has been clarified already. And if the defendant's appeal (if accepted) is unsuccessful, settlement might enter the equation, which is an unlikely prospect until the statute's meaning has been resolved definitively.

* * *

For all of these reasons, the Court denies CCS's motion to reconsider and grants its motion to certify the summary-judgment decision for appeal under § 1292(b). CCS has 10 days from the entry of these findings to request the Seventh Circuit's interlocutory review of the decision. The Court will stay the case pending interlocutory review, if granted.



Entered: November 2, 2012

John J. Tharp, Jr.
United States District Judge