TCPA Tracker - April 2020

April 17, 2020

Recent News

FCC Adopts STIR/SHAKEN Report & Order and Further Notice of Proposed Rulemaking

On March 31, 2020, the FCC adopted a Report & Order and Further Notice of Proposed Rulemaking (FCC 20-42) aimed at illegal call spoofing. The Order requires all telecommunications carriers to implement STIR/SHAKEN in the IP portions of their networks by June 30, 2021. It also proposes an extension of this deadline for small carriers and seeks comment on a number of related issues stemming from the TRACED Act. Comments are due on May 15, 2020, and reply comments are due on May 29, 2020. Please see our March 2020 TCPA Tracker for further coverage of the item.

FCC, FTC Demand Gateway Providers Cut Off Robocallers

On April 3, 2020, the FCC and the Federal Trade Commission ("FTC") demanded that service providers take action to stop coronavirus-related scam robocalls from bombarding American consumers. They specifically warned three gateway communications providers allegedly facilitating COVID-19-related scam robocalls originating overseas that they must take action to stop carrying these calls or face serious consequences. Specifically, if the providers do not take action to address the scam robocalls, the FCC will allow other providers to block all traffic from these gateway providers' networks. These letters, coupled with the recent activity by the FTC and FCC to combat illegal robocalls, signal the agencies' desire to cause a meaningful reduction in unlawful calling, and in particular, demonstrate a desire to prevent scammers from taking advantage of the COVID-19 crisis to carry out their deceptions. These federal actions are a good reminder for VoIP and other service providers to assess whether they have controls in place to detect if their customers' practices indicate unlawful use of VoIP or other services. For additional information, see our blog post.

FCC Clarifies that Hospital, Healthcare Provider and Government COVID-Related Communications Fall Within "Emergency Purposes" Exception to the TCPA

On March 20, 2020, the FCC's Consumer and Governmental Affairs Bureau released a Declaratory Ruling (DA 20-318) regarding the TCPA's "Emergency Purposes" exception to the consent requirement. The Bureau order declares that COVID-19 constitutes an emergency under the TCPA's exception, thus allowing communications (voice calls and texts) related to the emergency without consent. The order specifically permits calls/texts where (1) the communication is made by a hospital, healthcare official, state, local or federal government official or a person or entity acting on their behalf; and (2) the communication is informational, directly related to the COVID-19 pandemic and "related to the imminent health or safety risk of the pandemic." The order provides several non-exhaustive examples of communications that would fall within the emergency purposes exception. The Bureau made clear, however, that marketing messages may not be included in the communications.

This clarification applies to both voice calls and text messages that are sent by the designated entities (so long as the content related to the COVID-19 crisis). The order is designed to ensure that time-sensitive messages are delivered promptly and are not impeded by the TCPA's consent requirements. For entities not identified in the Bureau's clarification, we recommend that you obtain

the advice of counsel to determine how the TCPA applies to the proposed call or message.

FCC Petitions Tracker

Kelley Drye's Communications group prepares a comprehensive summary of pending petitions and FCC actions relating to the scope and interpretation of the TCPA.

Number of Petitions Pending

- 34 petitions pending
- 1 petition for review of the CGB order issued on 12/09/19 granting Amerifactors' petition for declaratory ruling that faxes sent and received over the Internet are not bound by the prohibitions on junk faxes that apply to telephone facsimile machines
- 1 petition for reconsideration of the rules to implement the government debt collection exemption
- 1 application for review of the decision to deny a request for an exemption of the prior express consent requirement of the TCPA for "mortgage servicing calls"
- 1 request for reconsideration of the 10/14/16 waiver of the prior express written consent rule granted to 7 petitioners

New Petitions Filed

- *American Bankers Association et al.* – Petition for expedited declaratory ruling, clarification, or waiver filed by financial services providers asking whether the providers' calls and text messages about COVID-19 that use an ATDS or prerecorded or artificial voice are made for emergency purposes and are thus exempt from the TCPA's consent requirements. *(Filed March 30, 2020)*

Upcoming Comments

- *American Bankers Association et al.* – Petition for expedited declaratory ruling, clarification, or waiver filed by financial services providers asking whether the providers' calls and text messages about COVID-19 that use an ATDS or prerecorded or artificial voice are made for emergency purposes and are thus exempt from the TCPA's consent requirements. (Comments due 05/06/2020, reply comments due 05/21/2020)

Decisions Released

- On March 17, 2020, the FCC issued an order upholding the Consumer and Governmental Affairs Bureau's ("Bureau") 2018 order eliminating the FCC rule that required opt-out consent language on faxes sent with prior express consent (the "Solicited Fax Rule").
- On March 20, 2020, the FCC's Consumer and Governmental Affairs Bureau released a Declaratory Ruling (DA 20-318) regarding the TCPA's "Emergency Purposes" exception to the consent requirement. The Bureau order declares that COVID-19 constitutes an emergency under the TCPA's exception, thus allowing communications (voice calls and texts) from certain sources and related to the emergency without consent.

Click here to see the full FCC Petitions Tracker.

Cases of Note

Second Circuit Adopts Broad Definition of ATDS – and Holds Past FCC Guidance as "Still Valid"

The Second Circuit has adopted a broad and inclusive definition of an ATDS that deepens the Circuit Split on this issue with the Second and Ninth Circuits on one side and Third, Seventh, and Eleventh on the other. In *Duran v. La Boom Disco*, the Second Circuit held that a system qualifies as an ATDS under the TCPA if it can either produce numbers using a random- or sequential-number-generator, or store numbers.

Defendant La Boom Disco used two systems to text its customers: ExpressText and EZTexting. The systems dialed numbers from a stored list. The defendant conceded that it sent text messages, but argued that it was not liable under the TCPA because the systems required a level of human intervention that removed them from the definition of an ATDS. On February 25, 2019, the district court agreed, denying the plaintiff's motion for summary judgment and awarding summary judgment in favor of La Boom Disco *sua sponte*. The district court found that because a user was required to determine when the message would be sent, the technology at issue did not qualify as an ATDS.

On April 14, 2020, the Second Circuit reversed. Citing the doctrine against surplusage – a canon of statutory interpretation that avoids reading a statute in a way that renders any word redundant – the Court held that Congress intended that an ATDS includes both (a) systems that store numbers, and (b) systems that produce numbers using a random- or sequential-number-generator. This was so, the Court reasoned, because a system that can randomly or sequentially generate numbers must also necessarily store them somewhere. The Court further reasoned that the TCPA's exemptions for calls placed by the government would make little sense if an ATDS only included systems that produced and stored randomly or sequentially generated numbers: the government makes these calls using human-generated lists of numbers.

The decision also rejected the common interpretation of the Second Circuit's June 29, 2018 *King* case, which had been read by multiple courts to have set aside the pre-2015 FCC Orders. *Duran* clarifies the opposite: "To the contrary, the 2003, 2008, and 2012 Orders, among others, survived our decision in *King* and the D.C. Circuit's decision in *ACA International*, and continue to inform our interpretation of the TCPA today." Put differently, any predictive dialer would appear to qualify as an ATDS in the Second Circuit.

Additionally, the Court proffered a narrow interpretation of human intervention required to remove a system from the scope of the ATDS definition. The Court found that "[c]licking 'send' does not require enough human intervention to turn an automatic dialing system into a non-automatic one" and materially differs from dialing numbers on a telephone, since it is not the actual or constructive inputting of numbers to make an individual telephone call or to send an individual text message. Thus, the Court held that the systems used by the defendant qualified as ATDS and vacated and remanded the district court's decision.

Duran v. La Boom Disco, Inc., No. 19-600-cv, 2020 U.S. App. LEXIS 10861 (2d Cir. Apr. 7, 2020).

Third Circuit Reverses Dismissal of TCPA Action Applying Third Party Liability Standard

In *Robert W. Mauthe M.D. v. Spreemo, Inc.*, the Third Circuit reversed a district court's dismissal of a TCPA Junk Fax claim at the pleading stage. The district court had granted defendant Spreemo's motion to dismiss, finding that it could not be liable under the TCPA as a matter of law for a fax sent to the plaintiff. The fax at issue stated that Spreemo, a medical diagnostics services vendor, was the "Primary Diagnostic Vendor" for an insurance company accepted by plaintiff's medical office. The district court concluded that the fax, on its face, did not constitute an "unsolicited advertisement" as required to trigger the TCPA, because it did not promote goods or services or initiate a commercial

transaction with the plaintiff.

The Third Circuit reversed, holding that the complaint sufficiently alleged a basis for third-party liability under the TCPA because the plaintiff alleged that the fax: (1) sought to promote or enhance the quality or quantity of a product or services being sold commercially; (2) was reasonably calculated to increase the profits of the sender; and (3) directly or indirectly encouraged the recipient to influence the purchasing decisions of a third party.

Robert W. Mauthe M.D., P.C. v. Spreemo, Inc., No. 19-1470, 2020 U.S. App. LEXIS 9319 (Mar. 25, 2020).

Applying Narrow Definition of ATDS, District Courts Continue to Toss TCPA Claims

In *Perez v. Quicken Loans*, the Northern District of Illinois granted the defendant's motion to dismiss where the plaintiff made only "barebones" allegations about the system used: a significant pause preceded the call, defendant continued to contact plaintiff after being requested to stop, and defendant's contacts were numerous. The Court agreed with the defendant that the pleadings were "vague," "generic," and failed to plead an ATDS was used under the Seventh Circuit's definition of an ATDS. The court, however, granted leave to amend, given that the complaint was filed before the leading Seventh Circuit case, *Gadelhak*, was decided.

In *DeCapua v. Metropolitan Property & Casualty Insurance Co.*, the District of Rhode Island dismissed the plaintiff's claim on two separate grounds. First, the dialing platform alleged in the complaint, EZTexting, required too much human intervention to qualify as an ATDS. As detailed in the complaint, a person had to upload and store numbers from outside the system, select recipients from "groups" of stored numbers, draft a message and select the delivery time, and finally review and send the message. Second, the system fell outside the statutory definition of an ATDS because it was not alleged to have the capacity to generate random or sequential phone numbers and dial them. In effect, the Court followed the narrower ATDS definition adopted by the Third, Seventh, and Eleventh Circuits.

DeCapua v. Metro. Prop. & Cas. Ins. Co., No. 18-590, 2020 U.S. Dist. LEXIS 47695 (D.R.I. Mar. 19, 2020); *Perez v. Quicken Loans, Inc.*, No. 19-cv-2072, 2020 U.S. Dist. LEXIS 53476 (N.D. Ill. Mar. 27, 2020).

Seventh Circuit Holds Bristol-Meyers Does Not Preclude Federal Courts From Asserting Personal Jurisdiction Over the Claims of Out-Of-State Putative Class Members

In *Mussat v. IQVIA*, the Seventh Circuit held that the Supreme Court's decision in Bristol-Myers Squibb Co. v. Superior Court does not foreclose federal courts from asserting personal jurisdiction over the TCPA claims of out-of-state, unnamed members of a putative nationwide class.[1]

In *Mussat*, the plaintiff filed a class action complaint against IQVIA after receiving an allegedly unsolicited fax that did not include the required opt-out notice. Plaintiff sought to represent all persons nationwide who received a similar fax from IQVIA. IQVIA moved to strike the class definition, arguing that under *Bristol-Meyers*, the district court lacked personal jurisdiction over non-resident putative class members. The district court granted the motion to strike and the plaintiff appealed to the Seventh Circuit. The Seventh Circuit reversed, finding that *Bristol-Meyers* did not apply to class actions brought pursuant to Federal Rule 23, and that holding was limited to cases under California's unique "coordinated mass action" statute. The Seventh Circuit observed that the "coordinated mass action" differs from a Rule 23 class action because it does not involve unnamed plaintiffs --- all plaintiffs in the state action are named parties to the suit. Furthermore, the Seventh Circuit reasoned that federal courts do not consider unnamed putative class members when determining venue or subject-matter jurisdiction; therefore, it saw no valid basis to consider unnamed class members when determining personal jurisdiction. Consequently, the Seventh Circuit held that only named plaintiffs have to demonstrate personal jurisdiction, not unnamed putative class members.

Mussat v. IQVIA, Inc., No. 19-1204, 2020 U.S. App. LEXIS 7560 (7th Cir. Mar. 11, 2020).

[1] In *Bristol-Meyers*, the United States Supreme Court held that California state courts could not assert personal jurisdiction over state law claims asserted by non-resident plaintiffs who brought a consolidated action pursuant to a California statute where the plaintiffs were not injured in the state.