TCPA Tracker - August & September 2022

September 19, 2022

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

- 29 petitions pending
- 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

- On January 26, 2022, the National Consumer Law Center and other consumer groups filed an ex parte letter requesting that the FCC expressly exclude prerecorded scam calls and automated texts from the exemptions from the consent requirement for these calls and texts in 42 U.S.C. § 227(b).

Upcoming Comments

- *None*

Decisions Released

- In the Matter of Advanced Methods to Target & Eliminate Unlawful Robocalls Call Authentication Tr. Anchor, No. CG17-59, 2022 WL 1631842, at *2 (OHMSV May 20, 2022)

Click here to see the full FCC Petitions Tracker.

Cases of Note

Eleventh Circuit Vacates Class Certification and Settlement in TCPA Case for Lack of

Article III Standing

The Eleventh Circuit recently provided a view into the evolving doctrine of standing in TCPA class actions post-*Salcedo v. Hanna.* In late July, an Eleventh Circuit panel vacated a lower court's approval of class certification and settlement, remanding the case for revision of the class definition. Plaintiffs brought suit in August 2019 against GoDaddy.com, LLC for TCPA violations, and following negotiations, Plaintiffs filed a proposed class settlement agreement with the district court.

However, the Eleventh Circuit was more interested in re-examining the issue of standing for the non-named plaintiffs. The district court below had ordered briefing regarding how *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019) applied to the class definition, which included persons within the United States who had received a single unsolicited text message. In *Salcedo* (which we have previously discussed), the Eleventh Circuit held that "receipt of a single unwanted text message was not a sufficiently concrete injury to give rise to Article III standing." Following the parties' submissions, the district court "determined that only the named plaintiffs must have standing," and that class members who had received a single text message and thus had no Article III standing in the Eleventh Circuit could remain in the class since they had "a viable claim in their respective Circuit [because of a circuit split]." The Eleventh Circuit received the case on appeal of an attorneys' fees issue, but first turned to whether the Court had subject-matter jurisdiction over the case and examined Plaintiffs' and the class's standing to bring suit.

Turning to the Supreme Court case of *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), the Eleventh Circuit applied the high court's reasoning that "[t]o recover individual damages, all plaintiffs within the class definition must have standing." The Court posited that "[i]f every plaintiff within the class definition in the class action in *TransUnion* had to have Article III standing to recover damages after trial, logically so too must be the case with a court-approved class action settlement." Applying this reasoning, the Eleventh Circuit held that the class definition in the case did not comport with the Circuit's *Salcedo* precedent.

Because *Salcedo* had established that a single text message was insufficient to meet the Article III requirement of a concrete injury in the Eleventh Circuit, the class definition that had been approved by the lower court could not stand. "Otherwise," the Eleventh Circuit reasoned, "individuals without standing would be receiving what is effectively damages in violation of *TransUnion*." The Court then turned to the question of whether class members who had only received a single cellphone call had sufficient standing. While the Eleventh Circuit had previously held that "receipt of more than one unwanted telemarketing call" was enough to rise to the level of a concrete injury to satisfy the Article III standing requirement, it had not faced the issue of whether a single call would be similarly sufficient. As a result, the Court vacated the class certification and settlement in the case, remanding it to the lower court "in order to give the parties an opportunity to redefine the class" with *TransUnion* in mind.

Drazen v. Pinto, 41 F. 4th 1354 (11th Cir. 2022).

Connecticut District Court Dismisses TCPA Claim Against Subway

A Connecticut district court recently dismissed a class action complaint filed against Subway. Plaintiff claimed that she had received a text message from Subway after she had already unsubscribed from their advertising by replying to the first text message with "STOP." The Court, however, held that Plaintiff had not plausibly alleged that the text messages were sent using an ATDS or "an artificial prerecorded voice." Plaintiff alleged that the equipment that Subway used for its advertising service classified as a "random or sequential number generator," and that the text message she received

from as a result violated the TCPA's "[r]estrictions on use of automated telephone equipment."

This decision follows on the heels of other Circuit's holdings that have narrowly interpreted what qualifies as a prohibited autodialer under the TCPA in the wake of *Facebook, Inc. v. Duguid* (discussed here). In *Duguid* the Supreme Court held that under the TCPA, "[t]o qualify as an 'automatic telephone dialing system,' a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1167 (2021). The Supreme Court found that this narrow interpretation was what Congress intended when it passed the TCPA, targeting a "unique type of telemarketing equipment that risks dialing emergency lines randomly or tying up all the sequentially numbered lines at a single entity." *Id*.

Plaintiff argued that Subway's software met the Supreme Court's definition of an ATDS because it used a "random or sequential indexing process" to select numbers from their consumer contact information database. The Court disagreed. The Court concluded that "[c]ourts interpreting the TCPA post-*Duguid* have rejected the argument that Plaintiff asserts here—that a device may be deemed an autodialer under the TCPA even if it uses a preprepared list of numbers, so long as the device randomly or sequentially chooses which numbers on that list to contact."

The Court also disagreed with Plaintiff that the advertisement from Subway was an "artificial or prerecorded voice" under the TCPA, stating that "[a] text message with no audio component does not qualify." Ultimately, the Court dismissed the complaint with prejudice because the ruling turned "purely on an issue of statutory interpretation," and "not a deficiency in the pleadings," making any possible amendment to the complaint "futile." Plaintiff filed a notice of appeal on August 8, 2022.

Soliman v. Subway Franchisee Advertising Fund Trust, LTD., et al., No. 3:19-cv-592 (JAM), 2022 WL 2802347 (D. Conn. July 18, 2022).

Florida District Court Rejects TCPA Class Action for Lack of Standing

A Florida district court recently denied a Plaintiff's motion for class certification because the alleged TCPA class claim created too many individual questions to establish that the proposed class had standing. Under Supreme Court precedent, standing requires that a plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."

Plaintiff alleged that Defendant Allsup Employment Services had violated the TCPA by "transmitt[ing] calls using an artificial or prerecorded voice to the telephone numbers of Plaintiff and members of the putative classes." The Court found that although Plaintiff was able to establish that she herself had standing, she failed to establish that the rest of the proposed class had also suffered sufficient injuries-in-fact sufficient for standing under Article III. The Court determined that Plaintiff had standing due to Defendant's "multiple voicemails," and the "repeated losses of personal time from having to listen to multiple voicemails," which, combined, constituted a sufficient injury-in-fact for Article III standing. Plaintiff's proposed class, however, would have consisted of persons "who received a call from Defendant and for whom Defendant's call records reflect" that Defendant had "delivered" a message to voicemail.

Class certification requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." Here, the court found that "whether putative class members have standing is a predominating individual issue that forecloses class certification." Defendant cited to *Grigorian v. FCA US LLC* in arguing that under the TCPA in the Eleventh Circuit, establishing standing requires that the Defendant's actions caused Plaintiff to be "unavailable to

receive legitimate calls or messages for [a] period of time." We previously discussed the Eleventh Circuit's *Grigorian* decision (discussed here). The Court agreed with Defendant, noting that "whether other putative class members received multiple phone calls or one phone call is unclear and will require an individualized inquiry."

The decision ultimately came down to the fact-specific nature of Eleventh Circuit voicemail case law. The Eleventh Circuit requires that "the calls result[] in a loss of time, render[] the device unavailable, cause[] the plaintiff to incur charges in the form of telephone minutes, and require[] the plaintiff's immediate attention" to establish standing. Determining whether each class member had standing would involve an inquiry into how many calls they each received, whether or not they picked up, and whether the call went straight to voicemail. For example, the Court posited that a single unanswered call "that resulted in a voicemail" would not be sufficient for an injury-in-fact, "but multiple unanswered phone call resulting in multiple voicemails" would be. The court found that these individualized inquiries prevented class certification in this case and ultimately denied Plaintiff's motion for class certification.

Barnes v. Allsup Employment Services, LLC, No 21-cv-21121-BLOOM/Otazo-Reyes, Slip Copy 2022 WL 2390715 (S.D. Fla. July 1, 2022).

District Court Denies Motion to Compel Arbitration in TCPA Class Action Under New Supreme Court Precedent

A West Virginia district court judge recently denied Defendant DIRECTV LLC's motion to compel arbitration, finding that Defendant had "unquestionably waived arbitration based on the history and factual backdrop of this litigation." The Court held that "by litigating for months [ ] before filing its Motion," Defendant had waived its right to enter into arbitration, relying on the Supreme Court's May 2022 decision in *Morgan v. Sundance*, 142 S. Ct. 1708 (2022). In *Sundance*, the Supreme Court held that a showing of "prejudice," under the Federal Arbitration Act, "is not a condition of finding that a party, by litigation too long, waived its right to stay litigation or compel arbitration under the FAA." *Sundance*, 142 S. Ct. at 1714.

Plaintiffs alleged that Defendant had hired a dealer who had "purchased a list of leads and phone numbers from a third party and used that list to make telemarketing calls." These calls allegedly included numbers on the national Do-Not-Call registry, and calls to these numbers were alleged to have violated the TCPA. The Court noted that the agreement between Defendant and dealer "expressly prohibited 'cold calling,'" and that Plaintiff's expert had identified numbers from the dealer's call data which had both been (i) contacted two or more times in a twelve-month period, and (ii) were on the national Do-Not-Call registry. The Court previously granted class certification in an August 1, 2022 order.

The Court identified the issue of whether or not DIRECTV had waived its right to arbitration as "entirely dispositive" of the motion to compel arbitration. The district court's analysis opened with acknowledging the Federal Arbitration Act's "liberal federal policy favoring arbitration agreements," while also observing that "ordinary state law principles regarding the formation of contracts" are also applied to arbitration agreements. Turning its focus to the Supreme Court's *Sundance* decision, the Court cited and referenced the Supreme Court's determination that the Federal Arbitration Act's "policy favoring arbitration" was "to make 'arbitration agreements as enforceable as other contracts, but not more so.'"

In holding that Defendant had "unquestionably waived arbitration," the Court identified a number of procedural considerations. The Court noted that Vance, the third of three named plaintiffs, was

added to the case in February of 2022. Thereafter, Defendant had "deposed [third named plaintiff], litigated various discovery disputes, and vigorously opposed class certification[.]" Defendant did not move to compel arbitration of the third plaintiff's claims until "more than five months after she was added to the case," prior to which, "defendant DIRECTV litigated this case as if no arbitration agreement existed."

Previously, Defendant had moved to compel arbitration against the other named plaintiffs, but did not do so against this plaintiff, "which served only to delay the resolution of the dispute."

The Court found that Defendant "knew about its right to arbitrate, and its arguments to the contrary" were not well taken by the Court, which stated that a review of the record "leads this Court to believe that defendant [ ] withheld its Motion to Compel until after the outcome of class certification in an act of legal gamesmanship and strategic pleading." These actions, according to the Court, were "wholly 'inconsistent' with an intent to enforce its right to arbitrate," and thus the Court denied Defendant's motion to compel arbitration.

Vance, et al. v. DIRECTV, LLC, et al., No. 5:17-cv-00179, 2022 WL 4180990 (N.D.W. Va. Aug. 25, 2022).