TCPA Tracker - December 2018

December 11, 2018

Recent News

In a Prelude to its TCPA Ruling, the FCC Votes to Create a Database to Identify Reassigned Numbers

With speculation increasing that the Federal Communications Commission will consider a remand order from *ACA International v. FCC* in January 2019, the FCC took a related step to reduce misdirected calls. At the December Open Meeting, the FCC approved a Second Report and Order ("R&O") to create a single, nationwide database for reporting number reassignments that will allow callers to verify whether a phone number was permanently disconnected before calling the number. The database will contain the date of the most recent "permanent disconnection" of a number. (Permanent disconnection refers to when a subscriber permanently relinquishes a number, or the provider permanently reverses the assignment of the number to a particular subscriber and disassociates that subscriber with active service to that number.) Parties would query the database with two pieces of information: the number to be checked and a date the party knows the subscriber last had the number. This latter date could be the date consent was obtained, the date the subscriber last accepted a call at the number, or some other date that the party contends is associated with the subscriber. Upon a query, the database will respond with a "yes," "no," or "no data" response indicating whether the number has been reassigned after that date.

The FCC modified its tentative decision to defer issues of TCPA liability for users of the database, and instead adopted a limited safe harbor against TCPA liability for "database errors." Under the FCC's safe harbor, a caller will not have liability under the TCPA if the caller previously obtained prior express consent of the called party, queries the database and the database erroneously returns a response of "no" (i.e., the number had not been permanently disconnected).

The FCC referred technical design issues relating to the database to an FCC advisory committee, with a deadline of June 2019. The FCC expects to bid the contract thereafter and have the database running "as soon as reasonably practicable" thereafter. The database is not expected to be operational before the end of 2019.

Citing a Desire to Promote Spam-Protection Measures, FCC Classifies Wireless Messaging as an Information Service

At the FCC's December Open Meeting, commissioners approved a Declaratory Ruling ("Ruling") that classifies native forms of wireless messaging, short message service ("SMS") and multimedia messaging service ("MMS"), as information services, and declares that such services are free from regulation as commercial mobile services. The FCC's objective with the Ruling is to remove uncertainty for messaging service providers about applicable regulations and also enable wireless messaging providers to adopt more rigid efforts to block spam and spoofing messages. This action

comes only a few months after Commissioner Mike O'Rielly publicly called for the FCC to finally act on the pending classification proceeding. The Commission also stated its intention that "successor protocols" (such as RCS messaging) would also be information services, provided they share similar characteristics. The ruling addresses petitions before the FCC dating back to 2008.

Consumer Groups Clarify Position on Whether a Smartphone Can Be an ATDS

On November 13, 2018, the National Consumer Law Center (NCLC) and five other consumer groups filed an *ex parte* letter in the Commission's *ACA International* remand docket regarding the classification of smartphones under the TCPA. The consumer groups stated that they "agree with [the FCC's] unstated assumption" that the Ninth Circuit's *Marks* decision would conflict with *ACA International* if "ordinary smartphones" met the definition of an ATDS, but argued that smartphones would not meet that definition unless modified. The consumer groups contend instead that smartphones "as manufactured and delivered to consumers" do not have the present capacity to dial multiple numbers simultaneously or to send mass texts, and therefore, if the "present capacity" is the test, an ordinary smartphone would not be an ATDS. The consumer groups argue that smartphones should be considered to meet the definition only if they have been modified or connected to a web-based mechanism to send mass texts.

This letter was filed in response to the Commission's request for comment on the implications of the *Marks v. Crunch San Diego, LLC* decision by the Ninth Circuit Court of Appeals and in anticipation of the FCC's upcoming remand order in *ACA International v. FCC*. The FCC is expected to address the definition of an ATDS at its January 30, 2019 Open Meeting.

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

- 28 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
- 10 applications for review of fax waiver orders under the *Anda* progeny (these applications for review were not addressed in the Nov. 14, 2018 Bureau order)

New Petitions Filed

- *Best Doctors, Inc.*, Petition for Declaratory Ruling (filed Dec. 14, 2018) (Best Doctors, Inc. seeks a declaratory ruling that faxes seeking verification of contact information and the operational status of an office are not "advertisements" within the meaning of the Junk Fax Protection Act of 2005)

Upcoming Comments

- None

Decisions Released

- *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Report and Order (FCC 18-177, rel. Dec. 13, 2018) (FCC creates a single, comprehensive database intended to enable callers to verify if a number has been reassigned before calling the number and adopts a limited safe harbor for database errors)
- *Petition for Declaratory Ruling on Regulatory Status of Wireless Messaging Service*, Declaratory Ruling (FCC 18-178, rel. Dec. 13, 2018) (FCC rules that SMS and MMS text messaging services are Title I information services and are not "commercial mobile services")
- *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order (DA 18-1159, rel. Nov. 14, 2018) (Acting on remand from *Bais Yaakov v. FCC*, the Consumer and Governmental Affairs Bureau eliminates the FCC rule that required opt-out consent language on faxes sent with prior express consent (aka "solicited faxes"). The Bureau stated that the decision was required by the "non-discretionary mandate" of *Bais Yaakov*. The Bureau also dismissed as moot 10 pending requests for waiver of the rules and two petitions for reconsideration of retroactive waivers granted by the Bureau.)

Click here to see the full FCC Petitions Tracker.

Cases of Note

Third Circuit Denies Tolling of the Statute of Limitations for Named Class Members' Individual Claims

In a precedential opinion issued on November 27, 2018, the Third Circuit upheld a dismissal of TCPA claims as time barred, finding that tolling of the statute of limitations does not apply to named class members. *Weitzner v. Sanofi Pasteur Inc.*, No. 17-3188 (3d Cir. Nov. 27, 2018). Plaintiff Ari Weitzner, a physician, filed a TCPA class action in Pennsylvania state court arising from two unsolicited faxes that the defendants sent to him in 2004 and 2005. *Weitzner*, No. 17-3188, slip op. at 4. The Pennsylvania court denied class certification in 2008, after which Weitzner continued his individual claims against the defendants. *Id.* Weitzner and his medical practice, a professional corporation of which he is the sole shareholder, filed a TCPA class action in the Middle District of Pennsylvania for the same faxes from 2004 and 2005. *Id.* at 6. They argued that the state class action tolled their class and individual claims, which were subject to a four year statute of limitations. *Id.* at 6-7. All of the plaintiffs' claims in the federal action would be time barred without tolling. *Id.* at 3.

The Supreme Court held in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), that the timely filing of a class action tolls the statute of limitations for putative class members until the court decides the issue of class certification. *Id.* at 3. The Third Circuit rejected the plaintiffs' class claims argument by applying the Supreme Court's recent decision in *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018), which ruled that *American Pipe* tolling does not apply to successive class claims. *Id.* at

11-12.

The court declined to toll Weitzner's individual claims because the purposes of *American Pipe* tolling are to promote the efficiency and economy of litigation and protect the interests of unnamed class members who did not know of the class action. *Id.* at 14-15. The court reasoned that tolling named class members' claims did not serve these purposes because the named members already filed their claims and know of the lawsuit. *Id.* at 15. The court concluded that such tolling serves no legitimate purpose and would abuse *American Pipe*. *Id.* at 17. The court applied the same reasoning to Weitzner's professional corporation, although it was an unnamed class member in the state court action. *Id.* at 18. It held that the corporation was not the type of putative class member that *American Pipe* intended to protect because Weitzner was always the sole shareholder of the corporation. *Id.* Thus, the corporation had notice of the state court action. *Id.* The Third Circuit noted that *American Pipe* tolling is "an equitable remedy that applies only where necessary to prevent injustice. Courts should not permit tolling where doing so would result in an abuse of *American Pipe*." *Id.* at 23.