TCPA Tracker - December 2021

December 31, 2021

Recent News

FCC Takes Further Action to Stem Illegal Robocalls

One of the top agenda items for the FCC in 2021 has been its efforts to combat illegal robocalls through implementation of new technology and new obligations. In December 2021, the FCC took several actions furthering these goals. First, on December 10, the FCC released a Fourth Report and Order in its Call Authentication docket which shortens the deadline for certain providers to implement the STIR/SHAKEN anti-robocall call authentication framework. Specifically, the FCC shortened by one year, to June 30, 2022, the obligation to implement STIR/SHAKEN for small, non-facilities-based VoIP providers. In addition, it gave its Enforcement Bureau the authority to mandate STIR/SHAKEN implementation within 90 days for entities found to have originated illegal robocalls, subject to a verification by the Bureau. Second, as it is required to do annually by the TRACED Act, the Wireline Competition Bureau evaluated – and maintained without change – its extensions from the STIR/SHAKEN implementation deadline. Specifically, the small provider extension, the extension for entities unable to obtain an SPC token and the extension for services subject to a Section 214 discontinuance petition remain in place. Finally, on December 30, the FCC released its annual report under the TRACED Act on the implementation of the Act's anti-robocall provisions. The annual report provides information on the number of complaints received by the Commission, its coordination with various federal and state enforcement authorities and the operations of the Industry Traceback Group in combatting illegal robocalls.

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

- No new petitions filed in December.

Upcoming Comments

- No pending comments due.

Decisions Released

- *None*

Click here to see the full FCC Petitions Tracker.

Cases of Note

Court Grants Motion for Summary Judgment For Informational Fax-Sending Defendant

A district judge in Missouri recently held that a fax sent to thousands of doctors and health care providers did not violate the TCPA because the fax was not "commercial in nature." Plaintiff health care provider brought suit alleging that Defendants sent an unsolicited fax advertisement "to over 55,000 doctors and health care providers." The fax notified the providers of "new supply limits on coverage for [prescriptions] for [certain patients] covered by plans sponsored by [Defendant's] clients." The issue before the Court on summary judgment was whether "a reasonable jury could find Defendants' unsolicited Fax constitutes an 'advertisement' as defined by the TCPA." The Court held that the fax at issue was not an "advertisement" since it was not "commercial in nature," but rather, "informational."

The Court confirmed that the "TCPA prohibits the use of fax machines to send 'unsolicited advertisements.'" The statute defines "advertisement" in section 227(a)(5) as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." The question of "[w]hether a fax constitutes an 'advertisement' under [the TCPA] is a question that the courts may decide as a matter of law."

The Court looked to the Sixth Circuit's *Sandusky Wellness Center, LLC, v. Medco Health Solutions, Inc.* decision for guidance. The *Sandusky* Court held that "a fax from a pharmacy benefit manager . . . to a health care provider . . . was not an 'unsolicited advertisement' under the TCPA" since the faxes in that case "merely informed the recipient-doctor of cost-effective drugs for the doctor's own patients who were covered under the defendant's clients' health insurance plan." The Court drew a factual parallel to the present case, since Plaintiff here was also prescribing doctor, and the fax "simply provides . . . information" relating to insurance coverage of certain medications.

The Court also looked to the fax's language, finding that the fax did not "advertise anything for sale," but instead informed Plaintiff of Defendants' "new supply limit and how this may affect Plaintiff in its professional practice."

In addition, the Court rejected considerations of whether Defendants "would obtain an indirect or ancillary commercial benefit" from sending the fax, finding that "the inquiry under the TCPA is whether the content of the message is commercial, not what predictions can be made about future economic benefits." The Court went on to observe that "the link" between Defendant "receiving any commercial benefit from sending this type of information to prescribing doctors is too tenuous for

the Court to speculate and the record is devoid of any evidence to the contrary."

In granting Defendants' motion for summary judgment, the Court found that the fax at issue was not an "advertisement" under 47 U.S.C. § 227(a)(5) "because no reasonable jury could conclude from the record that the Fax promoted the commercial availability or quality of [Defendants'] services, direct or indirectly."

BPP v. CaremarkPCS Health, L.L.C., No. 4:20-cv-126-MTS, 2021 WL 5195785 (E.D. Mo. Nov. 9, 2021).

California District Court Denies TCPA Class Certification

A California district court denied certification of a TCPA class where Plaintiff failed to prove that he satisfied Rule 23(a)'s requirements of numerosity and commonality, and further that common questions of law or fact predominated over individual ones. Plaintiff's inability to establish that the class should be certified was largely due to his failure to collect the requisite evidence needed to succeed on his claims during discovery.

Plaintiff sued defendant Yelp for calls he allegedly received from the social media company on his personal phone. Because Yelp is a website that exists solely to host profiles for businesses and serves certain advertising needs, the Court first noted that "the exemptions in the TCPA for calls to numbers that are linked to an existing business relationship, or which otherwise have provided consent to be called, are critical factors in determining whether [Defendant] may [be] liable as [Plaintiff] alleges, and whether the question of liability can be answered on a classwide basis."

The Court found that Plaintiff failed to complete basic discovery necessary to identify the calls at issue or members of the alleged class. To warrant class certification, Plaintiff was required to propose "a method that would reasonably account for the TCPA exemptions" without requiring "individualized inquiries for each putative class member." Plaintiff failed to request the requisite information during discovery. At the time discovery closed, Plaintiff was left with "only a few months of call records," which the Court noted was "well short of the several-year liability period alleged for the proposed class."

On numerosity, Plaintiff argued that Defendant "must have made millions of calls every year to numbers on the Do Not Call Registry" due to certain statistics. Plaintiff pointed to a 2013 acknowledgment by Defendant that "approximately 81% of its listings had accurate phone numbers, which [Plaintiff] takes to mean that approximately 19% of the numbers were not properly on [Defendant's] call lists," combined with the fact that "roughly 71% of telephone lines" are on the Do Not Call Registry, arguing this was enough to "deduce" that millions of calls were made every year. The Court found that it was "not enough that [Defendant] possibly made calls to phone numbers that may have been on the Do Not Call Registry." Plaintiff attempted to enlist an expert witness to help him identify class members, but the Court noted that any expert would have "virtually no data . . . as a result of [Plaintiff's failure] to pursue discovery."

The Court also found that Plaintiff failed to establish commonality and predominance of questions of fact or law common to the class. Specifically, Yelp had identified evidence of an established business relationship with certain putative class members. Thus, assuming Plaintiff had the requisite data to identify members of the class, the Court found that it would need to engage in individualized inquiries into whether Defendant had a valid defense against each putative class member.

As a result, the Court denied Plaintiff's motion for class certification. Plaintiff was permitted to proceed solely on the basis of his individual claim. Plaintiff has filed his notice of appeal with the

Ninth Circuit.

Sapan v. Yelp, Inc., No. 3:17-cv-03240-JD, 2021 WL 5302908 (N.D. Cal. Nov. 15, 2021), *appeal filed*, No. 21-80119, (9th Cir. Nov. 29, 2021).