

# TCPA Tracker - February 2018

February 21, 2018

## Recent News

### **FCC Denies Request for Reconsideration of \$1.84 Million Junk Faxing Fine**

On February 15, 2018, the FCC [released an order](#) denying a request for reconsideration of a 2016 Forfeiture Order that imposed a \$1.84 million fine against Scott Malcolm and his two companies for illegal transmission of unsolicited fax advertisements in violation of the TCPA. Mr. Malcolm argued in his request that the proposed forfeiture constitutes an excessive fine prohibited by the Eighth Amendment to the U.S. Constitution. The FCC rejected this argument for three reasons. First, the Commission found that Mr. Malcolm's request was procedurally deficient because he had not previously raised the issue, and the claim "does not rely on events that have occurred or circumstances that have changed since his prior filings." Second, the Commission found that the forfeiture is constitutional because (1) it did not exceed the "statutory maximum of \$16,000 per violation for the offense in effect at the time of the violation," and (2) the fine was "reasonable and not grossly disproportional to the gravity of the underlying offense" (the Commission observed that "Malcolm and his companies were found to be 'knowing, flagrant, and persistent violators of the junk fax rules' that were 'not likely to be deterred from continuing to send unsolicited faxes, and violating other junk fax rules, unless a substantial penalty is assessed.'"). Finally, the Commission concluded that Mr. Malcolm failed to adequately demonstrate inability to pay the fine or show that the forfeiture will deprive him the ability to make a living in the future.

### **Supreme Court Denies Petition for Certiorari of Fax Advertisement Decision**

On February 20, 2018, the U.S. Supreme Court denied a petition for a writ of certiorari by a group of class action plaintiff petitioners in *Bais Yaakov of Spring Valley et.al. vs. FCC* (No. 17-351) seeking to overturn the D.C. Circuit Court's decision to vacate the FCC's October 30, 2014 Fax Advertisement Waiver Order. The lower court found that the FCC's 2006 Solicited Fax Rule was unlawful to the extent that it required opt-out notices on faxes sent with the recipient's consent (i.e., "solicited" faxes) because the TCPA did not grant the FCC authority over solicited faxes. Justice Alito did not participate in the consideration or decision of the petition for a writ of certiorari.

## 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**

- 23 (+9 seeking a retroactive waiver of the opt-out requirement for fax ads)
- 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”
- 3 requests for reconsideration of the 11/2/16 fax waiver in response to petitions by 22 parties
- 1 request for reconsideration of the 10/14/16 waiver of the prior express written consent rule granted to 7 petitioners

### New Petitions Filed

- None

### Upcoming Comments

- *Advanced Methods to Target and Eliminate Unlawful Robocalls* (reply comments on Notice of Proposed Rulemaking due 2/22/18)

### Decisions Released

- *In the Matter of Scott Malcolm, DSM Supply, LLC, Somaticare, LLC* – order denying reconsideration of junk faxing fine (FCC 18-14; released 2/15/18)
- *Bais Yaakov of Spring Valley et.al. vs. FCC* – petition for writ of certiorari denied (No. 17-351; released 2/20/18)

[Click here](#) to see the full FCC Petitions Tracker.

## Cases of Note

### Eleventh Circuit Denies Rehearing of Suit Concerning Partial Revocation of TCPA Consent

On January 22, 2018, the Eleventh Circuit denied Comenity Bank’s [rehearing en banc request](#) that would have revisited a recent three-judge panel ruling that the TCPA allows for partial revocation of consent. The concise decision offered no explanation but noted that no Judge requested that the Court be polled on rehearing en banc. See *Schweitzer v. Comenity Bank*, No. 16-10498 (11th Cir. Jan. 22, 2018).

The plaintiff alleged that Comenity Bank violated the TCPA by placing over 200 automated calls to her within the five months after she told an employee that she did not want to receive any more calls “in the morning and during the work day.” Although the district court granted summary judgment in favor of Comenity noting that “no reasonable jury could find that [she] revoked consent to be called,” a three-judge Court of Appeals panel concluded that partial revocation was permissible and remanded the case for proceedings consistent with that opinion.

### Ninth Circuit Affirms Summary Judgement, Rejecting Plaintiff’s Vicarious Liability Theories

On January 10, 2018, the Ninth Circuit [affirmed](#) the district court’s grant of summary judgment in a lawsuit alleging that three lenders, Credit Payment Services, Pioneer Services, and Enova, and two marketing companies, LeadPile and Click Media, were vicariously liable for an unwanted text

message sent to the plaintiff by publisher AC Referral. AC Referral signed a contract with Click Media, but was otherwise unaffiliated with the remaining four parties, and was not a party to the lawsuit. *See Kristensen v. Credit Payment Servs. Inc.*, 879 F.3d 1010 (9th Cir. Jan. 10, 2018).

To arrive at its decision, the court relied on the Restatement (Third) of Agency to determine whether the defendants ratified AC Referral's acts. The Court ultimately found that the district court did not err in concluding that the plaintiff failed to raise a genuine issue of material fact as to whether the three lenders and two marketing companies ratified AC Referral's unlawful text messaging. In determining that the lenders and marketing companies ratified AC Referral's unlawful text messages, the court focused on the following points:

- AC Referral did not communicate with or even know of the lenders or LeadPile before the lawsuit was filed
- AC Referral did not enter into a contract with any of the lenders or LeadPile
- Plaintiff presented no evidence that Click Media had actual knowledge that AC Referral was sending text messages in violation of TCPA
- Plaintiff did not present evidence that Click Media with which AC Referral contracted "had knowledge of facts that would have led a reasonable person to investigate further," but ratified AC Referral's acts anyway without investigation

### **Ohio District Court Grants Motion to Stay Class Discovery Due to Plaintiff Misrepresentations**

On December 20, 2017, the United States District Court for the Southern District of Ohio [granted](#) defendant NG&E's motion to stay class discovery due to doubts concerning plaintiff's "fitness to serve as an adequate class representative." Plaintiff alleged that NG&E violated the TCPA when it called his residential number, which was listed on the Do Not Call Registry. NG&E disputed this claim, contending that the plaintiff initiated the call and enrolled in the company's fixed-rate electricity plan. *See Johansen v. Nat'l Gas & Elec. LLC*, No. 2:17-cv-587 (S.D. Ohio Dec. 20, 2017)

The court was ultimately troubled by statements in plaintiff's affidavit, specifically that he "posed" as an interested customer, he had no actual desire to enroll with NG&E's fixed-rate electricity plan, and he deliberately provided NG&E with an incorrect address and an incorrect account number. The court noted that plaintiff may not have a cause of action if he established a business relationship with NG&E, highlighting that plaintiff both completed the NG&E enrollment process and called back to inquire about completing the application process. Based on these findings, the court granted NG&E's motion to stay class discovery and ordered the plaintiff to show cause as to why the complaint should not be dismissed as meritless.

## **Events**

### **How to Avoid Lawyers and Other Problems (TCPA, etc.)**

Partner [Lauri Mazzuchetti](#) will present "How to Avoid Lawyers and Other Problems (TCPA, etc.)" at the LeadsCon Conference on March 7, 2018 in Las Vegas. The discussion will take a look at regulatory and commercial issues related to the TCPA and telemarketing with a focus on how to construct compliant campaigns that move quickly through contracting and result in high-quality

consumer experiences and conversions. For more information, please [click here](#).