TCPA Tracker for October - November 2024

December 16, 2024

Supreme Court Agrees to Hear TCPA Case

On October 4, 2024, the United States Supreme Court granted certiorari and agreed to hear arguments in *McLaughlin Chiropractic Associates, Inc. v. Mckesson Corp*. In doing so, the Court will address whether the Hobbs Administrative Orders Review Act ("Hobbs Act") requires a district court to afford "absolute deference" to the FCC's interpretation that the TCPA does not cover online fax services.

The underlying dispute in *McLaughlin* arises out of a class action TCPA lawsuit, where Plaintiff McLaughlin Chiropractic Associates Inc.'s proposed class included individuals who received messages via online fax service as well as those who received the same messages via physical fax machine. The Northern District of California denied class certification based on a 2019 FCC declaratory ruling that faxes received through an online fax service were not within the purview of the TCPA. Instead, the court created two separate classes of plaintiffs: those who received messages via online fax service and those who received messages via physical fax. The court then granted summary judgment for Defendants on the claims brought by the online fax service class, holding that the Hobbs Act required it to accept the FCC's interpretation of the TCPA's scope. The Ninth Circuit affirmed.

Plaintiffs disagreed and sought Supreme Court review, arguing that the Ninth Circuit's decision rested on an improper application of the Hobbs Act. The Hobbs Act grants federal courts of appeals exclusive jurisdiction to determine the validity of all FCC final orders. Two recent Supreme Court cases have questioned this aspect of the Hobbs Act: *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc*. and *Loper Bright Enterprises v. Raimando*.

In *PDR Network*, the majority declined to decide whether the Hobbs Act required a district court to accept the FCC's interpretations. However, a concurring opinion written by Justice Kavanaugh, and joined by Justices Thomas, Gorsuch, and Alito, stated that unless an act of Congress "has expressly precluded" judicial review, a party should be able to argue the agency's decision was incorrect. The Justices did not find that the language in the Hobbs Act expressly precluded judicial review, and therefore believed PDR Network should have had the opportunity to be heard on why the FCC's interpretation of the TCPA was wrong.

Additionally, the Supreme Court's recent decision in *Loper Bright*, which effectively eliminated *Chevron* deference, suggests the Court may be moving away from deferring to agencies' interpretations of the law, allowing parties challenging regulations greater leeway to argue why the agency's ultimate conclusion was incorrect.

Some believe the Court is eager to hear *McLaughlin,* as it presents an opportunity to further constrain federal court deference to agency interpretation.

Oral argument is scheduled for January 21, 2025.

McLaughlin Chiropractic Associates, Inc. v. McKesson Corporation, 2024 WL 4394119, 2024 U.S.

LEXIS 3060 (Oct. 4, 2024).

Ninth Circuit Reverses Dismissal of TCPA Claim—TCPA Protects Against ATDS Calls and Prerecorded Voice Calls

The Ninth Circuit reversed the District Court for the Southern District of California's decision dismissing Plaintiff Tracy Davis's TCPA claims. The district court dismissed the claims because the Plaintiff failed to allege the calls were the product of an automatic telephone dialing system ("ATDS"). The Ninth Circuit reversed and clarified that the TCPA bars two distinct types of phone calls independently: calls made by an ATDS and calls made using a prerecorded voice.

In September 2019, Plaintiff obtained a loan from Defendant Rockloans Marketplace, LLC. In September 2022, Plaintiff defaulted on the loan. Seeking repayment, Defendant and its agents called Plaintiff multiple times a day. Plaintiff then formally revoked her consent to receive communications from Defendant by submitting a cease-and-desist letter. Alleging that the calls did not stop, Plaintiff filed suit, alleging violations of California state law, the Rosenthal Fair Debt Collection Practices Act, and the TCPA. For Plaintiff's TCPA claims, she alleged the calls were made with an ATDS and/or a prerecorded voice. Defendant filed a motion to dismiss arguing Plaintiff failed to establish the three elements of a TCPA claim: "(1) the defendant called a cellular telephone number; (2) using an automatic telephone dialing system; and (3) without the recipient's prior express consent."

The district court found Plaintiff's claim failed because Defendant did not use an ATDS. According to the court, to qualify as an ATDS under the TCPA, the dialing system must generate and dial random or sequential telephone numbers, but if a consumer previously provided their phone number and the company calls it, an ATDS was not used. The court pointed out there would have been no reason for Plaintiff to revoke consent if she did not provide Defendants with her phone number in the first place, and therefore, any phone call from Defendant could not be the product of an ATDS. As a result, the district court granted Defendant's motion to dismiss for failure to properly allege a TCPA claim.

Plaintiff appealed to the Ninth Circuit. The Ninth Circuit agreed with the district court that Defendant did not use an ATDS. However, the Ninth Circuit made clear the TCPA can be violated by *either* the use of an ATDS *or* the "use of an artificial prerecorded voice, irrespective of whether an ATDS was used." Because the district court did not address whether Defendant used an artificial prerecorded voice, the Ninth Circuit reversed the dismissal and remanded the case for further factual findings.

Following this decision, companies should use caution when contacting consumers or potential consumers using either an ATDS or a prerecorded voice without prior consent.

Davis v. Rockloans Marketplace, LLC, 2024 WL 4345293, 2024 U.S. App. LEXIS 24620 (9th Cir. Sept. 30, 2024).

Missouri Court Tackles "Knowing" and "Willful" Violations of TCPA for Treble Damages

The District Court for the Eastern District of Missouri upheld Plaintiff Edward Koeller's TCPA claim but dismissed his claim for treble damages.

In March 2024, Plaintiff received two calls from Defendant Seemplicity Security Inc., despite Plaintiff's phone number being on the do-not-call registry since 2007. Following the calls, Plaintiff

filed a TCPA claim against Defendant. In his complaint, Plaintiff asked the court to treble his statutory damages and issue injunctive relief. Defendant responded, seeking dismissal of the underlying TCPA claim as well as Plaintiff's claims for treble damages and injunctive relief.

The court found Plaintiff successfully pled his TCPA claim by stating his cell phone is used for "personal residential purposes" and that he received two calls at this number from Defendant within a 12-month period even though his number was listed on the do-not-call registry.

However, the court did not find Plaintiff successfully plead his claim for treble damages. Section 227(c)(5) of the TCPA allows a court to increase damages up to 3 times the statutory award of $500 if "the court finds the defendant willfully or knowingly violated the regulations." Because neither the United States Supreme Court nor the Eighth Circuit have analyzed what "willfully or knowingly violated the regulations" means, the district court had to rely on tools of statutory interpretation. Analyzing the plain meaning of the statute and grammatical context in which the terms appear, the court determined a plaintiff must first allege a defendant "knowingly violated" CFR §64.1200(c)(2) by knowingly initiating a phone call and knowing the call was to a residential telephone subscriber whose number was on the national do-not-call registry. Plaintiff must then also allege defendant "willfully violated" CFR § 64.1200(c)(2) by purposely initiating the phone call to a residential telephone subscriber whose number was on the national do-not-call registry.

Here, Plaintiff alleged no facts to support that Defendant knew Plaintiff's number was on the do-not-call registry nor that Defendant purposely called a residential telephone subscriber whose number was on the national do-not-call registry. Therefore, Plaintiff failed to properly plead a claim for treble damages under the TCPA, and the court dismissed this claim. The court also dismissed Plaintiff's claim for injunctive relief where Plaintiff did not contest Defendant's motion to dismiss the injunctive relief claim.

Using the same logic, the court also dismissed Plaintiff's claim under Missouri's do-not-call list statute which is a Missouri state statute that operates like the TCPA. Under the Missouri state statute, for every "knowing violation" of the statute, plaintiff may recover the greater of the actual monetary loss or $5,000. Because the court already decided Plaintiff failed to allege that Defendant knew Plaintiff's number was on the do-not-call registry and that Plaintiff was a residential telephone subscriber, the court also dismissed this claim.

Koeller v. Seemplicity Security, Inc., 2024 WL 4751306, 2024 U.S. Dist. LEXIS 205164 (E.D. Mo. Nov. 12, 2024).

Northern District of Oklahoma Dismisses Claim for Failure to Adequately Connect Calls to Defendant

The District Court for the Northern District of Oklahoma dismissed Plaintiff Robert Anderson's putative TCPA class action claim against Defendant Farmers Insurance Exchange because he failed to allege facts to support that he received more than one phone call by or on behalf of Farmers.

Plaintiff alleged that he registered his personal phone number on the do-not-call registry in 2003 and that he primarily uses this phone for residential purposes. Beginning in October 2021, Plaintiff alleged that he received multiple calls from six different phone numbers, that he answered at least four of the calls, and heard the "exact same female voice" on each call that he answered, but he did not engage in extended conversation. On October 22, 2021, Plaintiff claimed that he answered a call from a seventh phone number and spoke to a female representative whose voice sounded the same

as the voice on the previous calls. During his conversation with the representative, Plaintiff answered her questions, allegedly in pursuit of an email with the caller's information. Following that call, Plaintiff contended that he received an email from a Farmers representative, using a Farmers email address, including a Farmers logo, and providing an estimate for a Farmers automobile insurance policy. Plaintiff, along with another named Co-Plaintiff, then filed a class action complaint alleging both direct and vicarious liability against Farmers under the TCPA.

Farmers moved to dismiss Plaintiff Anderson's claims only, arguing that Anderson cannot show that Farmers initiated the telemarketing calls, and that Anderson did not adequately plead an agency relationship between Farmers and the pre-October 22, 2021 callers. Farmers did not dispute that Plaintiff Anderson registered his phone number on the do-not-call list, used his phone for residential purposes, received solicitous phone calls, and received the calls within a twelve-month period.

The Court noted that the lone dispositive issue on the motion to dismiss was whether Plaintiff included sufficient facts to plead that he received more than one call from Farmers or on its behalf. The Court found that Plaintiff's claim that the October 22, 2021 caller identified herself as a Farmers representative was sufficient to connect that call to Defendant. Plaintiff's allegations that the other calls he received were from a "seemingly identical" sounding female voice, however, were too speculative for the Court to credit. Distinguishing Anderson's speculative assertion from his Co-Plaintiff's allegations, which specifically connected each of the calls to Farmers, the Court found that Anderson had not plead sufficient facts to show that the pre-October 22 phone calls were made by or on behalf of Farmers. Because Anderson failed to allege receipt of more than one phone call from Farmers, the Court granted Farmers's motion to dismiss and terminated Anderson as party plaintiff.

Anderson v. Farmers Insurance Exchange, 2024 WL 4656218, 2024 U.S. Dist. LEXIS 198669 (N.D. Okla. Nov. 1, 2024).

FCC One-to-One Consent Rule to Take Effect on January 27, 2025

On November 19, 2024, the FCC set the effective date for its new one-to-one consent rule. The new rule will be effective on January 27, 2025.

The FCC published this new rule back in December 2023 announcing the closure of the so-called "lead generator loophole." This loophole previously allowed sellers to share consumers' contact information with marketing partners, while directing consumers to the fine print or a hyperlink for more information.

Under the soon-to-be effective rule, sellers can only contact a consumer after the seller provides a clear and conspicuous disclosure and the consumer consents to communications from that particular seller. It will still be possible for a consumer to consent to multiple sellers at once, but the consumer must do so actively. For example, if a website offers a check box list of multiple sellers and the consumer can select which sellers to hear from, that is considered a one-to-one consent under this new rule.

New FCC Revocation Rules Effective April 11, 2025

On October 11, 2024, the FCC announced that its new TCPA revocation of consent rules will come into effect on April 11, 2025.

Back in February, the FCC released a Report and Order which explained the rules for revoking consent under the TCPA. Previously, revocation of consent for autodialed or prerecorded calls could

be done by “any reasonable means.” This vague language was the subject of much litigation, and thus necessitated clarification. The FCC’s intent with this clarification was to strengthen a consumer’s ability to revoke their consent to company communications.

The most important takeaways under the new rules are:

- the FCC will not allow companies to mandate a method of revocation—consumers must be able to revoke consent by “any reasonable method;”
- companies must honor opt-out requests within a reasonable time, not to exceed ten business days from the receipt of the revocation; and
- companies are allowed to confirm receipt of revocation if done within five minutes of the opt-out request.

Again, this new rule makes clear consumers are allowed to revoke consent by “any reasonable method,” and describes certain methods of revocation which are *per se* reasonable. For example, using the words “stop,” “quit,” “end,” “revoke,” “opt out,” “cancel,” or “unsubscribe” in reply to a text message is a reasonable method of revoking consent. Similarly, following the opt-out method provided by the caller either separately or on the call is reasonable.

Even where a consumer uses a reasonable method to revoke consent that is not explicitly listed in the rules, there is a rebuttable presumption that the consumer has revoked consent. This rebuttable presumption exists so long as there is uncontradicted evidence that the attempt to revoke occurred. It is up to the defendant to rebut this presumption by demonstrating that the totality of circumstances proves the consumer’s revocation was not conveyed in a reasonable method.

It is important to ensure that consumer communication methods will satisfy the new rules’ requirements prior to the April 11, 2025, effective date. Under these rules, it will likely be more difficult to overcome the presumption that revocation was not provided. The resulting litigation may pose a larger threat to businesses moving forward because of these additional fact-sensitive presumptions.