TCPA Tracker - July 2017

July 13, 2017

Recent News

"Ringless Voicemail" Petition for Declaratory Ruling Withdrawn

On June 20, 2017, All About the Message, LLC withdrew its FCC petition seeking a declaratory ruling that "the delivery of a voice message directly to a voicemail box does not constitute a call that is subject to the prohibitions on the use of an automatic telephone dialing system ("ATDS") or an artificial or prerecorded voice that are set forth in the Telephone Consumer Protection Act." The letter did not explain the withdrawal, but the FCC received hundreds of comments from consumers and consumer advocates opposing the request. This marks the second time that a petition asking for a declaratory ruling regarding direct-to-voicemail technology has been withdrawn.

FCC Commissioners Approve Call Authentication and Robocall NOIs at July Meeting

On July 13, 2017, the FCC Commissioners voted in favor of two items aimed at reducing unlawful calls to consumers. As the final documents had not been released when we finalized this update, the descriptions below are based on drafts available before the meeting.

Call Authentication NOI. First, the Commissioners approved a Notice of Inquiry on call authentication frameworks to allow telephone service providers to identify fraudulent calls. The authentication procedures are intended to allow subscribers and carriers to know that callers are who they say they are. The Commission seeks comment on the three-phase process put forward by the Alliance for Telecommunications Industry Solutions (ATIS) and SIP Forum. Phase one involves the development of the **S**ecure **H**andling of **A**sserted information using to**KENS** (SHAKEN) framework, based on the protocols developed by the Internet Engineering Task Force (IETF) Secure Telephone Identity Revisited (STIR) working group. As the Commission explains, "in the SHAKEN/STIR model, a call is authenticated when it is signed with a digital signature by an authentication service, operating on behalf of the party originating the call." Phase two will define how the authentication services are to receive certificates in the first place. Phase three is still being developed by ATIS and the SIP Forum.

The Commission seeks comment on what it should do, if anything, to promote adoption and implementation of authentication frameworks (such as the SHAKEN and STIR frameworks). The Commission asks for comment on the appropriate time frames and milestones for implementation of the frameworks. ATIS has suggested that the SHAKEN and STIR models require a "governance authority" and "policy administrator." In the NOI, the Commission asks what entity or entities would best serve in those roles, recognizing that the Commission could serve some of the functions, but may not be best positioned to handle all aspects of the positions. Because the SHAKEN and STIR proposals apply to SIP-based, but not SS7-based systems, the Commission also seeks comment on the role of SS7 and other legacy technologies in this proceeding.

As with most items under Chairman Pai, the NOI seeks comment to inform a cost and benefit analysis. The Commission asks for high-level estimates of the costs of implementing call

authentication, as well as estimates of the benefits of an authentication system. The Commission asks how these costs might be shifted among relevant stakeholders, and if end-user fees could be expected to cover service costs.

Second Robocall NOI. The second item approved by the Commissioners is a Second Notice of Inquiry to gather feedback on using numbering information to create a comprehensive list that businesses can use to identify telephone numbers that have been reassigned from a consumer that consented to receiving calls to a consumer who has not consented to the calls. Approximately 35 million telephone numbers are disconnected each year.

The Commission begins with asking how service providers can report number reassignments in an accurate and timely manner, and what information the provider would need to report. The Commission asks if a report when a telephone number is disconnected and is now "aging" would be adequate, or if the provider should also report when numbers become classified as available, or when the classification changes from available to assigned. The FCC asks if the reporting requirement should apply to all voice service providers, or whether it should apply only to wireless providers (given the Telephone Consumer Protection Act's greater protections for wireless over wireline numbers). The Commission seeks comment on extending the reporting requirements to interconnected VoIP providers or Mobile Virtual Network Operators (MNVOs).

The Commission seeks comment on four mechanisms for voice providers to report reassignments and for outbound callers to access that information. Option 1 is for voice providers to report to an FCC-established database, similar to what the FCC did to facilitate Local Number Portability. Option 2 is for providers to report reassigned number information to outbound callers directly or to number data aggregators. Option 3 is for providers to operate internal databases and field inquiries from outbound callers via an API. Option 4 is for providers to produce publicly available reports.

For each of these options, the Commission seeks comment on whether voice service providers should be compensated for the reassigned number information; the appropriate format of the information; the frequency with which voice providers would need to update reassigned information; managing access to reassigned number information; and the level of risk to customer proprietary network information (CPNI) and how to address any risk.

House Subcommittee Hears Testimony on Growing TCPA Litigation

On June 13, 2017, the House Subcommittee on the Constitution and Civil Justice heard testimony regarding the abuse of the TCPA's remedy provisions in recent years. Witnesses at the hearing were Rob Sweeney, Founder & CEO of Mobile Media Technologies LLC, Ms. Becca Wahlquist, who testified on behalf of the U.S. Chamber Institute for Legal Reform, Mr. Hassan Zavareei, who presented the consumer plaintiff perspective on the issue, and Adonis Hoffman, Founder & Chairman, Business in the Public Interest. Much of the testimony during the hearing suggested that the rapid increase in TCPA litigation in recent years is "less about protecting consumers and more about driving a multi-million dollar commercial enterprise of TCPA lawsuits." Such testimony echoed concerns expressed by FCC Chairman Ajit Pai and Commissioner Michael O'Rielly in recent years.

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

- 18 (+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
- (*Withdrawn – Petition of All About the Message, LLC* – seeking a declaratory ruling that the TCPA does not apply to direct-to-voicemail technology)

Upcoming Comments

- July 31 – Reply comments in *Advanced Methods to Target and Eliminate Unlawful Robocalls* (CG Docket 17-59)

Decisions Released

- None

Click here to see the full FCC Petitions Tracker.

Cases of Note

Third Circuit Determines That Single Voice Message With No Charge to Plaintiff Still Creates Standing Under Spokeo

According to a July 10, 2017, decision by the U. S. Court of Appeals for the Third Circuit, a plaintiff has standing to state a claim for a violation of the TCPA under the principles espoused in *Spokeo, Inc. v. Robins* even if the plaintiff only received one unsolicited cell phone call because that nuisance represented "the very harm Congress sought to prevent" under the TCPA.

In *Susinno v. Work Out World Inc.*, No. 16-3277, the Third Circuit reversed the district court's decision in determining that a purported violation of the TCPA establishes a sufficiently concrete injury to provide a plaintiff with standing to bring a lawsuit. In the case, the plaintiff alleged that the fitness chain defendant used an automated dialing system to leave a prerecorded message on her cell phone voice mail advertising gym memberships. Although she was not charged for the call, the plaintiff claimed that she, and other class members, were harmed by incurring cell phone charges and lost time retrieving the messages. The U.S. District Court for the District of New Jersey granted

the defendant's motion to dismiss in reasoning that the allegations served as "a bare procedural violation, divorced from any concrete harm." The district court concluded that the single phone call was not the type of situation that Congress sought to protect against in enacting the TCPA and that the plaintiff's receipt of the call caused no concrete harm.

On appeal, the Third Circuit held that the plaintiff's allegations were sufficient to state a claim for a violation of the TCPA. The court disregarded the claim that Congress was primarily concerned with the cost of prerecorded calls received by cell phones in the TCPA, reasoning that "if it were the case (as WOW suggests) that cell phone calls not charged to the recipient were not covered by the general prohibition, there would have been no need for Congress to grant the FCC discretion to exempt some of those calls."

The court also found that the harm alleged by the plaintiff was sufficiently concrete to confer standing under Article III of the U.S. Constitution. According to the court, "the TCPA addresses itself directly to single prerecorded calls from cell phones and states that its prohibition acts 'in the interest of [ ] privacy rights." 47 U.S.C. Section 227(b)(2)(c). Thus, the court reasoned that the plaintiff had standing to sue because her injury was made "legally cognizable" through the democratic process.

Consent Given as Consideration Cannot be Revoked in the Second Circuit

Courts have frequently held that individuals may successfully revoke consent to be called under the TCPA. In a recent case, however, the Second Circuit took a different approach to the revocation analysis. In *Reyes v. Lincoln Auto. Financial Servs.*, No. 16-2104-cv, 2017 WL 2675363 (2d Cir. June 22, 2017) the Court held that the plaintiff could not revoke express consent when it was given as consideration in a contract. In connection with an automobile lease agreement, the plaintiff provided his cell phone number and his express consent to be contacted for any reason. After the plaintiff stopped making his required lease payments, the defendant called him in an attempt to cure the default. Plaintiff allegedly mailed a letter to defendant that expressed his desire to cease further contact.

Analyzing the issue under principles of contract law, the Court concluded that “the TCPA does not permit a party who agrees to be contacted as part of a bargained-for exchange to unilaterally revoke that consent.” The plaintiff’s consent had become a part of the contracted business transaction. To thereafter attempt to revoke it would be akin to a “proposed modification” which would require “the mutual assent of every contracting party . . . .” The Court also rejected the plaintiff’s argument that he should be allowed to revoke consent because the consent was not an essential clause of the lease agreement. The Court noted that parties could choose to contractually bind themselves to whatever terms they agree to, and are bound to the terms to which they did, in fact, agree. “A party who has agreed to a particular term in a valid contract cannot later renege on that term . . . simply because the contract could have been formed without it.”

Although the Court recognized that businesses may undermine the TCPA’s effectiveness by inserting consent clauses into sales contracts, the Court concluded that it was a public policy consideration for Congress to resolve. Businesses with existing consent provisions in their contracts would be well-advised to compare such provisions with those of the lease agreement in *Reyes* to determine whether they have a possible defense to TCPA revocation claims.

Supreme Court Declines to Hear Challenge to Indiana’s Robocall Ban

In its July 26, 2017 Order, the U.S. Supreme Court denied *certiorari* in the case of *Patriotic Veterans v. Hill*, No. 16-1198, 2017 WL 2722437 (Mem) (U.S. June 26, 2017). Appellants attempted to

challenge the Seventh Circuit decision rejecting their First Amendment challenge to an Indiana statute banning robocalls. We previously discussed the Seventh Circuit decision *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 305 (7th Cir. 2017) in our January 2017 TCPA Tracker.

The Indiana statute banning robocalls had three exceptions: (1) messages from school districts to students, parents, or employees; (2) messages to those whom the caller has an existing business relationship; (3) messages advising employees of work schedules. Plaintiff argued that the statute's exceptions amounted to content discrimination because they disfavored political speech. The Seventh Circuit rejected the argument and noted that the exceptions "collectively concern who may be called, not what may be said, and . . . do not establish content discrimination." The Seventh Circuit thereby affirmed the Southern District of Indiana's ruling upholding the statute.

An Unaccepted Settlement Offer Does Not Moot a TCPA Claim under FRCP 67 or 68

In *Fulton Dental, LLC v. Bisco, Inc.*, No. 16-3574, 2017 WL 2641124 (7th Cir. June 20, 2017), the Seventh Circuit held that tendering a settlement offer, whether under Federal Rule of Civil Procedure 67 or 68, would not moot a plaintiff's claim under the TCPA. Plaintiff received an unsolicited fax advertisement from the defendant, and sued for damages. Before plaintiff could move for class certification, defendant made an offer of judgment of $3,005 plus accrued costs, pursuant to FRCP 68. Two days after the offer was filed, the Supreme Court decided *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663 (2016), holding that merely offering to make a settlement payment under FRCP 68 would not moot a plaintiff's case.

Following the Supreme Court's ruling, the plaintiff rejected the offer of judgment. In response, the defendant moved, pursuant to FRCP 67, to deposit with the court what it regarded as the maximum possible damages and fees that plaintiff could receive. In allowing a party to deposit money with the court, FRCP 67 essentially functions as a "mechanism that allows a party to use the court as an escrow agent." Defendant argued that the deposit thereby rendered plaintiff's individual claim moot, so the Court could enter a judgment against defendant in the amount of the deposit. The Seventh Circuit rejected this position, and concluded that there was no difference between attempting to force a settlement under FRCP 67 or as in *Campbell-Ewald*, FRCP 68.

First, the Court noted that a decision ordering damages and an injunction would be a ruling on the merits of the case. Therefore, if the case was moot, as defendant suggested, then the Court would lack the power to enter judgment on the merits. Accordingly, any money deposited with the Court would stay with the Court until it would escheat to the government, or until the defendant asked to have it returned; neither outcome would be satisfactory to the allegedly aggrieved plaintiff. The Court was also unable to state, as a matter of law, that the defendant's offer was enough to compensate plaintiff for not being able to represent a putative class. Therefore, the Seventh Circuit held that plaintiff's individual claim was not moot and plaintiff could proceed with his attempts to obtain class certification in the district court.