

TCPA Tracker - June 2017

June 13, 2017

Recent News

D.C. Circuit Denies Request for En Banc Review of Fax Advertisement Decision

On June 6, 2017, the U.S. Court of Appeals for the D.C. Circuit [unanimously denied](#) a request by a group of class action plaintiff petitioners in *Bais Yaakov of Spring Valley v. FCC* (No. 14-1234) for en banc review of the court's decision to vacate the FCC's October 30, 2014 Fax Advertisement Waiver Order. The 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. The court order noted that no judge requested a vote on rehearing.

Senate Anti-Spoofing Bill Advances to Legislative Calendar

On June 6, 2017, the [Spoofing Prevention Act of 2017](#) (S. 134) was voted out of the Senate Committee on Commerce, Science, and Transportation and placed on the Senate's legislative calendar. The bill, sponsored by Sen. Bill Nelson (D-FL), proposes the following modifications to the TCPA:

1. It would expand the scope of the anti-spoofing section to include calls originated by a person outside the U.S. if the recipient of the call is within the U.S.
2. It would define "text message" to mean "(i) ...a message consisting of text, images, sounds, or other information that is transmitted from or received by a device that is identified as the transmitting or receiving device by means of a 10-digit telephone number; [or] (ii) ... a short message service (commonly referred to as 'SMS') message, an enhanced message service (commonly referred to as 'EMS') message, and a multimedia message service ('MMS') message."
3. It would require the FCC, in coordination with the Federal Trade Commission, to develop consumer education materials to help consumers identify scams and other fraudulent activity typically associated with spoofing and raise awareness of technologies available to protect consumers from unlawful spoofing.
4. It would require the Comptroller General to issue a report within 18 months of passage on activities by the FCC and FTC related to spoofing.

A [companion bill](#) in the House of Representatives was passed in January (H.R. 423).

The proposal to codify the definition of a "text message" could significantly impact companies that transmit marketing messages via automatic text to consumers. Although the FCC has long

interpreted the TCPA to cover text messages, it has not formally adopted a definition as to what constitutes a “text message,” and historically has focused on short message service (SMS) transmissions. Thus, adding “text message” to the defined terms in the Act may expand the scope of text communications that are subject to the TCPA.

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

- 19 (+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

- None

Decisions Released

- None

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

Cases of Note

Affirmative Steps Determine the Initiator of Text in TCPA Case

The TCPA makes it unlawful to initiate a call or text using an automatic telephone dialing system without the express consent of the recipient. A [May 15th decision](#) demonstrates the importance of a marketplace app’s user functionality in determining whether it initiated a call under the TCPA.

In *Reichman v. Poshmark, Inc.*, No. 16-cv-2359 DMS (JLB), 2017 WL 2104273 (S.D. Cal. May 15,

2017), the plaintiff alleged that the “Poshmark” app that allows users to buy and sell used clothing violated the TCPA based on two text messages urging him to use Poshmark. The plaintiff received the texts via an invitation from his cellphone contact, who did the following: First, the contact used the “Find People” page, which allowed her to select options to find her contacts, either among her phone’s contact list, or via Facebook or Twitter. She then selected the “Invite All” button on the next page to invite her entire contact list, rather than individually selecting the invite button beside each contact’s name.

Basing its decision on the FCC’s order *In re Rules & Regulations Implementing the TCPA of 1991 et al.*, 30 FCC Rcd 7961 (F.C.C. July 10, 2015) (regarding the “TextMe” app), the Court concluded that the contact’s affirmative steps to invite the plaintiff made her the initiator of the text message, not Poshmark. The plaintiff would not have received any messages had his contact not taken these steps. As other courts have recognized, “[t]he goal of the TCPA is to prevent invasion of privacy, and the person who chooses to send an unwanted invitation is responsible for invading the recipient’s privacy . . .” *Cour v. Life360, Inc.*, No. 16-CV-00805-TEH, 2016 WL 4039279, at *4 (N.D. Cal. July 28, 2016) (internal citation omitted). Therefore, the plaintiff’s contact was the initiator.

This decision will prove to be particularly useful to app developers who have the ability to program their software in a way that incentivizes the users themselves to initiate promotional messaging. Doing so would allow the developer to circulate their advertising, while the users serve as the initiators of the texts.

New Jersey Court Extends *Spokeo* to Reject Standing for Three Text Messages

TCPA litigants are required to meet a higher burden in order to meet standing in the wake of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). They are required to demonstrate an injury-in-fact that is concrete and particularized, and not merely a conclusory allegation. This affords TCPA defendants greater protection from frivolous or *de minimis* claims.

In *Zemel v. CSC Holdings LLC*, Civ. No. 16-4064-BRM-DEA, 2017 WL 1503995 (D.N.J. April 26, 2017), the Court **dismissed** a plaintiff’s TCPA claim based upon receiving three allegedly unsolicited text messages from a phone number allegedly belonging to the defendant. The plaintiff responded twice, asking for “help” and then for the messages to “stop.” The Court summarily rejected the plaintiff’s three arguments in support of standing.

First, the Court rejected the plaintiff’s argument that the messages caused him to incur charges on his previously paid telephone plan, and held that a plaintiff must plead that they incurred some additional charges due to the unsolicited messages. A similar claim was rejected in *Susinno v. Work Out World, Inc.*, No. 15-cv-5881 (PGS)(TJB), 2016 U.S. Dist. LEXIS 113664 (D.N.J. Aug. 1, 2016) (noting that most cellphone plans allow for an unlimited amount of calls), cited by the Court.

The Court also rejected the plaintiff’s argument that the three messages were a nuisance, or an invasion of privacy, sufficient to constitute an injury-in-fact. This resembled the Court’s reasoning in *Romero v. Dep’t Stores Nat’l Bank*, 199 F. Supp. 3d 1256, 1264 (S.D. Cal. 2016) (holding that plaintiff could not meet standing after receiving 290 calls because she could not prove an injury-in-fact beyond the calls themselves).

Last, the Court held that the TCPA’s purpose was to deal with “common nuisance-telemarketing” and “to control residential telemarketing practices.” Three text messages, two of which the plaintiff responded to, did not reach to the level of telemarketing. The Court distinguished *Leyse v. Bank of*

Am. Nat'l Ass'n, No. 11-7128, 2016 WL 5928683, at *4 (D.N.J. Oct. 11, 2016) (finding that a single call to the plaintiff's residential phone line violated the TCPA) on the basis that a call to a residence invoked a greater privacy interest and fell within the zone of protection of the TCPA.