TCPA Tracker - June 2019

June 25, 2019

Recent News

FCC Adopts Declaratory Ruling on Call Blocking and FNPRM on SHAKEN/STIR

On June 6, 2019, the FCC adopted a declaratory ruling that allows carriers to block on an opt-out basis calls that spoof legitimate, in-service numbers when the blocking is based on "reasonable analytics" methodologies.
This ruling clarifies that customer consent can be on an opt-out basis, resolving uncertainty from a 2017 order. In that order, the Commission decided that carriers could block calls on behalf of their customers without violating their call completion obligations under the Communications Act so long as the customers consented, but certain language in the order made it unclear whether the consent could be on an opt-out basis. Carriers offering opt-out call-blocking programs must offer sufficient information, in a manner that is clear and easy to understand, so that their customers can make an informed choice as to whether they wish to remain in the program or opt out. This includes information on the types of calls that may be blocked and the risks of blocking wanted calls. Additionally, the Commission expects the opt-out process to be simple and straightforward.

The declaratory ruling did not specify what types of analytics must be used for a call-blocking program, saying that such programs can be "based on any reasonable analytics designed to identify unwanted calls." It does provide, however, that a call-blocking program may be based on a combination of factors, including large bursts of calls in a short timeframe, low average call duration, low call completion ratios, sequential dialing patterns, and improper SHAKEN/STIR authentication.

The Commission also adopted a Further Notice of Proposed Rulemaking ("FNPRM") that proposes to create a safe harbor for carriers that block calls when call authentication fails under SHAKEN/STIR. It also seeks comment on extending the safe harbor when carriers block unsigned calls, but specifically excludes consideration of call-blocking based on the different levels of attestation that can be assigned under the framework. Additionally, the FNPRM proposes to require carriers to implement SHAKEN/STIR if they have failed to do so by the end of 2019. Comments are due July 24, 2019, and reply comments on August 23, 2019.

NANC Given Extension to Submit Report on Technical Issues for Reassigned Numbers Database

The Consumer and Governmental Affairs Bureau and Wireline Competition Bureau of the FCC granted an extension to September 13, 2019 for the North American Numbering Council ("NANC") to file a report containing recommendations on technical issues related to the development of a reassigned number database. In particular, the report will address operational issues and technical issues regarding how fees will be collected from those that use the database. As reasons for requesting the extension, NANC cited "the complexity of the FCC's referral, the delay caused by the month-long government shutdown, and difficulties that it has had in acquiring similar technical

requirements associated with other databases," as well as NANC members being concurrently engaged on other Commission referrals. The original deadline was June 13, 2019, and NANC had requested an extension until April 13, 2020.

Senate Passes TRACED Act to Address Robocalls

On May 24, 2019, the Senate passed the Telephone Robocall Abuse Criminal Enforcement and Deterrence ("TRACED") Act (S-151) in a 97-1 vote. In its current form, the bill would allow the FCC to levy civil penalties of up to $10,000 per call when a caller intentionally violates the TCPA and would extend the statute of limitations to three years for such violations. The bill would also require the FCC to issue a rule within 18 months after enactment, requiring carriers to implement the STIR/SHAKEN framework if they have not done so already, with a safe harbor for when carriers could block calls based on authentication under the framework. The Commission would be required to reassess the efficacy of the framework every three years. Additionally, the FCC would be required to submit an annual report to Congress about its enforcement of the TCPA and related regulations, and would require the Attorney General and FCC Chairman to convene an interagency working group to study Government prosecution of TCPA violations. The House of Representatives has not yet taken action on robocall legislation, but several similar proposals have been introduced or are in development.

Bipartisan Stopping Bad Robocalls Act Introduced in the House

On June 20, 2019, a bipartisan group of legislators, led by House Energy and Commerce Chairman Frank Pallone, Jr. (D-NJ) and Greg Walden (R-OR), introduced the Stopping Bad Robocalls Act.

The bill directs the FCC to do the following: (1) issue rules to better effectuate the intent of the TCPA, including updates on descriptions of automatic telephone dialing systems and artificial or prerecorded voice calls, clarification of withdrawal of consent by consumers, and provisions to address circumvention or evasion of the TCPA; (2) file a report with Congress within one year on the implementation of a reassigned number database ("RND"); (3) annually submit a report to Congress, prepared in consultation with the FTC, on enforcement under the TCPA; (4) implement rules requiring carriers to implement call authentication technology and reassess the efficacy of the technology every two years; (6) prescribe regulations that streamline how private entities can inform the FCC of TCPA violations with the FCC within eighteen months; and (7) study whether VoIP providers must maintain call records to allow calls to be traced and submit a report to Congress within eighteen months on the results of the study.

Other parts of the bill would update the definition of "called party" to read "the current subscriber or customary user of the telephone number to which the call is made, determined at the time when the call is made," which codifies the definition of the rule adopted by the FCC in 2015, but that was overturned by the D.C. Circuit in 2018 in *ACA International v. FCC*. The change would not go into effect until the RND is established. The bill would also amend the Communications Act to make Section 503(b) inapplicable to TCPA violations, meaning that a citation would not be needed for a forfeiture penalty. Additionally, the bill would increase the statute of limitations for forfeiture penalties to three years for unintentional violations of the TCPA and four years for intentional violations.

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

- 30 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
- 10 applications for review of fax waiver orders under the *Anda* progeny (these applications for review were not addressed in the Nov. 14, 2018, Bureau order)
- 1 application for review of the CGB order issued on 11/14/18 eliminating the opt-out language rule for solicited faxes (and 2 oppositions to the application for review)

Upcoming Comments

- *AmeriCredit Financial Services Inc.* – Seeks a waiver to allow it to provide only its d/b/a name, GM Financial, when placing artificial or prerecorded voice calls because it would reduce consumer confusion and will not hinder the ability of consumers to search for and find the company's contact and other corporate information (Comments due 6/24/19; reply comments due 7/9/19)

Decisions Released

- *bebe stores, inc. and ViSalus, Inc. Waiver Petitions Granted* – The FCC granted limited retroactive waivers of its prior-express-written-consent rule due to confusion about whether written consent obtained prior to when the rule was adopted was still valid, consistent with waivers granted to other petitioners.

Click here to see the full FCC Petitions Tracker.

Cases of Note

Supreme Court Sends Hobbs Act Case Back to Court of Appeals

On June 20, 2019, the U.S. Supreme Court issued its much-anticipated decision in *PDR Network LLC* ('PDR") v. *Carlton & Harris Chiropractic* ("C&H"), which concerned the extent to which district courts are bound by the FCC's interpretations in TCPA cases. PDR allegedly sent a fax to C&H, a chiropractic practice. C&H claimed that the fax violated the TCPA's prohibition on faxing "unsolicited advertisements." PDR moved to dismiss the complaint, arguing that the fax was not an advertisement under the TCPA. C&H opposed and relied on a 2006 FCC Order (the "2006 Order") that interpreted the definition of unsolicited advertisement in the TCPA to include faxes that promote

goods and services offered at no cost. On reply, PDR challenged the FCC's interpretation of unsolicited advertisement.

The district court allowed PDR's challenge and dismissed the case. In doing so, the district court both exercised jurisdiction and did not follow the FCC's definition of unsolicited advertisement. The Fourth Circuit reversed, holding that the district court violated the Hobbs Act. The Fourth Circuit held that under the Hobbs Act only federal courts of appeal can determine the validity of agency orders. The Supreme Court granted certiorari on the question of whether the Hobbs Act required divesting the district court of jurisdiction to address the 2006 Order.

The Court unanimously agreed to vacate the Fourth Circuit's decision but disagreed on the next steps in the case. The case is remanded for the appellate court to address: (1) whether the 2006 Order is a "legislative rule" or an "interpretive rule," and (2) whether PDR had a "prior and adequate opportunity" to seek judicial review of the 2006 Order under a Hobbs Act petition.

The Court's majority opinion emphasized that each of these questions "may" (its word) impact whether a district court is bound by an FCC interpretation in a subsequent case to enforce the TCPA. Concurring opinions by Justices Kavanaugh and Thomas suggested more expansive theories under which district courts would be permitted to rule on the scope of the TCPA despite a prior FCC order.

At this point, the Fourth Circuit must address the questions raised by the Supreme Court. After the Fourth Circuit issues its decision, either party may seek review from the Supreme Court, but such review is not guaranteed.

Attorney-Son's Arbitration Agreement Applies to Father Because They Shared the Same Phone Line and Calls Overlapped

In *Reo v. Palmer Admin. Servs.*, the United States Court of Appeals for the Sixth Circuit compelled a father's TCPA claim to arbitration after his son had previously settled his own TCPA claim with the same defendant for calls made to the same shared phone number.

In 2018, Plaintiff, represented by his son, alleged that defendant made unauthorized telemarketing calls to his landline telephone number. Two years earlier, the attorney-son threatened to file a complaint against defendant for the same conduct. The attorney-son and defendant entered into a settlement agreement "to resolve any and all future disputes and claims arising between them" through binding arbitration.

The district court compelled arbitration of the father's claims "because they involve telemarketing calls made to the same landline at the same address in overlapping periods of time."
The Sixth Circuit rejected the father's argument that he is not subject to the prior arbitration provision because he and his son were not in privity with one another. Under Ohio law, privity does not require a contractual relationship, but rather "privity exists when the interests of one adequately represent[] the interests of another."

The Court affirmed the order compelling arbitration , finding the father and attorney-son were in privity because they "share an address and a telephone landline . . . both seek to prevent future calls from" defendant and "both sought relief for an alleged injury stemming from calls to the same shared, residential landline."

The case is *Reo v. Palmer Admin. Servs.*, --- Fed. App'x ---, 2019 WL 2306641 (6th Cir. 2019).

Third-Circuit Sets Test for Third-Party Based Liability Based on Allegedly Unsolicited Faxes

The United States Court of Appeals for the Third Circuit set forth its test for when the sender of a fax advertisement could face liability under the TCPA if the recipient of the fax was not the ultimate purchaser of the sender's goods or services, but rather such ultimate purchaser was a third-party.

In *Robert W. Mauthe M.D., P.C. v. Optum Inc.*, the plaintiff healthcare corporation sued defendants for sending unsolicited faxes. The defendants maintain a national database of healthcare providers containing contact, demographic and other information. Defendants sent the faxes at issue to verify and update the information contained in their provider database. The faxes advised the recipients that "[t]here is no cost to you to participate in the data management initiative. This is not an attempt to sell you anything." Plaintiff alleged that the fax he received from defendant was an unsolicited advertisement in violation of the TCPA.

The Court determined that "there is no basis on which defendants can be held to have violated the TCPA on the basis of the fax if the meaning of the word advertisement is viewed in a conventional way" because plaintiff admitted that he was not a potential direct purchaser of defendants' database. The Court then considered whether a "possible broader basis for liability" could exist predicated on the fact that the case involved third parties beyond the plaintiff and defendants, i.e., the users of the defendants' database.

The Court provided an example when such broader "third-party based liability" could exist: When a "fax [is] sent to a doctor encouraging the doctor to prescribe a particular drug to the doctor's patients who, rather than the doctor, are the likely purchasers of the sender's product."

The Court set forth the following test to establish third-party based liability under the TCPA: The plaintiff must establish that the fax: "(1) sought to promote or enhance the quality or quantity of a product or services being sold commercially; (2) was reasonably calculated to increase the profits of the sender; and (3) directly or indirectly encouraged the recipient to influence the purchasing decisions of a third party." In other words, "the fax must convey the impression . . . that a seller is trying to make a sale" and that the sender may have had a profit motive is not enough, but rather "there must be a nexus between the fax and the purchasing decisions of an ultimate purchaser whether the recipient of the fax or a third party."

The Court explained that its third-party based liability standard "hinges on whether the fax was somehow intended to influence a potential buyer's decision in making a purchase, irrespective of whether the sender sent the fax to the potential buyer or to a third party and must have been intended to or at least be capable of influencing a buyer's purchasing decision."

The Court rejected plaintiff's claim that the fax at issue was an advertisement under the third-party based liability standard. It noted that "[c]ommercial entities conducting research sometimes do so by sending faxes." Such faxes, like the one at issue in *Mauthe*, do "not promote the sale of any products or services, or seek to influence the purchasing decisions of a potential buyer." Instead, the "defendants intended their faxes to obtain information enhancing the quality of their services . . . the faxes did not attempt to influence the purchasing decisions of any potential buyer, whether a recipient of the fax or a third party." Accordingly, the Court held that the faxes at issue were not advertisements and affirmed summary judgment.

The case is *Robert W. Mauthe, M.D., P.C. v. Optum Inc.*, ---F.3d ---, 2019 WL 2262706 (3d Cir. 2019).

Podcast

Inside the TCPA, Episode 5: Call Blocking and Call Authentication

“Inside the TCPA” offers a deeper focus on TCPA issues and petitions pending before the FCC. Each episode tackles a single TCPA topic or petition that is in the news or affecting cases around the country. This episode discusses the FCC’s efforts to reduce the volume of illegal robocalls. Steve refreshes the audience on illegally spoofed calls and discuss the FCC’s efforts to urge carriers to implement call blocking and call authentication techniques, including the SHAKEN/STIR framework.

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