TCPA Tracker - June 2021

June 15, 2021

Recent News

Comments Support March 2021 Petition for Reconsideration with Exceptions

Dozens of concerned parties, both corporate and individual, have filed Comments largely in support of ACA International's (ACA) Petition for Reconsideration of the December 2020 order re-examining TCPA exemptions. The ACA submitted its Reply Comment on May 7, 2021 summarizing and reiterating the supporting comments. According to the ACA, "No commenter asked the Commission to apply the written consent requirement to informational calls, and there is no evidence in the record such a requirement would help consumers or serve the Commission's consumer protection goals."

Support for the Petition in its entirety was not unanimous. Most notably the National Consumer Law Center (NCLC) argued against two of the ACA's requests. In regards to prerecorded calls made to residential lines, the NCLC asserts that "Requiring covered calls to provide an automated opt-out mechanism will significantly empower telephone recipients to stop unwanted calls" and eliminating the requirement would "undermine Congress's intent to put limits on the calls made pursuant to exemptions, and would lead to more unwanted calls." The ACA Petition urged the FCC to increase the "three-calls per-30 days limit" imposed on certain types of prerecorded calls, particularly those with messages relating to healthcare. Conversely, the NCLC believes the FCC should reduce the limit for certain types of calls, regardless of content, and apply a uniform limit.

The ACA's Reply Comment addressed the NCLC's opposition. The ACA maintains that it has not asked the FCC to abandon the opt-out requirement, but merely to broaden the scope of the exemptions. As for the "three calls limit," the ACA argues that there is not sufficient evidence to justify the NCLC's concerns and asserts that it is in the consumer's best interest to tailor the limits to the contents of the calls.

Florida Passes ATDS Bill, Expanding Upon TCPA Definitions

Florida recently passed CS/SB 1120, which creates a private cause of action for violations of Florida's Do Not Call Act. The bill also requires "prior express written consent," adopting a definition similar to the TCPA, prior to making calls using "an automated system for the selection or dialing of telephone numbers" or prerecorded messages. The bill's reference to automated dialers is broader than the Supreme Court's interpretation of an ATDS under the TCPA, so telemarketers should review their dialers to determine how the law applies.

The bill also adjusts the timeframe during which consumers can receive calls, the number of calls a caller can make in a 24-hour period, and requirements related to caller ID under the state Telemarketing Act. Subject to the Governor's signature, the bill will go into effect on July 1, 2021.

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

- 28 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

New Petitions Filed

- *None*

Upcoming Comments

- *None*

Decisions Released

- *None*

Click here to see the full FCC Petitions Tracker.

Cases of Note

Colorado District Court Judge Adopts Report and Recommendation to Deny Cannabis Dispensary's TCPA Motion to Dismiss

The District of Colorado issued an order on April 29 denying Defendant cannabis dispensary's motion to dismiss Plaintiff's two TCPA claims. Defendant brought a motion to dismiss for (1) lack of standing, arguing that Plaintiff had consented to receive the text messages at issue, and (2) failure to state a claim, arguing that Plaintiff had failed to plead existence of an ATDS.

On the standing question, the court denied Defendant's motion to dismiss for lack of standing, finding it was premature to address that question.

In support of its 12(b)(1) motion, Defendant relied on precedent from the Pennsylvania district courts and the Eighth Circuit to argue that consent is "relevant to the standing inquiry." Plaintiff cited to a Ninth Circuit opinion finding that "express consent" is an affirmative defense "for which the defendant bears the burden of proof," and "not an element of a plaintiff's prima facie case." *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1044 (9th Cir. 2017). The court disagreed with both approaches, stating that the real concern was "whether consent is properly framed as an issue

of the merits or jurisdiction." Turning to Tenth Circuit precedent in the Title VII context, the court held that where jurisdictional questions were intertwined with the merits – such as when subject matter jurisdiction is dependent upon the same statute which provides the substantive claim in the case – dismissal on a challenge to subject matter jurisdiction would be inappropriate. In the instant matter, the court found that there was "no way in which to resolve the question of whether consent eliminates an injury-in-fact without getting into the merits of claim." The court observed that "the issue of express consent under the TCPA is a perfect example of the jurisdictional (i.e. standing) and merits-based questions being intertwined," and that the "question of consent" should be resolved "on either a Rule 12(b)(6) motion or a motion for summary judgment, not on a Rule 12(b)(1) motion." Therefore, the court denied the 12(b)(1) motion to dismiss.

Turning to Defendant's motion to dismiss for failure to state a claim, the court found that Plaintiff had "plausibly alleged the use of an ATDS," and denied Defendant's motion to dismiss for failure to state a claim. It noted at the outset that the Supreme Court recently decided in *Facebook v. Duguid*, (summarized here), that a device must use a random or sequential number generator to constitute an ATDS, which it stated would "prove far more relevant on a future motion for summary judgment than it does now." Plaintiff alleged that Defendant "relied on the Platform's ability to store telephone numbers, generate sequential numbers, dial numbers in a sequential order, and dial numbers without human intervention," and, in other words, "generated numbers in sequential order." Thus, Plaintiff's allegations met *Facebook*'s pleading mandate. The court denied Defendant's motion to dismiss in its entirety, permitting Plaintiff's claims against it to proceed to discovery.

Montanez v. Future Vision Brain Bank LLC, No. 1:20-CV-02959, 2021 WL 1291182 (D. Colo. Apr. 7, 2021) (Magistrate Judge's Report and Recommendation); *Montanez v. Future Vision Brain Bank LLC*, No. 1:20-CV-02959, 2021 WL 1697928 (D. Colo. Apr. 29, 2021) (adopting Magistrate Judge's Report and Recommendation in its entirety).

Unanimous Second Circuit Panel Affirms Lower Court's TCPA Summary Judgment Decision Finding Prior Express Consent Was Given

The Second Circuit, in a unanimous three-judge panel decision, affirmed the District Court of Connecticut's order granting summary judgment to Lands' End, finding that Plaintiff-Appellant Gorss gave "prior express invitation or permission" to receive the faxes at issue.

Plaintiff Gorss operated a Super 8 Motel, "a brand owned by non-party Wyndham Hotel Group," and the Lands' End faxes advertised "products approved by Wyndham for use in Wyndham-branded hotels and sold by Defendant-Appellee[.]" On appeal, Plaintiff argued that "the district court erred in granting summary judgment to Lands' End and denying class certification" because even if Plaintiff "did give permission to receive fax advertisements, that permission extended only to faxes from Wyndham, and not to Lands' End."

The district court had found that Gorss gave consent for the faxes because Gorss "'list[ed] its fax number and agree[d] to receive information from its franchisor's affiliates and approved vendors' in its 2014 franchise agreement with Wyndham."

The Second Circuit found that "Gorss agreed that Wyndham and its affiliates could 'offer optional assistance . . . with purchasing items used at or in' the motel, and in the same agreement provided its fax number." The court observed that, "[t]o be sure, mere provision of a fax number in the course of a business relationship is not sufficient to establish permission to receive fax advertisements," but it concluded that Plaintiff's receipt of the "Franchise Disclosure Document," together with other provisions and past receipt of "many similar faxes from Wyndham and its affiliates advertising

products of approved suppliers," added up to more than merely providing a fax number.

The court similarly dismissed Plaintiff-Appellant's argument that any permission it gave to Wyndham and its affiliates "would not extend to the faxes here, which Gorss contends were sent by Lands' End and not by Wyndham." The faxes at issue, however, were "drafted by Lands' End, edited by Wyndham, sent by Wyndham to a third-party contractor [and then a subcontractor], which ultimately distributed the fax." The court found that it "seems clear that although Lands' End is the entity 'whose goods or services are advertised or promoted' by the fax, Wyndham is the entity 'on whose behalf' the fax was sent[.]"

Gorss Motels v. Lands' End, No. 20-589-CV, 2021 WL 1915998 (2d Cir. May 13, 2021).

District Court Finds Faxes Promoted Businesses' Services and Fax Broadcaster had a High Degree of Involvement in the Fax, Grants Plaintiff's Motion for Summary Judgment

The Eastern District of Missouri recently granted Plaintiff's motion for summary judgment as against business Defendants in a fax-based TCPA case. Innate Wellness Centers and Neptune Enterprises LLC had partnered to create "onsite wellness programs with businesses who responded to Innate's Lunch N'Learn faxes." Plaintiff alleged that Innate contracted with ProFax to send unsolicited faxes in violation of the TCPA. Only one defendant, ProFax opposed Plaintiff's motion for summary judgment, and itself moved to decertify the class and for summary judgment.

ProFax argued that the FCC's ruling in *Amerifactors*, (previously discussed in Kelley Drye's FCC Petitions Tracker here), took e-faxes wholly outside of the ambit of the TCPA, and therefore class certification would result in 10,000 mini-trials to determine whether the putative class members received the fax at issue over email or by a physical fax machine. The court pointed out that even though the *Amerifactors* decision "does not appear to constitute a 'final order' of the FCC under the Hobbs Act," and "does not require reconsideration of this Court's certification decision," the court was "mindful that the TCPA makes it 'unlawful for any person . . . to use any telephone facsimile machine, computer, or other device to send, **to a telephone facsimile machine**, an unsolicited advertisement . . .'" (emphasis in original). Because "some of the 10,000-plus members of the class likely received the subject faxes via email," the court ordered the parties to submit additional briefing for the possibility of "narrowing the class to include only phone numbers that received the subject faxes on a standalone facsimile machine." The court specified, however, that this decision was "independent of *Amerifactors*" and did not require reconsideration of its certification decision.

Defendant had also argued that its "dire financial circumstances" meant that Plaintiff was unable to satisfy Rule 23(b)(3)'s requirement that a class action be the superior method of adjudication. The court was not persuaded, stating that it was "reluctant to decertify a class based only on the financial position of defendant."

The court also entered summary judgment for Plaintiff on the merits, ruling against each of the three arguments ProFax raised in opposition: that (1) the faxes in question were not advertisements; (2) it did not have a high degree of involvement in the unlawful activity; and (3) the TCPA violates the Fifth and Eighth Amendments to the Constitution. *First*, the court held that the faxes "clearly promote[d] the services provided by Innate Wellness Centers" and were advertisements within the definition of 47 U.S.C. section 227(a)(5)." *Second*, the court held that ProFax's actions in setting up the opt-out service, among other things, "constitute[d] a high degree of involvement as a matter of law." *Third*, on the constitutional challenge, the court found that ProFax abandoned the argument by failing to discuss it in its reply brief, but noting that courts including the Eastern District of Missouri had previously rejected the argument.

Levine Hat Co. v. Innate Intelligence, LLC, et al, No. 4:16-CV-01132, 2021 WL 1889869 (E.D. Mo. May 11, 2021).

District Court Judge Denies Carrier Defendants' Motion to Dismiss on Personal Jurisdiction and Common Carrier Liability Claims

In *Mey v. All Access Telecom et al*, the Northern District of West Virginia denied a motion to dismiss filed by a group of common carriers ("Carrier Defendants") in a lawsuit challenging the Carrier Defendants' role in completing calls to Plaintiff. The judge denied at the pleading stage the Defendants' arguments that the court lacked personal jurisdiction and that the common carriers could not face liability for merely completing the calls.

First, the court rejected Defendants' argument that as common carriers, "they are 'mere middlemen,'" and therefore not subject to personal jurisdiction in West Virginia. The court found that Plaintiff had plausibly alleged Defendants were subject to personal jurisdiction in West Virginia because "[e]ach Defendant was paid to send these calls into West Virginia, each knew the calls were headed to West Virginia, and the calls were in fact received in West Virginia." Further, the court held that "[b]ecause each Defendant profited from its exposure to this market and purposefully availed themselves of conducting business here, they are answerable in West Virginia courts for their conduct in making these West Virginia calls."

The court also rejected the argument that Defendants could not be liable under the TCPA because they did not make the calls at issue. The court looked to the factors set forth in the FCC's 2015 *Omnibus TCPA Order* and found that, at the motion to dismiss stage, the totality of circumstances of the facts alleged was sufficient to support a plausible inference that the Defendants could be liable under the TCPA. The court similarly rejected the argument that common carriers are always immune from TCPA liability, finding there is case law suggesting they can be liable if they have "been found to have been so involved in the unlawful communications that [they] can be deemed to have made them." Thus, the court concluded that it could not, at this stage, conclude that the Defendants were immune from liability as common carriers.

Mey v. All Access Telecom, et al, No. 5:19-CV-00237, 2021 U.S. Dist. LEXIS 80018 (N.D.W.Va. Apr. 23, 2021).

District of South Carolina Holds Predictive Dialer Is Not An ATDS

In *Timms v. USAA Federal Savings* Bank, the District of South Carolina applied the Supreme Court's decision in *Facebook v. Duguid* and entered summary judgment for Defendants, dismissing the TCPA claims against it. Specifically, the court held that because the predictive dialing equipment produced by Aspect was not capable of generating random telephone numbers or sequential blocks of numbers, it does not qualify as an ATDS.

Plaintiff sued in 2018, alleging that she had received calls in violation of the TCPA. While the action was pending, the Supreme Court issued its decision in *Duguid*, holding that the TCPA's prohibitions against the use of an ATDS encompassed only devices that "use a random or sequential number generator to either store or produce phone numbers to be called." The Defendants moved for summary judgment on the basis of that ruling, arguing that the device used fell outside of the definition of an ATDS. The court agreed and entered summary judgment in favor of Defendants.

The record showed that Defendants used predictive dialing equipment that stored lists of numbers in list management software, along with other account information or associated with the call recipient. A representative then used the software to create a list of numbers by specifying different criteria,

such as whether the account associated with the number is in overlimit, the duration of delinquency, and the amount of debt. Then, the list management software would transfer the lists to one of two dialing systems that Defendants used: Aspect Unified IP ("Aspect UIP"), which would initiate the call automatically, and Aspect Agent Initiated Contact ("Aspect AIC"), which required a representative's input to initiate the call. Neither system used a random or sequential number generator to store or produce phone numbers to be called. Thus, the evidence demonstrated that Defendant did not use equipment that qualified as an ATDS post-*Duguid*.

The court addressed footnote 7 in *Duguid*, which stated that certain technology may still qualify as an ATDS if it "use[d] a random number generator to determine the order in which to pick phone numbers from a preproduced list." The court first rejected both Plaintiff's argument that Defendants' equipment used a "random number generator" to determine the order in which recipients were called, noting that this assertion contradicted Plaintiff's recitations of facts in which she alleged that recipients were "specifically," not randomly, ordered. Second, the court disagreed with Plaintiff's expansive reading of footnote 7, interpreting the scope of the footnote only to apply to a "preproduced list" that is "sequentially generated and stored." Because Defendants' lists were not sequentially generated, the footnote was inapposite.

The court therefore held that Aspect UIP and Aspect AIC did not qualify as an ATDS and thus entered judgment for Defendants, dismissing Plaintiff's claims against them.

Timms v. USAA Federal Savings Bank, No. 3:18-cv-01495-SAL, 2021 WL 2354931 (D.S.C. June 9, 2021).