TCPA Tracker-March 2017

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Recent News

FCC Opens New "Robocall" Proceeding and Plans to Vote on NPRM at March Meeting

On March 2, 2017, the Federal Communications Commission (FCC) announced that it was opening a new proceeding entitled "Advanced Methods to Target and Eliminate Unlawful Robocalls." The preliminary objective of the proceeding, as its name suggests, is to develop rules-based and other solutions to reduce the number of robocalls placed to consumers. The FCC's first action in this proceeding is a Notice of Proposed Rulemaking (NPRM) and Notice of Inquiry (NOI) through which the Commission is seeking input from the public on several issues and questions related to robocalls. These include the adoption of rules that would allow providers to block spoofed robocalls either upon request from a subscriber whose telephone number is being spoofed or if the calls are placed from "invalid numbers, valid numbers that are not allocated to a voice service provider, [or] valid numbers that are allocated but not assigned to a subscriber." The FCC also seeks comment on a proposal to establish a corresponding safe harbor from the provider's call completion obligations, methods to address spoofing from internationally-originated numbers, and other safeguards the Commission should put in place to minimize blocking of lawful calls. The NPRM/NOI is listed on the tentative agenda for the FCC's next open meeting, scheduled for Thursday, March 23rd. If the Commission votes to adopt the item, the public will then have the opportunity to comment on it.

FCC Petitions Tracker

With the rise in TCPA litigation, numerous parties have sought clarification of the rules. Kelley Drye's Communications group has compiled this comprehensive summary of the pending petitions.

Number of Petitions Pending	New Petitions Filed	Upcoming Comments	Decisions Released
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	*Lane Labs-USA, Inc.* – seeking a retroactive waiver of the opt-out requirement for fax ads (Filed 2/24/17) *Getaway Seminars, Inc.* – seeking a retroactive waiver of the opt-out requirement for fax ads (Filed 2/28/17)	*M3 USA Corporation* – seeking a retroactive waiver of the opt-out requirement for fax ads (Replies due 3/15/17) *Cunningham and Moskowitz* – consumer petition seeking a rulemaking to overturn the Commission's interpretation that "prior express consent" includes implied consent resulting from a party's providing a telephone number to the caller (Replies due 3/27/17)	*Paul Armbruster* – approval of withdrawal of consumer petition seeking a declaratory ruling or rulemaking regarding a consumer's right to revoke consent to receive text messages from a common carrier (3/6/17)

Click here to see the full FCC Petitions Tracker.

Cases of Note

Putative Class Plaintiffs' TCPA Claims Run Out

Last month, the Second Circuit, in *Leyse v. Lifetime Entertainment Services, LLC*, Nos. 16-1133-cv & 16-1425-cv, 2017 WL 659894 (2d Cir. Feb. 15, 2017), affirmed that receipt of a pre-recorded voicemail on the plaintiff's residential line satisfies the concrete-injury requirement, and affirmed the denial of class certification for lack of an ascertainable class. At issue were unsolicited, pre-recorded messages by a co-host of the TV show "Project Runway" regarding the channel's renumbering in the named plaintiff's geographic area. A list of called numbers, however, was unobtainable following discovery. In a nonprecendential summary opinion, rendered shortly after oral arguments, the Second Circuit joined other circuits and district courts' conclusion that evidence of such a TCPA violation satisfies Article III standing requirements – before and after the Supreme Court's guidance in *Spokeo Inc. v. Robins*, 136 S. Ct. 1540 (2016). Nevertheless, the named plaintiff could not meet the implied requirement of ascertainability to maintain a class action pursuant to *Brecher v. Republic of Argentina*, 806 F.3d 22 (2d Cir. 2015). His proposal to identify the putative class by soliciting individual affidavits and telephone bills, in lieu of a list of called numbers, was not "a sufficiently reliable method" obviating '"mini-hearing[s] on the merits of each case.'" *Leyse*, 2017 WL 659894, at *2 (quoting *Brecher*, 806 F.3d at 25 (alteration in original)). Yet, the Second Circuit did warn that such a list "will not always be necessary to render a class ascertainable." *Id.* Finally, the Second

Circuit affirmed the mooting of the plaintiff's remaining individual claim via the defendant's depositing a check with the clerk of court for the full amount of statutory damages and costs recoverable.

No TCPA Exception – or Vicarious Liability – for Student Loan Guarantor

Two weeks ago, in *Henderson v. United Student Aid Funds, Inc.*, No. 13cv1845 JLS (BLM), 2017 WL 766548 (S.D. Cal. Feb. 28, 2017), a district judge in San Diego granted a federal student loan guarantor's motion for summary judgment on the putative class representative's claim that it was vicariously liable for the unsolicited calls to her cell phone by its loan servicer to collect $6,100 in defaulted loans. The class action complaint did not allege direct liability on the part of the non-profit defendant guarantor. (The loan servicer and its collectors were previously dismissed from the lawsuit for lack of jurisdiction.) The service agreement and a year of discovery revealed that the loan servicer agreed to submit to periodic audit rights focused on collection performance and conformance with federal loan law (rather than the TCPA), but otherwise acted in an independent capacity.

As an initial matter, the district court held that the TCPA amendment excepting from liability calls "made solely to collect on a debt owed to or guaranteed by the United States," created by the Bipartisan Budget Amendment Act of 2015 (codified at 47 U.S.C. § 227(b)(1)), did not apply to the defendant. Following a footnote in the FCC's order implementing the amendment, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 31 F.C.C. Rcd. 9074, 9082 n.54 (2016), the court held that it did not apply to the defendant, but "solely when calls are made during a period in which the United States' obligations as the ultimate guarantor or debtee have been triggered and are active." 2017 WL 766548, at *5.

As to the vicarious liability argument, the court laid out the FCC's 2013 order that "a seller may be vicariously liable under agency principles for violations of [the TCPA]," *In re DISH Network, LLC*, 28 F.C.C. Rcd. 6574, 6590 n.124 (2013), under "a broad range of agency principles, including not only formal agency, but also principles of apparent authority and ratification," *id.* at 6584. It then summarized the common law agency principles under Ninth Circuit precedent. As to express agency with the servicer, and subagency with the servicer's collectors, the court noted the requirement of mutual assent to the principal's right to control the agent. Indeed, "[a]gency is not established when 'control may be exercised only as to the result of the work and not the means by which it is accomplished[;]' in such a case 'an independent contractor relationship exists.'" 2017 WL 766548, at *6 (citation omitted) (alteration in original). The plaintiff must prove – and could not – control of more than the resulting calls, but also "'the manner and means of the … conduct[],'" *id.* (quoting *Thomas v. Taco Bell Corp.*, 879 F. Supp. 2d 1079, 1084 (C.D. Cal. 2012), *aff'd*, 582 F. App'x 678 (9th Cir. 2014). The court rejected the named plaintiff's arguments that the defendant's termination right and periodic audit of, and post-audit recommendations to, the servicer qualified as such control. Rather, "to extend vicarious liability to such a circumstance would result in almost any long-term contract automatically creating an agency relationship unless the hiring entity turned a completely blind eye to the contract once signed." *Id.* Even if the servicer was an agent, they could not "reasonably believe" that the defendant granted the authority to hire violators of the TCPA.

Finally, without any indication that audits covered TCPA compliance or that they revealed violations thereof, the collectors could not reasonably believe that the defendant implicitly authorized them to violate the TCPA. And without the requisite principal-agent relationship between the defendant and

the servicer, or subagency with the collectors, the defendant could not have ratified the alleged conduct.

Speaking Engagements

TCPA / Fair Credit Reporting Act/ Debt Collection Issues

On March 28, 2017 partner Lauri Mazzuchetti will present TCPA / Fair Credit Reporting Act/ Debt Collection Issues during PLI's 22nd Annual Consumer Financial Services Institute in New York, NY. For more information, and to register, please click here.

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