

TCPA Tracker - March 2018

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Recent News

D.C. Circuit Issues Landmark Decision Reviewing FCC's 2015 TCPA Declaratory Ruling and Order

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On March 16, 2018, the U.S. Court of Appeals for the D.C. Circuit issued its long-awaited decision reviewing the FCC's 2015 TCPA Declaratory Ruling and Order. In the case of ACA International v. FCC, Case No. 15-1211, the Court, in a 3-0 opinion authored by Judge Srinivasan, granted in part and denied in part the various petitions for review.

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FCC and FTC Announce Two Joint Robocalling Events

On March 7, 2018, the Federal Communications Commission and Federal Trade Commission announced that they will co-host two upcoming events focused on robocalling issues. First, on March 23, 2018, the two agencies will co-host a Policy Forum at FCC headquarters to discuss the regulatory challenges posed by illegal robocalls and what the FTC and FCC are doing to both protect consumers and encourage the development of private-sector solutions. Second, on April 23, 2018, they will co-host a Technology Expo for consumers that will feature technologies, devices, and applications to minimize or eliminate the illegal robocalls consumers receive.

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

- 24 (+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

- *Inovalon, Inc.* (seeking a declaratory ruling that faxes sent by the designee of a health plan to a medical provider seeking to collect patient health records are not advertisements under the TCPA, and faxes that offer “no cost” electronic health record collection are not advertisements under the TCPA) (Filed 2/19/18)

Upcoming Comments

- *Inovalon, Inc.* (seeking a declaratory ruling that faxes sent by the designee of a health plan to a medical provider seeking to collect patient health records are not advertisements under the TCPA, and faxes that offer “no cost” electronic health record collection are not advertisements under the TCPA) (Comments due 3/26/18; replies due 4/10/18)

Decisions Released

- None

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

Cases of Note

Fourth Circuit Vacates TCPA Dismissal, Rejecting District Court’s Use of *Chevron*

On February 23, 2018, the Fourth Circuit [vacated the district court’s dismissal of a lawsuit](#) alleging that PDR Network violated the TCPA by sending a fax advertising a free copy of an e-book. The issue was whether an offer for a free good or service constitutes an “advertisement” covered by the TCPA.

The district court followed a *Chevron* analysis to determine whether the TCPA and the related 2006 FCC Rule required the fax to have a “commercial aim.” By not deferring to the 2006 FCC Rule interpreting the TCPA, the Fourth Circuit found that the district court violated the Hobbs Act, which retains all authority to vacate or invalidate a final FCC order in federal courts of appeals. In applying *Chevron*, the district court effectively invalidated the 2006 FCC Rule in choosing not to apply the Rule’s plain language.

The Fourth Circuit found that the plain language of the 2006 FCC Rule clearly includes offers for free materials as advertisements under the TCPA. Therefore, the district court’s judgment was vacated and the case was remanded.

In the dissent, Judge Thacker determined that by engaging in a *Chevron* analysis, the district court was not invalidating the 2006 FCC Rule. Instead, the district court attempted to harmonize the TCPA and the FCC Rule by focusing on whether both required a “commercial aim” on the part of the sender. Moreover, the appellant did not challenge the 2006 FCC Rule on its face, rather it argued for a specific interpretation of the Rule. Thus, according to Judge Thacker, the district court did not violate the Hobbs Act.

Illinois District Court Grants Motion to Decertify Class Due to Unmanageability

On February 13, 2018, the United States District Court for the Northern District of Illinois [granted defendant Yahoo! Inc.’s motion](#) to decertify the proposed class due to concerns about class manageability. The plaintiff contended that the defendant had violated the TCPA by sending an unsolicited welcome message associated with its online messenger program to the plaintiff’s cell

phone. In an earlier decision, the district court had certified the class to include all persons who received the welcome message during the month of March, 2013 while the number was assigned to Sprint, but was not associated with a Yahoo! user in Yahoo!'s records.

New information the defendant provided after this ruling indicated that the question of prior express consent would apply to thousands of individual class members; thus, individual consent issues would predominate any issues that applied to the entire class. Yahoo! identified that 20 to 25% of the class would have to be verified to determine if the owner of the cell number did indeed have a Yahoo! account. This was significant enough for the court to decertify the class. The court also rejected the plaintiff's attempts to redefine the class by excluding class members who might have consented because the plaintiff had not provided a new class definition.