TCPA Tracker - May 2018

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Recent News

Congress Shows Keen Focus on Robocall Issues

Just over a month after the D.C. Circuit struck down large portions of the FCC's 2015 Declaratory Ruling interpreting the Telephone Consumer Protection Act (TCPA), several developments on Capitol Hill last week suggest that Congress has renewed its focus on robocall issues. While these actions are preliminary, it could indicate that addressing robocalls may be priority for Congress ahead of the mid-term elections.

The flurry of activity related to robocalls began with a hearing before the Senate Committee on Commerce, Science, and Transportation on April 18, 2018, entitled "Abusive Robocalls and How We Can Stop Them." During the hearing, the Committee members first posed questions to Adrian Abramovich, who the FCC alleged in a June 2017 Notice of Apparent Liability (NAL) violated the Truth in Caller ID Act by placing more than 95 million robocalls to consumers while "knowingly causing the display of inaccurate caller ID information." Mr. Abramovich appeared before the Committee pursuant to a subpoena and provided answers to general questions about robocalling practices. However, he refused to answer questions related to his specific activities or the allegations in the FCC's NAL, citing his Fifth Amendment right against self-incrimination, which prompted Committee Chairman John Thune (R-SD) to suggest that the Committee may seek to hold him in contempt of Congress.

The Committee then heard testimony from the following witnesses, representing the federal government, industry and businesses, and consumer advocates: Lois Greisman, Associate Director of the Marketing Practices Division for the FTC's Bureau of Consumer Protection, Rosemary Harold, Chief of the FCC's Enforcement Bureau, Kevin Rupy, Vice President of Law and Policy for the United States Telecom Association, Scott Delacourt, on behalf of the U.S. Chamber of Commerce, and Margot Saunders, Senior Counsel at the National Consumer Law Center. During this part of the hearing, Committee members posed numerous questions to the witnesses about what resources are currently available and what more could be done to reduce the number of robocalls consumers receive, and the commenters generally agreed that a holistic approach, including enforcement activity and technological improvements in the industry, would be the best way to address the issue.

During the hearing, Senator Richard Blumenthal (D-CT) also announced new proposed legislation entitled the Repeated Objectionable Bothering of Consumers on Phones (ROBOCOP) Act, which would, among other obligations: (1) require telecommunications companies to verify that caller ID is accurate, with some exceptions, and offer consumers optional free robocall-blocking technology; (2) establish a private right of action against telecommunications companies that violate Section 227 of the Communications Act; and (3) authorize the FCC to create a nationwide unblocking system that will ensure consumers are in control of the calls and text messages they receive. The bill is co-sponsored by Senators Ed Markey (D-MA), Ron Wyden (D-OR), Chuck Schumer (D-NY), Tammy

Baldwin (D-WI), and Jeff Merkley (D-OR). Representative Jackie Speier (D-CA) introduced a companion bill in the House on the same day.

In addition, Senator Brian Schatz (D-HI), along with eleven co-sponsors, introduced separate legislation called the Robocall Enforcement Enhancement Act of 2018. This bill would extend the statute of limitations to three years for both the TCPA and the Truth in Caller ID Act. (Coincidentally, Ms. Harold specifically referenced harmonization of the statutes of limitations for these laws during the Commerce Committee hearing as one way that Congress could help the FCC in its enforcement efforts.)

Finally, fifteen Senators sent a letter to FCC Chairman Ajit Pai requesting that the Commission take a number of specific steps in response to the D.C. Circuit decision. In particular, the letter asks the FCC to (1) "establish a comprehensive definition of the term auto dialer"; (2) "maintain aggressive protections restricting unwanted calls and texts to reassigned numbers, and ensure that callers face liabilities for these illegal calls and texts in any future TCPA order or rulemaking"; and (3) "reiterate that consumers always have the right to revoke consent, regardless of any contractual clauses that may be included in user agreements." The Senators requested that Chairman Pai respond in writing to their letter by May 9, 2018.

Meanwhile, the FCC is proceeding with examination of issues surrounding a possible database of reassigned numbers, having adopted a further notice of proposed rulemaking at its April Open Meeting. Comments on the proposal are due on **June 7th**, and replies are due on **July 9th**.

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

- 26 (+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

- *U.S. Chamber of Commerce Institute for Legal Reform et al.* – seeking a declaratory ruling that (1) to be an "ATDS," equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention; and (2) only calls made using actual ATDS capabilities are subject to the TCPA (Filed 5/3/18)
- *P2P Alliance* – requesting clarification that "peer to peer" text messaging is not subject to the

TCPA (Filed 5/3/18)

Upcoming Comments

- *Advanced Methods To Target and Eliminate Unlawful Robocalls* – Notice of Proposed Rulemaking to establish a reassigned number database (Comments due 6/7/18; Replies due 7/9/18)

Decisions Released

- *None*

Click here to see the full FCC Petitions Tracker.

Cases of Note

Fax Invites to Dinner and Medical Seminar Are Not Advertisements

The District of Connecticut recently granted summary judgment to pharmaceutical defendants in a potential junk fax class action case, finding that a dinner invitation faxed to potential attendees was not violative of the TCPA's Junk Fax Rule. Repeat TCPA Plaintiff Physicians Healthsource, a Cincinnati, Ohio medical clinic, filed suit against Boehringer Ingelheim Pharmaceuticals and Medica, Inc. (collectively "Boehringer"), alleging that one of its physicians received an unsolicited advertisement from Boehringer that failed to contain a proper opt-out notice as required under the TCPA, 47 U.S.C. § 227, as amended by the Junk Fax Prevention Action of 2005, in *Physicians Healthsource v. Boehringer Ingelheim Pharmaceuticals, et al.*, Civil Case No. 3:14-cv-00405 (SRU) (D. Conn.). The fax at issue invited the recipient to attend a dinner at McCormick & Schmick's in Cincinnati which was scheduled to feature a presentation on female sexual disorders. During this same time period, Boehringer was seeking approval from the FDA for a new drug that it developed – flibanserin – that was intended to be used as a treatment for female sexual disorders.

Defendants filed a motion to dismiss, which was granted by District Court Judge Stefan Underhill. Plaintiff appealed to the Second Circuit, which overturned the dismissal and remanded the case. The Second Circuit held that at the pleadings stage, it was "plausible" that Boehringer "advertised or planned to advertise, its products or services at the seminar," meaning that the fax had the commercial purpose of promoting those products or services. The Second Circuit also held that defendants could "rebut [the] inference [of a commercial purpose] by showing that it did not or would not advertise its products or services during the seminar."

Following a remand from the Second Circuit, the parties engaged in discovery, and both parties filed for summary judgment. In granting summary judgment to defendants, Judge Underhill found that the evidence demonstrated that Boehringer did not feature or promote its products or services at the seminar in question. In fact, Boehringer could not promote flibanserin at that seminar due to FDA regulations governing communications about disease awareness by pharmaceutical companies and governing's Boehringer's promotion of the drug during the FDA approval process. Judge Underhill also rejected plaintiff's "sweeping" interpretation of an advertisement, which attempted to correlate Boehringer's efforts to educate physicians about the medical conditions discussed during the seminar with future efforts to promote flibanserin with those same physicians. Judge Underhill found that the fax containing the dinner invitation was not an advertisement under the Junk Fax Protection Act, and therefore defendants had not violated the TCPA.

Subway Seeks Stay to Allow Supreme Court to Consider Motion to Compel Arbitration of TCPA Case Under Federal Law

On April 25, 2018, Subway requested that the Ninth Circuit stay its ruling which would allow consumers to restart a TCPA text message class action case, while Subway prepares its appeal to the Supreme Court in *Rahmany v. T-Mobile USA, Inc.*, Case No. 17-35094 (9th Cir.). This case was originally filed in the Western District of Washington by consumers who received a text message offering a free sandwich from their cellular carrier T-Mobile, as a thank you gift for signing up for T-Mobile's services. Defendant T-Mobile was dismissed from the case two days after it was filed by plaintiffs, as Subway argues, so that the plaintiffs could avoid their binding arbitration agreement with T-Mobile as part of their respective contracts with the cellular carrier. While Subway was not a signatory to the arbitration agreement, the District Court granted Subway's motion to compel arbitration, finding that plaintiffs' claims fell within the scope of the agreement, and finding that Subway satisfied the requirements of equitable estoppel under California law, which controls. Plaintiffs appealed to the Ninth Circuit, which reversed the lower court's decision, holding that Subway had not satisfied California's equitable estoppel requirements.

Subway has now requested a 90 day stay to allow it to prepare and file a writ of certiorari to the U.S. Supreme Court, requesting that the Supreme Court address its argument that it met the requirements of equitable estopped under federal law, which Subway argues that the Ninth Circuit did not consider. Even more significant, Subway also seeks to question the viability of the federal equitable estoppel doctrine following *Arthur Andersen v. Carlisle LLP*, 556 U.S. 624 (2009), and whether, as Subway argues, federal arbitration law supersedes state arbitration law, where the state law would otherwise block arbitration.