

TCPA Tracker - November 2021

November 30, 2021

Recent News

State Attorneys General Urge FCC to Adopt “Know Your Customer” Requirements to Curb Illegal and Fraudulent Robocalls

In reply comments filed November 15, 2021, Fifty-One State Attorneys General (“State AGs”) supported the FCC’s proposal to restrict direct access to telephone numbers by certain interconnected VoIP providers. The State AGs supported the FCC’s proposal to require interconnected VoIP providers to certify, among other things, that they will use numbering resources lawfully; will not encourage nor assist and facilitate illegal robocalls, illegal spoofing, or fraud; and will take reasonable steps to cease origination, termination, and/or transmission of illegal robocalls once discovered. The State AGs argued that additional “know your customer” (“KYC”) obligations should be adopted in order to prevent “anonymous use” of telephone numbers. The State AGs expressed concern that purchasing telephone numbers from providers that lack robust KYC policies would undermine STIR/SHAKEN authentication and lead to unreliable “full” attestations. Moreover, the State AGs urged the FCC to expand its rules beyond interconnected VoIP providers, arguing that “Any company that provides access to phone numbers without accurately and fully verifying the identity of their customer is assisting and facilitating all illegal robocalls that utilize that phone number.” The State AG comments are available [at this link](#).

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

- 29 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

- On November 18, 2021, Perdue for Senate, Inc. withdrew its Petition for Declaratory Ruling regarding ringless voicemail technology (RVM), filed July 2, 2021.

Upcoming Comments

- No pending comments due.

Decisions Released

- *None*

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

Cases of Note

[District Court Dismisses Pro Se ATDS Claim Due To Insufficient Facts](#)

In *Hunsinger v. Alpha Cash Buyers, LLC*, the Northern District of Texas granted-in-part a motion to dismiss a pro se Plaintiff's complaint, holding that Plaintiff failed to plead sufficient facts to permit the Court to reasonably infer that Defendant used an ATDS to send Plaintiff the text messages at issue. Because Defendant's Motion to Dismiss only addressed Plaintiff's claim based on Section 227(b) of the TCPA prohibiting the use of calls placed with an ATDS without prior express consent, the Court permitted Plaintiff's remaining claims to proceed.

According to his Complaint, Plaintiff alleged that he received a total of eight unsolicited marketing phone calls from the same telephone number. Plaintiff answered one of the calls, provided his email address to the agent on the phone, and thereafter received an email from which he determined Defendant's identity. After the phone calls, Plaintiff received two identical text messages that addressed him by name. Plaintiff alleged those eight calls and two text messages were made in violation of the TCPA.

The Court identified the central issue as whether Plaintiff had pleaded "sufficient facts for the court to draw the reasonable inference that [Defendant] used an ATDS to send the two text messages[.]" Plaintiff did not allege that Defendant's "system used a random or sequential number generator," which the Supreme Court's 2021 decision in *Facebook, Inc. v. Duguid* held defined an ATDS

Further, the Court found that even the "indirect allegations" in the complaint did not support "a reasonable inference that [Defendant] used an ATDS to send the text messages." While the Complaint alleged an "impersonal and generic nature" to the two text messages, the Court noted that the copies provided to the Court "only permit the court to draw the reasonable inference that the messages are neither impersonal nor generic." The Court arrived at this conclusion because the messages were sent directly to Plaintiff and they addressed him by name, both of which weighed against a reasonable inference that Defendant "used an ATDS[.]" The Court also emphasized the context in that the messages were received after Plaintiff had spoken with an agent for Defendant, and that they "were sent from an SMS long code telephone number," which "does not preclude the use of an ATDS," but also "does not support an inference that an ATDS was used."

Thus, the Court dismissed Plaintiff's claim under § 227(b). The Court did so without prejudice, giving Plaintiff the opportunity to cure his pleading deficiency.

Hunsinger v. Alpha Cash Buyers, LLC, No. 3:21-CV-1598-D, 2021 WL 5040228 (N.D. Tex. Oct. 29, 2021).

[District Judge Decertifies Class Action In TCPA Action](#)

On December 9, 2019, the FCC issued a declaratory ruling in *Amerifactors* that had the effect of eliminating “liability under the TCPA for faxes received via an online fax service.” We have previously discussed that [decision](#) here. In February, [we reported](#) that in *True Health Chiropractic Inc. v. McKesson Corp.*, the Northern District of California modified a class definition on the basis of the *Amerifactors* ruling, segregating the class into two subclasses of individuals who received faxes via (1) an online fax service, and (2) a traditional fax machine. The Court offered Plaintiffs the opportunity to obtain class-wide proof that could show how class members received the faxes at issue. The Court also subsequently entered summary judgment against the online fax services class.

Following class discovery, the parties then submitted responses to subpoenas that Plaintiffs issued to telephone carriers who provided service to the fax recipients. Plaintiffs presented the Court with “over 100 telephone carrier declarations,” and Defendants provided two additional carrier declarations. According to Defendants’ declarations, “[t]elephone carriers who provided service to over 60% of the class members affirmatively say they have no way of knowing if the class member received faxes via a stand-alone fax machine,” or through an online service. The Court then issued an order to show cause why the class should not be decertified, and after full briefing and oral argument, decertified a class of fax recipients seeking to recover for allegedly unsolicited faxes they received through a standalone fax machine. The Court held that this class could not proceed because there was no way of knowing whether members received online or physical faxes. Therefore, neither the predominance or superiority requirements were met.

On the predominance requirement for the class, the Court found that “individual inquiries are required to prove a core element of liability,” *i.e.*, how the fax was received, and so the Court found that “individual questions predominate over common questions.”

In addition, the Court found that since the manner in which the fax was received was a “central issue,” especially given that Plaintiffs had proposed splitting the class into two subgroups of stand-alone fax machine recipients and online fax service recipients, the “individual questions predominate over common questions.”

The Court similarly found the class action superiority requirement was not met because the “core fact” necessary to establish TCPA liability in the case “is only determinable through individualized inquiries.” Thus, a class action was not the superior method of adjudication.

The Court noted that while Plaintiffs “can and no doubt will argue on appeal that *Amerifactors* is not binding,” the Court, under Ninth Circuit precedent, “must follow the FCC’s interpretation.” Thus, it decertified the standalone fax machine class.

True Health Chiropractic Inc. v. McKesson Corp., No. 13-cv-02219-HSG, 2021 WL 4818945 (N.D. Cal. Oct. 15, 2021).