

# TCPA Tracker - October 2020

October 19, 2020

## Recent News

### **As Required by the TRACED Act, FCC Releases NPRM Examining Past TCPA Exemptions**

On October 1, 2020 the FCC released a Notice of Proposed Rulemaking ([NPRM](#)) to seek input on proposed rules to codify previous exemptions to the TCPA's consent requirements. [Section 227\(b\) of the TCPA](#) prohibits "any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party" unless the call meets the requirements of certain exemptions. The exemptions under review by the FCC include "(1) non-commercial calls to a residence; (2) commercial calls to a residence that do not constitute telemarketing; (3) tax-exempt nonprofit organization calls to a residence; (4) HIPAA-related calls to a residence; (5) package delivery-related calls to a wireless number; (6) financial-institution calls to a wireless number; (7) healthcare-related calls to a wireless number; (8) inmate calling service calls to a wireless number; and (9) cellular carrier calls to their own subscribers. Section 8 of the [Pallone-Thune TRACED Act](#) directed the FCC to examine these exemptions to ensure that they contain requirements addressing "(1) the classes of parties that may make such calls; (2) the classes of parties that may be called; and (3) the number of such calls that may be made to a particular called party." To this end, the proposed measures include classifying parties as "informational callers" for callers only providing information, and "transactional callers" for callers trying to complete or confirm commercial transactions, in addition to limiting the number of calls that may be made during a period of time. Comments are due October 26, 2020, and reply comments are due November 3, 2020.

### **FCC Adopts New Rules to Combat Spoofed Robocalls**

On October 1, 2020, the FCC released a [Second Report and Order](#) in its ongoing call authentication proceeding under the TRACED Act. In March, the FCC required originating and terminating voice service carriers to implement the STIR/SHAKEN call authentication framework in the IP portions of their networks by June 30, 2021. In the Second Report and Order, the FCC requires intermediate carriers also to implement the STIR/SHAKEN framework in their IP networks and to pass STIR/SHAKEN authentications to downstream carriers. The FCC extended the implementation deadline for small voice carriers (those with fewer than 100,000 subscriber lines) for two years, until June 30, 2023. Any carrier taking advantage of the extension must, however, implement a reasonable call mitigation program to reduce the origination of unlawful robocalls and must, by a date to be specified by the FCC, file a certification describing its call mitigation program. In addition, the Second Report and Order requires voice service carriers either to convert the non-IP portions of their networks to IP by June 30, 2021 or to be participating in industry efforts to develop and implement a call authentication framework for non-IP calls. Finally, implementing a requirement of the TRACED Act, the FCC prohibits voice service providers from imposing a line item fee on consumers to implement the STIR/SHAKEN framework.

## FCC Proposes to Dismiss Old TCPA Preemption Petitions

On September 23, 2020 the Consumer and Governmental Affairs Bureau released a [Public Notice](#), announcing plans to dismiss 10 pending petitions seeking preemption of state laws addressing unwanted robocalls and faxes. The petitions were filed between 2003 and 2005, and the relief requested may no longer be relevant due to regulatory changes that have occurred since their filing. The FCC will dismiss the petitions with prejudice unless petitioners file letters by November 20, 2020.

## FCC Warns Robocall Scams May Undermine COVID-19 Contact Tracing Efforts

The FCC has warned consumers in the past against answering calls from unknown numbers in order to avoid falling victim to robocall scammers. During the September 25, 2020 Consumer Advisory Committee [meeting](#), the CGB acknowledged that this advice may interfere with contact tracing efforts, as contact tracing calls will likely come from unknown numbers. Complicating matters, many recent scams explicitly refer to contact tracing in robocall messages. Some scammers even go so far as to spoof actual health department phone numbers. The FCC published an updated [consumer guide and COVID-19 scam alert](#) on their website to help consumers identify scams.

## Anderson + Wanca File Application for Review of Ryerson Order

On October 5, 2020 Anderson + Wanca filed an [Application for Review](#), asking the FCC to consider reversing the [Ryerson Declaratory Ruling](#). According to Anderson + Wanca, “the Commission should reverse the Ryerson Bureau Order under Rule 1.115(b)(2) because its reasoning regarding ‘online fax services’ is in conflict with the statute, regulations, case precedent, and established Commission policy, and is based on erroneous factual findings.” More specifically, the Application questions whether the equipment referenced in the Ryerson decision as an online fax service has the requisite capacity to be a telephone fax machine. Anderson + Wanca also argue that the [Amerifactors Declaratory Ruling](#), the decision cited as the primary reason for granting the Ryerson Petition, was based on a mistaken understanding of the TCPA guidelines and thus warrants Commission review.

# 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

- *None*

## Upcoming Comments

- *None*

## Decisions Released

- *None*

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

# Cases of Note

## District Court Finds All TCPA Claims Between 2015 And 2020 Barred By Supreme Court's *Barr* Decision

In *Creasy v. Charter Commc'ns, Inc.*, the Eastern District of Louisiana found that the Supreme Court's decision in *Barr v. Am. Ass'n of Political Consultants* ("*Barr*") rendered the entirety of 227(b)(1)(A)(iii) unconstitutional during the period from Congress's 2015 addition of the unconstitutional government-owned debt exception until its July 6, 2020 severance from the TCPA. Thus, the Court ruled that it lacked subject matter jurisdiction to hear claims alleging violations of the TCPA's ATDS prohibition during that window of time.

In *Barr*, the Supreme Court held that the 2015 amendment adding an exception to the TCPA's ATDS provision for calls made in connection with a government-owned debt created an impermissible content-based speech restriction. As a remedy, the Supreme Court excised the government-owned debt exception and left the (other constitutional) remainder of the TCPA intact.

In *Creasy*, the plaintiffs alleged that the defendant made 130 autodialed calls and texts without the necessary consent. None of the calls involved a government-owned debt. One hundred twenty-nine of the 130 were made during the time that the government-owned debt exception to the TCPA was operative.

The defendant moved to dismiss all claims as to the 129 calls arguing that the Court lacked subject matter jurisdiction because courts lack authority to enforce violations of unconstitutional laws. The Eastern District of Louisiana dismissed the 129 calls finding that the unconstitutional exception rendered the entire statute unconstitutional during that time period. Because the Supreme Court found the exception unconstitutional, the Court determined that it lacked subject matter jurisdiction to apply the law to the defendant's conduct.

With respect to the lone remaining communication, the defendant unsuccessfully sought dismissal and the case will proceed. The Court rejected arguments that the defendant could not be held responsible for calls placed by its subsidiary and found the plaintiffs had met the standard for stating a valid claim. Thus, the motion to dismiss was granted-in-part and the claims as to the one post-*Barr* call will continue.

*Creasy v. Charter Commc'ns, Inc.*, No. CV 20-1199, 2020 WL 5761117 (E.D. La. Sept. 28, 2020)

## Court Dismisses Vague Text Claims For Lack Of Standing

In *Clements v. Porch.com, Inc.*, the District of Alaska dismissed 17 plaintiffs' TCPA claims based on a failure to allege proper standing. Plaintiffs alleged a total of 3,318 texts received, based solely on an

approximation derived from multiplying the number of weeks during which each plaintiff received texts times an alleged average of 2 messages per week. The Court found that plaintiffs did not support those calculations with any specific allegations concerning specific text messages received by any specific plaintiff and produced only exemplar text messages. The Court found the Complaint lacked clear allegations that each plaintiff had received texts in violation of the statute. The Court further found that plaintiffs failed to properly allege which plaintiff(s) were pursuing Do Not Call claims under § 227(c)(5) since there were no allegations regarding any plaintiff's number being listed on the National DO Not Call Registry. Thus, the Court held that plaintiffs' assumptions were insufficient to establish an injury in fact and dismissed based on a lack of constitutional standing.

Clements v. Porch.com, Inc., No. 1:20-CV-00003-SLG, 2020 WL 5739591 (D. Alaska Sept. 24, 2020)

### **Court Dismisses Fraud Counterclaim Against TCPA Plaintiff**

In *Mey v. Castle Law Grp.*, the District of West Virginia granted plaintiff's motion to dismiss fraud counterclaims against an alleged "serial" TCPA plaintiff because it found that the alleged basis for the counterclaim was actually behavior encouraged by the TCPA. Plaintiff's complaint alleged that the defendants and/or their agents had called her using auto-dialers and pre-recorded messages selling debt relief services in violation of the TCPA. Four of the defendants counterclaimed for fraud asserting that the plaintiff voluntarily participated in a credit card qualification process in order to "trap the purported telemarketers into a lawsuit."

Plaintiff moved to dismiss arguing that her alleged conduct did not constitute fraud but was instead the type of investigation encouraged under the TCPA. The Court agreed. The Court relied heavily on a prior, similar District Court case holding that statutory damages in laws like the TCPA are "specifically designed to appeal to plaintiffs' self-interest and direct that self-interest toward the public good" and "operate as bounties, increasing the incentives for private enforcement of the law." Thus, the court dismissed the fraud counterclaim.

Mey v. Castle Law Grp., No. 5:19-CV-185, 2020 WL 5648326 (N.D.W. Va. Sept. 22, 2020)