TCPA Tracker - October 2022

November 9, 2022

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. Highlights of this month's summary are provided below.

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 January 26, 2022, the National Consumer Law Center and other consumer groups filed an ex parte letter requesting that the FCC expressly exclude prerecorded scam calls and automated texts from the exemptions from the consent requirement for these calls and texts in 42 U.S.C. § 227(b).

Upcoming Comments

- No pending comments due.

Decisions Released

- In the Matter of Advanced Methods to Target & Eliminate Unlawful Robocalls Call Authentication Tr. Anchor, No. CG17-59, 2022 WL 1631842, at *2 (OHMSV May 20, 2022)

Click here to see the full FCC Petitions Tracker.

CASES OF NOTE

Ninth Circuit Directs Court to Apply Constitutionality Tests to Statutory Punitive Award of Nearly One Billion Dollars

In a recent Ninth Circuit decision, Plaintiff alleged that Defendant, ViSalus Inc., ("ViSalus") a multi-level marketing company that sells weight-loss products, placed systematic calls to former

promoters and customers to entice them to return or reactivate their memberships from 2012 to 2015 as part of a "WinBack Campaign."

Plaintiff enrolled as a ViSalus promoter in 2012, voluntarily providing her phone number on the application. In April 2015, after discontinuing her relationship and receiving written confirmation of termination in 2013, Plaintiff received five prerecorded messages on her home phone from ViSalus as part of the aforementioned campaign. As a result, Plaintiff sued Visalus in October 2015 alleging that "ViSalus had violated the TCPA by sending unsolicited telemarketing calls featuring artificial or prerecorded voices without her prior express consent." Because ViSalus did not provide the written disclosures to Plaintiff prior to making the calls at issue, it petitioned the FCC for a retroactive waiver of the written prior express consent rule. In its Answer, however, ViSalus did *not* plead that it had consent for the calls as an affirmative defense.

After a three-day trial, the jury returned a verdict against ViSalus with a total damage award of $925,220,000. Approximately two months later, the FCC granted ViSalus a retroactive waiver of the written consent and disclosure requirements. ViSalus then moved to decertify the class, grant judgment as a matter of law, or, in the alternative, a new trial and challenged the damage award as unconstitutionally excessive. The district court denied the motions.

On October 20th, Judge Tallman for the Ninth Circuit affirmed the "district court's refusal to decertify class, grant judgment as a matter of law, or grant a new trial." However, the Court "reversed and remanded to the district court for further proceedings regarding the constitutionality of the nearly one-billion-dollar statutory damages award." The Court analyzed ViSalus's argument utilizing the test set forth in *St. Louis, I.M. & S. Ry. Co. v. Williams*, arguing that $925,220,000 was so "severe and oppressive" that it violates ViSalus's due process rights.

The Court found that "[a]s with punitive damages awarded by juries and per-violation statutory damages awards, a district court must consider the magnitude of the aggregated award in relation to the statute's goals of compensation, deterrence, and punishment to the proscribed conduct."

The Court instructed the district court to reassess the damages guided by factors provided in *Williams* and *Six Mexican Workers*: "1) the amount of award to each plaintiff, 2) the total award, 3) the nature and persistence of the violations, 4) the extent of the defendant's culpability, 5) damage awards in similar cases, 6) the substantive or technical nature of the violations, and 7) the circumstances of each case."
Wakefield v. ViSalus, No. 21-35201, 2022 WL 11530386 (9th Cir. Oct. 20, 2022).

Ninth Circuit Parses Whether Messages Sent to "Mixed-Use" Phones Used for Both Personal and Business Purposes Fall Within Scope of TCPA

On October 12th, 2022, a split Ninth Circuit panel reversed the 12(b)(6) dismissal of TCPA claims, holding that Plaintiffs had statutory standing under the TCPA for messages sent to their cell phones that are used for both personal and business purposes. Defendants' business model involved selling client leads to home improvement contractors. Defendants had gathered and stored contact information for millions of contractors from various websites and sent automated text messages soliciting leads. Defendants allegedly sent 7,527 texts through automatic telephone dialing systems ("ATDS") without Plaintiffs' consent. Fifteen of the plaintiffs had registered their numbers on the National Do-Not-Call Registry. Plaintiffs claimed that these texts violated two provisions of the TCPA: § 227(b) which prohibits calls using ATDS to cell phones, and § 227(c) which prohibits telephone solicitations sent to residential telephone subscribers who have registered their numbers on the Do-

Not-Call Registry.

The Ninth Circuit held that Plaintiffs had statutory standing under § 227(b), following a brief "plain reading analysis" of the statutory text. The court found that "under the most natural reading of the term, 'entity' includes a business. Section 227(b) thus covers call to cell phones of businesses as well as individuals." The Ninth Circuit looked to case law noting the importance of statutory interpretation when determining whether a plaintiff falls within the "zone of interests" of a "legislatively conferred cause of action." Defendants argued that Plaintiffs lacked statutory standing because the phones that received the messages are used for business purposes associated with their home improvement businesses, in addition to personal use, and therefore fall outside the scope of the TCPA. Defendants cited Senate and House reports to show that "Congress did not intend to disrupt normal business communications." The Ninth Circuit, however, found that the words of the statute were clear and unambiguous.

Turning to liability concerning the Do-Not-Call Registry, the Court first found that "in the view of the FCC, a subscriber's use of a residential phone (including a presumptively residential cell phone)" for a home business "does not necessarily take an otherwise residential subscriber outside the protection of § 227(c)." The Court honed in on the question of "whether a cell phone that is used for both business and personal purposes can be a 'residential' phone within the meaning of § 227(c)." Defendants argued that because "Plaintiffs use their cell phones both for personal calls and for calls associated with their home improvement businesses, they do not qualify as residential subscribers." However, after noting that "a few district courts have held, despite the view of the FCC, that a phone used for both person and business purposes is not a residential phone for purposes § 227(c)," the Ninth Circuit held that following discovery, defendants could argue they "rebutted the presumption by showing that plaintiffs' cell phones" should have been "properly regarded as business rather than 'residential' lines."

The majority opinion found that the FCC has concluded that "a cell phone is presumptively residential." Thus, lacking guidance on whether a mixed-use phone becomes a "business phone" outside the scope of the TCPA, the Court opted to continue with this presumption. As such, the Court held that Plaintiffs had both Article III standing and statutory standing under § 227(b) and (c), reversing and remanding the lower court's motion to dismiss decision.

Chennette v. Porch.Com, Inc., --- F.4th ---, 2022 WL 6884084 (9th Cir. Oct. 12, 2022).

Use Versus Capacity: New York Southern District Court Parses Ambiguity in Binding 2021 SCOTUS Decision, *Facebook v. Diguid*

On September 30th , the S.D.N.Y. Chief District Judge granted Defendants' summary judgment motion in a TCPA action, relying the on Third Circuit's reasoning its *Panzarella* decision (discussed here). Here, Plaintiff alleged that he had received upwards of 300 calls intended for the former owner of Plaintiff's phone number. The number's former owner had provided the number on Defendant bank's cardholder agreement. Defendant bank, Credit One, authorized a collection agency to make the calls to the provided phone number after the former owner defaulted on her credit card account. Plaintiff filed suit alleging that Defendants had violated the TCPA by "placing autodialed phone calls to his cell phone without his consent."

In prior proceedings, the trial court had held for Plaintiff, relying on three FCC orders that had "instructed that a certain piece of equipment called a 'predictive dialer' constituted an auto-dialer and thus was 'subject to the TCPA's restrictions on the use of auto-dialers.'" While the case was

pending appeal in the Second Circuit, the Supreme Court issued its *Facebook v. Duguid* decision (discussed here), and the case was remanded back to the trial court. To start, the Court here found it was "bound by the Supreme Court's holding that a device 'must use a random or sequential number generator' to be an auto-dialer within the meaning of the statute." The calls here were made using the LiveVox dialing system, which calls numbers by going down a curated list of phone numbers provided by Defendant bank. The LiveVox system does not generate numbers on its own, but uses an algorithm to automatically place and adjust the number of calls. The system also "has the capacity to store and dial randomly or sequentially generated numbers," which Plaintiff's expert contended could hypothetically happen if an agent were to upload "randomly or sequentially generated telephone numbers" into the system.

In order to determine whether liability attached by the "use" of such a system, or whether the system's "capacity" alone was determinative, the Court turned to the Third Circuit's *Panzarella* decision. The Court, being careful to note that the Third Circuit had relied on case law from both the Second and Third Circuits, specifically reiterated the *Panzarella* court's holding that to violate the relevant TCPA provision, the calls at issue "must *actually employ* an auto-dialer's 'capacity to use a random or sequential number generator.'" Just as in *Panzarella*, the Court here observed that "even if Defendant's LiveVox system theoretically had the capacity to store or produce lists of random or sequential phone numbers to be called, there is no evidence showing that Defendants made" the calls at issue "using such a technique."

The Court ultimately granted Defendants' motions for summary judgment, finding that because the LiveVox system "dialed Plaintiff's phone number from a curated list and employed no random-or-sequential-number-generating capacity to do so, it did not employ the kind of harmful dialing system that Congress sought to proscribe through the TCPA."
Jiminez v. Credit One Bank, N.A., --- F. Supp. 3d ---, 2022 WL 4611924 (S.D.N.Y. Sept. 30, 2022)

District Court Considers the "Health Care Message Exception" that Lowers Threshold for Consent, and Effective Revocation of Consent to Receive Calls

A Maryland district court recently denied a Plaintiff's cross-motion for summary judgment and class certification where Plaintiff had provided prior "express" consent and because the calls were "health care messages." Defendant was a primary care doctor who undertook a messaging campaign inform his patients that he was reducing his practice to 300 patients (from his nearly 4,000 patients) on a subscription-based membership model. The calls were pre-recorded voice messages, made only to patients whom Defendant treated before.

The Court established that Plaintiff had been a patient of the Defendant's until about 2015, Plaintiff had provided her cell phone number, and Plaintiff signed a privacy form that authorized the practice to use and disclose her contact information "to perform the necessary administrative" business functions of the practice. Around 2015, Plaintiff obtained a new primary care doctor and called Defendant's office to request that her medical records be transferred. Although an employee thereafter told her that the practice "no longer considered [Plaintiff] a patient," because Plaintiff did not pay the transfer fee nor fill out transfer paperwork as directed, there was no record of Plaintiff leaving Defendant's practice, and she remained on the list used for the 2021 messaging campaign. Plaintiff did not contact Defendant to ask the office to stop contacting her after receiving either of the two calls.

The Court first turned to the relevant regulations to determine whether the calls Plaintiff received

delivered a "health care" message: "If they did, the calls required mere prior express consent. If they did *not*, then the calls required prior express *written* consent—a heightened threshold that Defendants effectively conceded they did not meet." Defendant first argued that, although Plaintiff did not provide express *written* consent to receive the calls, this "heightened consent" was not required because the calls fit under the "health care message exception" which has a lower prior-express-consent threshold under § 64.1200(a)(2). Under the health care message exception, " a 'covered entity' may lawfully place a telemarketing call that "delivers a . . . message" about "health care[,]" as long as the called party provides prior express consent." The Court found that the calls were "health care messages" because they "discussed impending changes to patients' primary care," and as such, the Court found the express consent adequate. The court observed that "nothing in the TCPA suggests that a health care message cannot also encourage sales," noting that "the health care message exception is meant for calls that *both* 'constitute…telemarketing' *and* 'deliver…a health care message.' "

Turning next to consent, the court determined that Plaintiff "provided prior express consent for the calls she received." Since "[n]either the TCPA nor its regulations" define "prior express consent," the Court relied on past FCC orders and federal court decisions that holding that "by giving a phone number as part of a transaction, a person gives prior express consent to receive 'transaction-related communications[.]' " The Court similarly rejected the argument any consent did not "transfer" to the medical consulting company utilized by Defendant doctor. Finally, the Court found that Plaintiff needed to have "clearly express[ed] [her] desire not to receive further calls," and thus, Plaintiff's call to the office to request a transfer of her medical records was bit a withdrawal of consent. Ultimately, the Court held that Defendants' calls were "health care messages" under the TCPA and that Plaintiff had provided express consent for the calls, granting Defendant's motion for summary judgement.

Derossett v. Patrowicz, No. DKC 21-1294, 2022 WL 4448859 (D. Md. Sept. 23, 2022).

Summary of Michigan House Bill 6307

On June 30, 2022, Michigan introduced its own "Mini-TCPA" legislation, following the direction of several other states, including Florida and Oklahoma. While the Michigan Telephone Solicitation Act ("TSA") differs slightly from its Florida and Oklahoma counterparts in its treatment of automatic dialing systems and consumer consent, the most concerning difference for companies is the severity of the penalties that the Michigan TSA provides. The TSA contains a private right of action which would allow people who "suffer[] a loss as a result of a violation" to bring a civil cause of action to recover either actual damages (including attorney's fees), or $1,000, whichever is greater (which is greater than the $500 per violation provided for by Florida or Oklahoma). Even more concerning, however, is that the TSA would make a "violation of a federal or state law relating to the subject matter of this act, including but not limited to, 16 C.F.R. part 310 [Telemarketing Sales Rule] and 47 USC 227 [TCPA], [] a violation of this act."

Further, while other states cap their civil penalties at $1,500 per willful violation of their acts, the Michigan TSA (linked here) would allow courts to levy a civil fine of up to $25,000 for any violation. Notably, "each telephone communication may be considered a separate violation and a singular telephone communication may generate multiple separate violations." The TSA would also provide for enhancements of civil fines up to $50,000 when a person "knowingly . . . targets vulnerable individuals" (individuals 75 or older or those with disabilities) and up to $75,000 for "persistent and knowing violations" directed at vulnerable individuals.

The use of an "automatic dialing and announcing device" ("ADAD")—defined as any device or system that is used, whether alone or in conjunction with other equipment, for the purposes of automatically selecting or dialing telephone numbers—would be prohibited in solicitations that "otherwise violate [the] act" or unless the list of numbers from which the ADAD selects excludes both: (1) those on the "do-not-call" list; and (2) "vulnerable" numbers, such as numbers for emergency and government services, healthcare facilities, and schools. The TSA would also prohibit altogether any telephone solicitation to residential subscribers whose numbers are on the FTC's "do-not-call" list.

Beyond the standard prohibition that telemarketers cannot engage a subscriber "in telephone solicitations repeatedly, continuously, or in a manner that a reasonable person would consider annoying, harassing, or abusive," the TSA would prohibit any telephone solicitations using a "recorded message in whole or in part," require solicitors to state their full first and last name and the name and address of their organization at the beginning of each call, and prohibit calls between 8 P.M. and 9 A.M. The TSA would also prohibit solicitors from blocking their caller ID and would require companies to retain records related to telephone solicitations for four years.

Finally, the TSA includes several exemptions. For example, it would still allow solicitations made on behalf of debt collectors; made to existing customers; made on behalf of schools; and made with a subscriber's "express verifiable authorization"—which would include (i) prior written authorization or confirmation, (ii) prior electronic authorization or confirmation, (iii) a recorded prior oral authorization, or (iv) prior confirmation through an independent third party.

The TSA has not yet been passed into law. It was referred to the Michigan House of Representatives' Committee on Commerce and Tourism for consideration, but the committee has not officially addressed the bill and the bill has not been put to a vote. The Michigan House of Representatives must consider the TSA before the end of the year as it will not carry over into next year's session. However, even at this stage, it is worth noting the TSA's requirements and preparing for its potential enactment.