

TCPA Tracker - September 2018

September 13, 2018

Recent News

FCC to Receive Comments in September to Refresh the Record on Call Blocking

September will see an opportunity for parties to address actions the Commission could take to allow carriers to block illegal calls under the TCPA. On August 10, 2018, the FCC's Consumer and Governmental Affairs Bureau issued a [Public Notice](#) asking for public comment "to refresh the record on how the Commission might further empower voice service providers to block illegal calls before they reach American consumers." In particular, the Bureau is seeking input on numerous questions related to the following:

1. Methods/criteria that service providers can use to identify illegal calls (e.g., large bursts of calls from a particular caller in a short time window, low average call duration, or low call completion ratios);
2. How service providers can use these additional call identification criteria to prevent illegal calls from reaching consumers (e.g., labeling, blocking, traceback);
3. The status of industry traceback efforts, and what the FCC can do to facilitate such efforts; and
4. How to reduce the potential for false positives and to address situations in which false positives occur.

Initial comments are due to the FCC on September 24, 2018, and replies are due on October 8, 2018.

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

- 27 (+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

- None

Upcoming Comments

- *Advanced Methods to Target and Eliminate Unlawful Robocalls* – comments to refresh the record on additional criteria voice providers could use to identify and block illegal calls (Comments Due 9/24/18; Replies Due 10/8/18)

Decisions Released

- None

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

Cases of Note

Eighth Circuit Dismisses Junk Fax Case Alleging Insufficient Opt-Out Notices

Concluding that plaintiff had not been harmed by a technically deficient opt-out notice, on August 6, 2018, the U.S. Court of Appeals for the Eighth Circuit [upheld a lower court's decision](#) to dismiss plaintiff's complaint alleging that the defendant violated the TCPA by transmitting fax advertisements that did not comply with the FCC's opt-out notice requirement. *St. Louis Heart Ctr., Inc. v. Nomax, Inc.*, 899 F.3d 500. The faxes at issue included either a box that the recipient could check "[i]f you wish to no longer receive faxes" or a checkbox next to an inscription reading "Please do NOT fax to this office," *id.* at *1, and all provided a return fax number and the name, telephone number and email address for a contact person at defendant. The plaintiff conceded that it never attempted to opt-out of receiving the faxes, but nevertheless alleged it was damaged by the loss of paper and toner, the interference with its use of its fax machine, and the time spent by employees reviewing the faxes. The court rejected the plaintiff's argument, finding that it lacked Article III standing because "[t]he Heart Center had the means and opportunity to opt out from receiving future facsimiles, but simply declined to do so. Any technical violation in the opt-out notices thus did not cause actual harm or create a risk of real harm." *Id.* at *9. Note: Although this decision was issued after the D.C. Circuit's ruling in the *Bais Yaakov* case, the court did not rely on the D.C. Circuit's invalidation of the FCC's rule as applied to "solicited faxes" in its decision. Instead, the decision stands for the proposition that the deficiency in the opt-out notice must cause harm to plaintiff in order to be actionable in federal court.

Ohio Court Issues Mixed Bag Decision on TCPA Consent

On August 31, 2018, the U.S. District Court for the Northern District of Ohio [issued a decision](#) in *Rodriguez v. Premier Bankcard, LLC*, 2018 U.S. Dist. LEXIS 149225, in which the court considered two issues related to the plaintiff's consent to receive calls. First, the court concluded that a husband providing his wife's phone number to a creditor (when the husband is the subscriber but not the primary user of that phone number) is sufficient to demonstrate prior express consent to place calls to that phone number. *Id.* at *21-22. However, the court then rejected the defendant's argument that the plaintiff was not permitted to revoke consent that was granted in the agreement with the defendant because the agreement did not address revocation. In so doing, the court expressly

criticized an earlier ruling in *Reyes v. Lincoln Automotive Fin. Servs.*, 861 F.3d 51, 56 (2d Cir. 2017), stating that “it does not explain how a contract which does not discuss revocation can be read to waive the right to revoke consent.” *Id.* at *33.

Texas Court Enforces Arbitration Clause That Includes “Affiliates”

On July 18, 2018, the U.S. District Court for the Northern District of Texas [granted the defendant’s motion](#) to compel arbitration in *Bow v. Ad Astra Recovery Servs.*, 2018 U.S. Dist. LEXIS 120067. The plaintiff had objected to the motion on the grounds that the defendant was not a signatory to the agreement between the plaintiff and her creditor which contained the arbitration clause that the defendant was attempting to enforce. The court concluded that because the agreement covered “affiliates” and expressly referenced the defendant as an affiliate of the companies that had signed the agreement, the defendant was permitted to enforce the arbitration clause. This decision serves as a reminder of the effectiveness of arbitration clauses and underscores the importance of carefully drafting them to ensure that they are sufficient in scope.

Events

Kelley Drye Full Spectrum — Inside the TCPA: Call Blocking

Kelley Drye discussed efforts by the FCC and private industry to limit the number of illegal calls that reach consumers’ phones in the latest episode of “Inside the TCPA.” In particular, they give an overview of a 2017 FCC order that authorized carriers to block certain types of calls, discuss the basics of private industry call blocking and call labeling services, and review suggestions from both industry and consumer groups on how to address this issue going forward. To listen, please [click here](#).