TCPA Tracker - September 2021

September 30, 2021

Recent News

FCC Flexes New Enforcement Muscle, Proposes $5 Million Forfeiture for Unlawful Robocalls

On August 24, 2021, the FCC proposed to fine two individuals sending prerecorded political messages $5,134,500 for making over 1,000 unlawful calls in violation of the TCPA. This proposed fine is the first TCPA robocall fine proposed since the TRACED Act gave the FCC authority to issue proposed fines without first issuing a citation (warning) to the offending entity. (Previously, the FCC had to issue a citation and then could take action only if additional illegal calls were made after the citation.) The TRACED Act authority now allows the FCC to go after illegal calling more quickly, just as it has recently for illegal spoofing violations.

In the Notice of Apparent Liability (NAL), the FCC concluded that J.M. Burkman & Associates, and its two principals, John M. Burkman and Jacob Alexander Wohl, apparently sent 1,141 prerecorded messages to consumers' wireless phones without obtaining consent from the recipients for the calls. Under Section 227(b) of the TCPA, prerecorded message calls require consent when they are sent to wireless numbers and certain other telephone numbers. The FCC's investigation indicated that the consumers who received the calls apparently did not provide consent to receive the calls. The FCC proposed a fine of $4,500 per illegal call, yielding a fine of over $5 million. The Commission also concluded that both the company originating the calls and its two principals were liable for the calls. The targets will have an opportunity to respond to the NAL before the Commission considers whether to impose the proposed forfeiture.

FCC to Consider Reduction of Robocalls to 911 Numbers and Anti-Robocall Obligations of International Gateways at September Open Meeting

The FCC included two robocall-related items on its September 30 meeting agenda. The first FNPRM would propose to update the FCC's rules governing the PSAP Do-Not-Call registry. Although the FCC adopted rules in 2012 to establish the registry as a means to protect PSAPs from unwanted robocalls, the registry has not been fully implemented due to security concerns associated with releasing PSAP telephone numbers to entities accessing the registry. The FNPRM would propose that voice service providers block autodialed calls to PSAP telephone numbers on the PSAP Do-Not-Call registry, as an alternative to allowing entities claiming to use autodialers to access the registry to identify telephone numbers that may not be called. In addition, the FNPRM would seek comment on whether autodialed calls and text messages continue to disrupt PSAPs' operations, security risks associated with maintaining a centralized registry of PSAP telephone numbers, ways to address security issues (such as enhanced caller vetting and data security requirements) and alternative means to prevent robocalls to PSAPs (such as by utilizing other technological solutions or leveraging the National Do-Not-Call registry).

The second FNPRM would propose to require gateway providers to assist in the battle against illegal robocalls by applying STIR/SHAKEN caller ID authentication and other robocall mitigation techniques to calls that originate abroad from U.S. telephone numbers. The FNPRM would also seek comment on several other proposals aimed at mitigating robocalls, including the following requirements that would be applicable to gateway providers: (1) responding to traceback requests within 24 hours; (2) blocking calls upon notification from the Enforcement Bureau that a certain traffic pattern involves illegal robocalling; (3) utilizing reasonable analytics to block calls that are highly likely to be illegal; (4) blocking calls originating from numbers on a do-not-originate list; (5) confirming that a foreign call originator using a U.S. telephone number is authorized to use that number; (6) including robocall mitigation obligations in contracts with foreign customers; and (7) submitting a certification regarding robocall mitigation practices to the Robocall Mitigation Database. In addition, the FNPRM would seek comment on a requirement that service providers block calls from gateway providers identified as bad actors by the FCC and on whether additional information should be collected by the Robocall Mitigation Database. The FNPRM would ask whether there are alternative means to stop illegal foreign-originated robocalls. Finally, while the rulemaking proceeding is pending, the FCC would not enforce the prohibition in Section 63.6305(c) of the FCC's rules on U.S.-based providers accepting traffic carrying U.S. NANP numbers that is received directly from foreign voice service providers that are not in the Robocall Mitigation Database.

FCC Enforcement Bureau Selects Incumbent USTelecom to Continue as Registered Industry Consortium

As required by the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act), the FCC must annually select "a single consortium to conduct private-led efforts to trace back the origin of suspected unlawful robocalls." On August 25, the Enforcement Bureau released a Report and Order selecting the incumbent, USTelecom's Industry Traceback Group, to continue as the registered consortium. A second entity had also applied to serve as the consortium but the FCC chose to continue with USTelecom as the existing provider.

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

- 30 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

- Enterprise Communications Advocacy Coalition – Petition for Declaratory Ruling

On July 30, 2021, the Enterprise Communications Advocacy Coalition (ECAC) filed a Petition for Declaratory Ruling seeking federal preemption of portions of recently enacted Florida legislation (SB 1120), which amends the Florida Do Not Call Act and the Florida Telemarketing Act. The ECAC contends that portions of SB 1120 imposes obligations more restrictive than the TCPA Regulations and impose additional prohibitions on calls and the use of dialing equipment that are legal under federal law. The Petition relies upon a 2003 Commission TCPA order which states that "that any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted."

- Perdue for Senate, Inc. – Petition for Declaratory Ruling

On July 2, 2021 Perdue for Senate, Inc. (Perdue for Senate) filed a *Petition for Declaratory Ruling*, asking the FCC to confirm that the Telephone Consumer Protection Act (TCPA) does not regulate ringless voicemail technology (RVM). Specifically, Perdue for Senate wants the FCC to rule that "the delivery of a voice message directly to a voicemail box through RVM technology does not constitute a 'call' subject to prohibitions on the use of an automatic telephone dialing system ("ATDS") or an artificial or prerecorded voice under Section 227(b)(1)(A)(iii) of the TCPA or Section 64.1200(a)(1)(iii) of the FCC's rules." In the lead up to the January 2021 Senate runoff elections in Georgia, Perdue for Senate employed vendors that used RVM technology to deliver voice messages directly to potential voters' voice mailboxes. According to Perdue for Senate, these RVM transmissions fall outside of the scope of the TCPA and other FCC rules because, not only are they not "calls," they are also not transmitted via a wireless network, and the technology does not bill the recipients of the messages. Perdue for Senate claims that RVM technology is a "beneficial alternative" to robocalls, in that it allows non-profit organizations to relay important information without disrupting the lives of message recipients and/or adding charges to their bills.

This is the third petition to be presented to the FCC involving ringless voicemail technology. Two prior petitions relating to ringless voicemail were filed and subsequently withdrawn by the petitioners prior to a Commission decision.

Upcoming Comments

- Perdue for Senate, Inc. – Petition for Declaratory Ruling; **Comments due Oct. 4; Replies due Oct. 19.**

Decisions Released

- *None*

Click here to see the full FCC Petitions Tracker.

Cases of Note

Sixth Circuit Holds District Courts Have Jurisdiction Over TCPA Claims Arising During Pre-*Barr* Period of Unconstitutional Government-Debt Exception

In November 2020, we reported on *Lindenbaum v. Realgy*, a decision out of the Northern District of Ohio that granted defendant's motion to dismiss because the TCPA's so-called "government-debt

exception" rendered the TCPA's prohibitions on calls sent through an automated telephone dialing system or through prerecorded messages void in its entirety between 2015 and 2020. Plaintiff appealed that decision to the Sixth Circuit, which reversed.

The Lindenbaum plaintiff alleged that she received prerecorded calls, not placed to collect government-debt, between 2015 and 2020. The district court held that it lacked subject-matter jurisdiction over calls allegedly placed in violation of the TCPA between 2015, when the statute was amended to add the government-debt exception, and 2020, when the Supreme Court held it unconstitutional in *Barr v. American Association of Political Consultants* ("*AAPC*"). The basis for the Court's ruling in *AAPC* was that the government-debt exception discriminated on the basis of speech: prerecorded messages placed to collect private debt were prohibited under the statute, while the same calls placed to collect government-owned debt were exempted.

Applying *AAPC*, the district court dismissed plaintiff's claims, arguing that because the clearest statement in *AAPC* should apply retroactively was in a footnote joined by only three judges, *AAPC*'s effect in severing the government-debt exception should only apply prospectively. At the time defendant's calls were allegedly placed to plaintiff, the TCPA unconstitutionally regulated certain speech and exempted other based on its content. The statute, therefore, was void and the court lacked subject matter jurisdiction.

Lindenbaum appealed the dismissal of her case to the Sixth Circuit. Appellee-Defendant put forth two arguments: (i) the district court correctly held that *AAPC*'s severance of the government-debt exception applied prospectively, and (ii) imposing liability for a prerecorded message placed while the government-debt exception was in place, but refusing to hold liable government-debt collectors who lacked fair notice that the exception they relied on was unconstitutional, created the same First Amendment violation recognized by the Court in *AAPC*. The Sixth Circuit rejected both arguments. On the first argument, the Sixth Circuit agreed with Appellant that the district court erred in its analysis. The court reasoned that "the Constitution itself displaces unconstitutional enactments," not the judiciary. "Unconstitutional enactments are not law at all." Thus, the role of the court is to interpret what "the statute has meant from the start in the absence of the always-impermissible provision." That is what the Court did in *AAPC*: it recognized that the Constitution has "automatically displaced" the government-debt exception "from the start," and "interpreted what the statute has always meant in its absence." As a legal determination, it applied retroactively, as judicial decisions tend to do (barring some independent reason for its inapplicability, such as due process concerns).

The Sixth Circuit also found Appellee's second argument unpersuasive. It agreed that due process concerns—i.e., a lack of fair notice—sometimes prevents courts from applying a judicial decision retroactively, and therefore might result in a judgment of no liability under the TCPA for a debt collector who wrongly relied on the government-debt collection in placing prerecorded messages to collect government-debt between 2015 and 2020. That, however, is a function of a "centuries-old rule that the government cannot subject someone to punishment without fair notice," and not a function of the government's regulation of speech. Because a "speech-neutral fair-notice defense" does not raise the issue of government regulation of speech, it does not rise to the level of speech restriction that might violate the First Amendment.

Thus, the Sixth Circuit reversed.

Lindenbaum brings the Sixth Circuit into accord with the majority of district courts who have answered the question of whether the TCPA remained valid after *AAPC*. Now just two decisions, Creasy and Hussain, hold the TCPA void between 2015 and 2020.

Lindenbaum v. Realgy, LLC, No. 20-4252, 2021 WL 4097320 (6th Cir. Sept. 9, 2021)

Ninth Circuit Reverses TCPA Dismissal and Clarifies Regulatory Application to Cell Phones

In *Loyhayem v. Fraser Financial and Insurance Services, Inc.*, the Ninth Circuit reversed a lower court's dismissal of a TCPA action predicated on a job-recruitment "robocall." The Court held that the lower court misread the TCPA and accompanying regulations because it misapprehended the type of consent that the TCPA requires when placing such calls to cell phones. "For robocalls involving advertising and telemarketing, [Section 64.1200](a)(2) requires prior express *written* consent, whereas the calls covered by paragraph (a)(1) require prior express consent, which may be given orally or in writing."

Plaintiff in *Loyhayem* alleged that he received a job recruitment call from defendant that was made both using an ATDS and an artificial or pre-recorded voice, without his express consent. Defendant moved to dismiss, which the district court granted, holding that "the TCPA and the relevant implementing regulation, 47 C.F.R. § 64.1200, do not prohibit making job-recruitment robocalls to a cellular telephone number." The lower court "read the Act as prohibiting robocalls to cell phones only when the calls include an 'advertisement' or constitute 'telemarketing,' as those terms have been defined by the [FCC]." Because plaintiff "admitted that the job-recruitment call" did not contain advertising nor telemarketing, the lower court "concluded that he had not adequately pleaded a violation of the TCPA."
Plaintiff appealed and the Ninth Circuit reversed. The Ninth Circuit reviewed the text of the TCPA, and found that the "applicable statutory provision prohibits in plain terms 'any call,' regardless of content, that is made to a cell phone using an automatic telephone dialing system or an artificial or pre-recorded voice, unless the call is made either for emergency purposes or with the prior express consent[.]" The court recognized that plaintiff had adequately alleged both that the call was not made for emergency purposes and that he provided no consent to be contacted by defendant.

With respect to the pertinent regulation, the Ninth Circuit found that the lower court "read paragraph (a)(2) [of the regulation] as effectively removing robocalls to cell phones from the scope of the TCPA's coverage unless the calls involve advertising or telemarketing," which was incorrect. The Ninth Circuit held that while plaintiff "did not allege that the call he received involved advertising or telemarketing," that "simply means the heightened written consent requirement imposed by paragraph (a)(2) does not apply."

The Court clarified that Plaintiff's case "is still governed by paragraph (a)(1), which requires that prior express consent have been given either orally or in writing." Because plaintiff adequately alleged that he did not provide consent, dismissal was unwarranted. The Ninth Circuit reversed.

Loyhayem v. Fraser Fin. & Ins. Servs., Inc., 7 F.4th 1232 (9th Cir. 2021).

District Courts Continue to Find Footnote 7 in *Duguid* Unpersuasive

We have previously discussed lower courts treatment of *Facebook v. Duguid*'s Footnote 7. The Western District of Washington and Southern District of Ohio have joined the District of South Carolina and Northern District of California to hold that to qualify as an ATDS, a device that uses a number generator to randomly dial stored numbers must also generate random or sequential numbers to be dialed. The court held that defendant's "use of its system to send advertisement text messages to consumers who entered their phone numbers into a form on its website simply does not implicate the problems" Congress intended to address when it passed the TCPA.

In *Borden v. eFinancial*, plaintiff filed his complaint in September 2019, alleging that he was

contacted by defendant after filling out a form to receive insurance rates, including his telephone number, though he stopped short of actually submitting that form. Nonetheless, he began to receive text messages from defendant. Following the *Duguid* decision in April, 2021, plaintiff amended his complaint to allege that defendant sent its text message advertisements using "a sequential number generator to (1) determine the order in which to pick phone numbers to be dialed from a stored list or database of phone numbers and (2) populate the LeadID field that is assigned to a phone number and used to identify phone numbers in its database." Plaintiff did not allege that defendant "generate[d]random or sequential phone numbers and sends text messages to those numbers."

Specifically, the Court found plaintiff's allegation that " [defendant's] system uses a sequential number generator to select which stored" numbers to dial and to populate a certain field in said system to identify numbers in the database. The court was careful to observe that plaintiff "does not, however, allege that [defendant's] system 'generate[s] random or sequential phone numbers' to be dialed[.]"
Plaintiff relied on footnote 7 of *Duguid* "for the proposition that it is enough that an autodialer 'use a random number to determine the order in which to pick numbers from a preproduced list[.]" The Court disagreed, finding that "[plaintiff's] argument relies on a selective reading of one line within footnote 7 and ignores the greater context of that footnote and the opinion." The Court further relied upon the amicus brief cited by the Supreme Court in the footnote for support, and found that the amicus brief "makes clear that the preproduced list of phone numbers referenced in footnote 7 was itself created through a random or sequential number generator, thus differentiating it from the stored list of consumer-provided phone numbers used by [defendant]."

Accordingly, the Court dismissed the complaint with prejudice, finding that because plaintiff "expressly alleges that he provided his phone number to [defendant] – and thus the text messages at issue necessarily were not sent through an ATDS. Thus, "amendment would be futile[.]"
....

The Southern District of Ohio reached as similar conclusion in *LaGuardia v. Designer Brands*. There, plaintiffs alleged violations of Section 227(b) (prohibiting use of an ATDS) and Section 227(c) (soliciting an individual registered on the Do-Not-Call Registry). Defendants had moved for summary judgment on two grounds: (i) their text messaging system was not an ATDS under Section 227(b), and (ii) an established business relationship with plaintiffs precluded liability under Section 227(c).

Defendants relied on their expert's report that the device in question did not have the capacities that *Duguid* defined as an ATDS. Plaintiffs first unsuccessfully sought to exclude that expert opinion. Next, it argued that defendants' dialing system was an ATDS because it would issue a unique sequential identification for every message it sends, then would use that ID number to track responses. According to the court, "Plaintiffs' focus is off," pointing out that the definition of an ATDS "addresses the ability to randomly or sequentially store or generate phone numbers, not message identification numbers." The court was similarly not convinced by plaintiffs' reliance on Footnote 7 of *Facebook Inc. v. Duguid*, observing that "Plaintiffs contend that this dicta, which addresses a hypothetical in an *amicus* brief, establishes that [defendant's dialing system] is an ATDS because of its ability to randomly generate ID numbers to use those numbers to determine which phone numbers to send text messages to."

Further, the court held that despite defendants' evidence demonstrating that it had some business relationship with plaintiffs, summary judgment on liability under Section 227(c) was inappropriate because defendants failed to establish that it maintained an internal Do Not Call list, which the Court found was required under relevant TCPA regulations.

As a result, the Court entered summary judgment for defendants because their dialing system was not an ATDS but denied summary judgment on the established business exception.

Borden v. eFinancial, LLC, No. C19-1430JLR, 2021 WL 3602479 (W.D. Wash. Aug. 13, 2021) (*appeal filed* Sept. 2, 2021); *LaGuardia, et al. v. Designer Brands Inc., et al*, No. 2:20-cv-2311, 2021 WL 4125471 (S.D. Ohio Sept. 9, 2021).