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TCPA & Consumer Calling

Monthly TCPA Digest

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In light of the continued compliance and litigation challenges presented by the Telephone Consumer Protection Act (TCPA), Mintz Levin's TCPA and Consumer Calling Practice team have launched an inaugural newsletter to keep you informed of the latest regulatory and legislative updates, class action developments, and trends. On a monthly basis, we will share FCC declaratory rulings and public notices, petitions filed with the FCC, selected summaries of comments and *ex partes* filed with the FCC, and recent TCPA class actions pending in state and federal courts. If you have suggestions for content you would like us to feature in this newsletter, or if you have any questions about the topics presented in this issue, please feel free to contact one of our attorneys.

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Part I - TCPA: Regulatory

FCC Releases

FCC released a ***Report and Order*** ("*Order*") adopting rules implementing Section 301 of the Bipartisan Budget Act of 2015 ("Budget Act"), which amends the TCPA by excepting from its consent requirement robocalls "made solely to collect a debt owed to or guaranteed by the United States." The Order places limits on federal debt collection calls to wireless phones (including texts). Notably, the FCC determined that the Budget Act exemption does not alter the current rules regarding non-telemarketing robocalls to residential numbers.

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- ***Covered Calls.*** The FCC determined that the exemption covers debt collection calls and certain debt servicing calls. Specifically, it covers calls made regarding debts that are in default, are delinquent, or are in imminent, non-speculative risk of delinquency due to a specific, time-sensitive event that affects the amount or timing on payments due. Calls concerning imminent risks of delinquency may be made up to 30 days before the delinquency-triggering event. In addition, the relevant debt must be currently owed to or guaranteed by the federal government at the time the call is made; debts that have been sold in their entirety by the federal government are not covered. Only the owner of the debt or its contractor may place covered calls.
- ***To Whom Calls May Be Placed.***Covered calls may only be made to the debtor or another person or entity legally responsible for paying the debt, and to other persons listed on the debt paperwork. In order to reach the debtor, calls may be placed to (1) the wireless telephone number the debtor provided at the time the debt was incurred; (2) a phone number subsequently provided by the debtor to the owner of the debt or its contractor; or (3) a wireless telephone number the owner of the debt or its contractor has obtained from an independent source, provided that the number is actually the debtor's telephone number. Calls to wrong numbers are not covered by the exemption, and calls to reassigned numbers are covered by the *2015 TCPA Order*'s one-call exception.
- ***Limits on the Number, Duration, and Timing of Calls.*** The Commission limited covered calls to three calls within 30 days, with the limitation applying in the aggregate to all calls from a caller to a particular debtor, regardless of the number of debts of each type the servicer or collector holds for the debtor. In addition, the three calls cap is cumulative for debt servicing calls and debt collection calls. However, federal agencies administering relevant programs and statutes may request a waiver seeking a different limit. Artificial and pre-recorded voice calls may not exceed 60 seconds, exclusive of any required disclosures. There is no length cap on live-caller, autodialed calls. Covered calls are not permitted outside the hours of 8:00 a.m. to 9:00 p.m. Consumers have a right to stop these calls at any point.

The Commission issued two **Declaratory Rulings:**

- The first Declaratory Ruling, addressing petitions filed by Broadnet Teleservices LLC ("Broadnet"), National Employment Network Association, and RTI International, clarifies that the TCPA's autodialer and robocalling restrictions do not apply to calls made by or on behalf of the federal government in the conduct of official government business. Calls placed by third party agents will be immune from TCPA liability only where (i) the calls are placed pursuant to authority that was "validly conferred" by the federal government, and (ii) the third party complies with the government's instructions and otherwise acts within the scope of his or her agency, in accord with federal common-law principles of agency. The Declaratory Ruling concerns only the federal government, and does not address calls placed by state or local governments or their agents (which Broadnet had included in its petition for declaratory ruling). Further, the TCPA continues to apply to non-governmental activities, including political campaign events conducted by federal officeholders.
- The second Declaratory Ruling is particularly directed to calls made by schools and utilities, and responds to petitions filed by Blackboard, Inc. ("Blackboard") and by Edison Electric Institute and the American Gas Association (collectively, "EEI/AGA"). The Commission restated the general rule that non-emergency (whether or not telemarketing) robocalls and automatic texts are *lawful* if the caller has the consumer's prior express consent. It further stated that the "clearest way to obtain consent is for a caller to be explicit about the types of calls he or she wishes to have consent for, and the Commission has acknowledged that in limited cases, the mere giving of a telephone number as a contact number satisfies the consent requirement as long as the call or text is closely related to the purpose for which the consumer gave the number…" The Commission went on to address the Blackboard and EEI/AGA petitions directly. The main points of the decision are below.

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- Blackboard filed a request that the Commission find that "all automated informational messages sent by an educational organization via a recipient's requested method of notification are calls made for an 'emergency purpose' and therefore outside the requirements of the [TCPA]." In response, the Commission found that only certain calls – autodialed calls to wireless numbers made necessary by a situation affecting the health and safety of students and faculty – are made for an emergency purpose. For those calls, no consent is required. For non-emergency calls, the usual rules regarding informational calls apply – meaning that prior express consent is required.
- EEI/AGA filed a petition requesting that the Commission confirm that, under the TCPA, providing a wireless telephone number to an energy utility constitutes "prior express consent" to receive, at that number, non-telemarketing informational calls related to the customer's utility service. In response, the Commission stated that consumers who provide their wireless telephone number to a utility company have given prior express consent to be contacted by their utility company at that number with messages that are closely related to the utility service. The Commission defined calls that are "closely related to the utility service" broadly.

The FCC issued six **Public Notices**:

- The FCC issued **two** Public Notices concerning the National Consumer Law Center's Petition for Reconsideration and Request for Stay of the Broadnet Declaratory Ruling (see below). The FCC seeks comment on the petition for reconsideration and on the request for stay. Comments on the stay were due August 11, 2016, and reply comments were due August 16, 2016. Comments on this petition are summarized below. For comments on the petition for reconsideration, the deadlines are August 31, 2016 for comments and September 15, 2016 for reply comments.
- The FCC issued a Public Notice seeking comment on the Mortgage Bankers Association petition requesting that the Commission exempt autodialed and prerecorded residential mortgage servicing calls to wireless numbers, when the calls are not charged to the called party and do not contain an advertisement or constitute telemarketing. Comments are due September 2, 2016 and reply comments are due September 19, 2016.
- The FCC released a Public Notice announcing that the FCC will host the first meeting of an industry-led "robocall strike force" this Friday, August 19th**.**
- The FCC released a Public Notice seeking comment on the Professional Services Council's Petition for Reconsideration of the Broadnet Declaratory Ruling (see below), which seeks a modification of that portion of the ruling necessary to provide TCPA relief to government contractors acting on behalf of the federal government, in accordance with their contract's terms and the government's directives, without regard to whether a common-law agency relationship exists. Comments are due September 14, 2016 and reply comments are due September 29, 2016.
- Last, the FCC released a Public Notice seeking comment on a Petition for Expedited Declaratory Ruling and/or Clarification of the TCPA and the *2015 TCPA Order* filed by Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management. The petition asks that the Commission clarify its rules to ensure that they are interpreted in a way that is consistent with HIPAA. Specifically, it asks that the Commission clarify (1) that the provision of a phone number to a HIPAA "covered entity" or "business associate" constitutes prior express consent for non-telemarketing calls allowed under HIPAA for the purposes of treatment, payment, or health care operations; and (2) that the health care exemption in the *2015 TCPA Order*

applies to all HIPAA "covered entities" and "business associates." Comments are due September 19, 2016 and reply comments are due October 4, 2016.

Calls By or on Behalf of the Federal Government

National Consumer Law Center, along with many other advocacy programs and legal aid organizations, filed a Petition for Reconsideration and Request for Stay of the Broadnet Declaratory Ruling, arguing that if the Commission does not change its ruling, tens of millions of Americans will be flooded with unwanted robocalls from federal contractors with no means of stopping these calls and no remedies to enforce their requests to stop these calls. The National Consumer Law Center contends that the Supreme Court's decision in *Campbell-Ewald Co. v. Gomez* is about derivative sovereign immunity and provides no support for the proposition that federal contractors acting as agents for the government are not "person[s]" under the TCPA. They also argue that the text and structure of the TCPA make clear that government contractors are subject to the law's prohibitions. National Consumer Law Center representatives, along with representatives from other public interest groups, also met with staff from Chairman Wheeler's office, the International Bureau, the Consumer and Governmental Affairs Bureau, Commissioner Rosenworcel's office, and the General Counsel's office to discuss these issues. As noted above, comments on the request for stay ("NCLC Stay") were due August 11, 2016. Six parties filed comments. These comments are summarized below.

- **Broadnet Teleservices** and **RTI International** filed comments in opposition to the NCLC Stay. Broadnet argued that the underlying NCLC Petition for Reconsideration is unlikely to succeed on the merits because it is procedurally and substantively defective. Further, NCLC's claimed harms to consumers are theoretical. NCLC does not explain why the checks on calls imposed by the *Broadnet Declaratory Ruling* and government entities themselves are insufficient, or why government entities would permit calls that annoy consumers to be made on their behalf. Staying the decision will also deprive wireless-only citizens of opportunities to engage with the government. RTI International also argued that the NCLC Stay exaggerates the *Broadnet Declaratory Ruling's* impact – the federal government uses contractors to place calls that could be placed by the federal government itself with no TCPA liability, and thus the federal government has no incentive to increase the number of calls it places based on the *Broadnet Declaratory Ruling*. In addition, the ruling is supported by the plain language of the statute and consistent with other TCPA rules and exemptions, and staying the ruling would not serve the public interest.
- **Consumers Union** filed comments in support of the NCLC Stay, arguing that the ruling should be reversed because it will lead to an increase in unwanted calls to consumers from federal government contractors – calls that are costly for many consumers, and that compromise their privacy**. Robert Biggerstaff** and **Gerald Roylance** argued that NCLC's Petition for Reconsideration is likely to succeed on its merits since the *Broadnet Declaratory Ruling* is inconsistent with other TCPA decisions and rules, and that NCLC clients will suffer irreparable harm without the stay. Last, **Burke Law Offices, LLC** contended that the *Broadnet Declaratory Ruling* did not adequately consider its impact on the consumer privacy interests the TCPA was enacted to protect, especially in light of the broad range of individuals, corporations, and other parties who contract with the federal government.

Reply comment summaries will be provided in a future update. For comments on the petition for reconsideration, the deadlines are August 31, 2016 for comments and September 15, 2016 for reply comments.

Professional Services Council ("PSC") filed a Petition for Reconsideration of the Broadnet Declaratory Ruling. PSC states that the ruling indicates that the Commission intended to exclude from the TCPA definition of "person" federal government contractors who are complying with government instructions. However, the ruling instead more narrowly states that the TCPA does not apply to federal government agents acting within

the scope of their agency under common-law principles of agency. Because even government contractors that adhere to the terms of their agreements are routinely considered *not* to be common law agents of the government, PSC requests that the Commission reconsider its decision to the extent necessary to remedy this issue. As noted above, comments are due September 14, 2016, and reply comments are due September 29, 2016.

Budget Act Exemption for Federal Debt Collection

Prior to release of the Report and Order on this issue, numerous parties filed *ex partes* concerning federal debt collection calls.

Navient filed multiple *ex partes* reporting on meetings with advisors to Chairman Wheeler, advisors to Commissioners Rosenworcel, O'Rielly, and Pai, and Consumer and Governmental Affairs Bureau staff. The meetings covered the many of the points Navient has made in its comments in the Budget Act exemption proceeding – specifically highlighting that there is no support in the record for a three-calls-per-month limit, and that the exemption should cover debt servicing calls, calls prior to delinquency, and calls to numbers other than those provided by borrowers. Navient also filed a letter regarding the US Treasury Bureau of the Fiscal Service's *Report on Initial Observations from the Fiscal-Federal Student Aid Pilot for Servicing Defaulted Student Loan Debt*. Navient argues that the report (1) supports the need for flexibility to place more than three calls to borrowers each month; (2) confirms the difficulty that those working with federal student loan borrowers have in locating some of the most at-risk borrowers; (3) highlights the complexity of options available to student loan borrowers and underscores the necessity of live contact for borrowers to navigate these options; and (4) supports the position that the Commission should not adopt limitations on the duration of exempted calls.

National Council of Higher Education Resources ("NCHER") representatives met with an advisor to Commissioner Pai. NCHER also highlighted the US Treasury Bureau of the Fiscal Service's report. It further argued that the proposed three call limit is too low and that student loan servicers should not have to wait until a borrower is delinquent before making calls.

Nelnet filed *ex partes* reporting on meetings with Commissioner Clyburn, Commissioner Rosenworcel and her advisor, advisors to Chairman Wheeler, and advisors to Commissioners Pai and O'Rielly. Nelnet argued that the Commission's federal debt collection NPRM and its Broadnet Declaratory Ruling are at odds and that the Commission's proposals would force entities attempting – on behalf of the federal government – to keep student borrowers out of delinquency to either comply with rules that restrict their ability to educate their borrowers about their options, or violate the rules, and face the risk of liability in order to honor their contracts with the federal government. Nelnet also discussed the importance of being able to provide student loan borrowers timely and material information about their loans and described how the proposed rules, specifically those regarding call frequency and reassigned numbers, would impede that objective. Nelnet suggested two alternatives with regard to reassigned numbers: one that would require call attempts to cease following notice to a servicer that the number it was calling was not associated with a student borrower, and one creating an affirmative defense to any claim from a reassigned number by demonstrating that the servicer had a good-faith belief that the number was associated with a student borrower.

US Department of Education ("DOE") filed an *ex parte* letter in which it agreed that loan servicing calls should be included under the exemption. However, the FCC should not limit the number of covered calls to three calls per month per delinquency, and only after delinquency has occurred, as this limit is too low.

National Association of Consumer Advocates, Consumers Union, Center for Responsible Lending, and Consumer Action representatives spoke with staff from the Consumer and Governmental Affairs Bureau, Chairman Wheeler's office, and Commissioner Rosenworcel's office. They generally argued that the rules should provide (1) that only three calls per servicer or collector per month is permitted, instead of three calls per loan; and (2) that servicers may call if either the debt is delinquent or if the consumer is delinquent in

responding to a notice for entering into a payment plan or forbearance program. They further argued that it would be illegal and improper for the Commission to provide an exemption for Fannie Mae, Freddie Mac, and their servicers. However, they agreed that callers need not be limited to the phone number originally provided by the debtor and should be allowed to call a new number that the debtor has acquired, as long as there is a reasonable, documented basis for believing the phone number belongs to the debtor. With regard to requests for calls to stop, the Commission should harmonize its rules with the Fair Debt Collection Practices Act.

Education Finance Council filed an *ex parte* regarding the Budget Act exemption, highlighting the US Treasury Bureau of the Fiscal Service's *Report on Initial Observations from the Fiscal-Federal Student Aid Pilot for Servicing Defaulted Student Loan Debt* and arguing (1) that the Commission should not limit the duration these debt collection calls; (2) that three calls per month is insufficient; (3) that student loan servicers should be permitted to contact borrowers at phone numbers other than those provided by the borrower; and (4) that servicers should not be penalized for placing calls to a reassigned number if the company has not been informed that they have reached a reassigned number.

Additional Considerations

The **Kansas Department for Children and Families**, on behalf of the **State of Kansas**, filed comments arguing that sovereign immunity precludes the application of the TCPA to a state, an agency of the state, or an employee of a state agency, as long as the state agency's act is in the performance of its official functions. As such, the Kansas Department for Children and Families is entitled to send text messages to child support obligors' wireless phones.

Citizens Bank, N.A. withdrew its January 2015 petition asking that the Commission find that a called party has provided prior express consent to receive non-telemarketing, auto-dialed or pre-recorded voice calls on a cell phone where the called party takes purposeful and affirmative steps to release her cell phone number to the public for regular use in normal business communications.

Part II - TCPA: Litigation

Do Plaintiffs Really Have State Courts As An Option When They Lack Article III Standing?

In the wake of the US Supreme Court's decision in *Spokeo v. Robins*, some corporate defendants are concerned that successfully challenging plaintiffs' Article III standing in TCPA class actions will merely cause plaintiffs to re-file the action in state court, a forum which corporate defendants traditionally view as less favorable. However, plaintiffs that cannot articulate a concrete harm traceable to the alleged TCPA violation are not likely to establish standing anywhere, even in the state courts with more liberal standing requirements.

A Victory in Federal Court Will Preclude Suits in State Courts Adopting the Federal Injury-in-Fact Requirement or a More Stringent Standard

Representative states: Alabama, Connecticut, Nebraska, New York, Montana, Vermont

Numerous state courts apply the same standing doctrine as federal courts. *See e.g. Ex Parte Ala. Educ. Television Comm'n*, 151 So. 3d 283 (Ala. 2014) (articulating the federal standing test as the means of determining standing in Alabama state courts) (Alabama); *Thompson v. Heineman*, 289 Neb. 798, 814 (2015) (finding "[c]ommon-law standing usually requires a litigant to demonstrate an injury in fact that is actual or imminent.") (Nebraska); *Conn. Ass'n. of Health Care Facilities v. Worrell*, 508 A.2d 743, 746 (Conn. 1986)

(adopting “the federal standards for association standing”) (Connecticut); *Stewart v. Bd. of County Comm’rs*, 573 P.2d 184, 186 (Mont. 1977) (explaining that the state standing requirement derives from the state constitution, which limits the judicial power to “cases at law and in equity” and which has been interpreted to embody the same limitations as the Article III “case and controversy” provisions of the US Constitution) (Montana); *Parker v. Town of Milton*, 726 A.2d 477, 480 (Vt. 1998) (adopting the federal *Lujan* test for standing) (Vermont).

Other states, such as New York, have a more stringent test for standing which requires plaintiffs to establish standing by demonstrating “an injury in fact that falls within the relevant zone of interests sought to be protected by law.” *Caprer v. Nussbaum*, 825 N.Y.S.2d 55, 62-63 (App. Div. 2006).

In all of those states, plaintiffs’ counsel would be foolish to re-file the action in state court after the case has been dismissed for lack of standing in federal court. If they do, defendants can readily defeat the state action by citing the dismissal in federal court.

Plaintiffs Alleging Mere Procedural Violations of the TCPA Will Not Necessarily Fare Better in State Courts Despite More Liberal Standing Requirements

Representative states: California, New Jersey, Wisconsin

Although there is no “injury in fact” requirement in states such as California, New Jersey, and Wisconsin, the same common sense arguments that corporate defendants would have made in federal court could persuade state court judges to dismiss frivolous TCPA class actions. Congress enacted the TCPA to redress unwanted and unwelcome robocalls that are vexatious and intrusive. However, in many TCPA actions, the harm alleged is non-existent and does not implicate privacy interests. In such cases, defendants who find themselves in state court should challenge plaintiffs’ statutory standing and highlight the economic motivations underlying the TCPA claim.

Conclusion

In most cases, the benefits of filing a motion to dismiss for lack of Article III standing outweigh the “risk” of ending up in state court. In the best case scenario, the federal dismissal will preclude plaintiffs from filing in state court. Even in the worst case scenario, defendants will have the opportunity to appeal to the state judge’s common sense and attack plaintiffs who seek rewards for non-existent injuries.

About Our TCPA & Consumer Calling Practice

In an economy where timely and effective communication with both current and prospective customers is vital to the success of nearly every business, modern technology, such as autodialers, recorded and artificial voice messages, text messaging, and e-mail provide companies the ability to reach large numbers of people with increasingly smaller up-front costs. But, companies cannot afford to overlook the hidden costs of using these mass communication methods if the many regulations that govern their use are not carefully followed.

Companies have been hit with class action lawsuits under the Telephone Consumer Protection Act (TCPA) for tens or even hundreds of millions of dollars. Mintz Levin's multidisciplinary team work tirelessly to help our clients understand the ever-changing legal landscape and to develop workable and successful solutions. TCPA rules can apply to certain non-sales calls, such as a recorded call to employees about a new work schedule or a text to customers about a new billing system. We advise on how to set up calling campaigns that meet state and federal requirements as well as how the Federal Communications Commission and the Federal Trade Commission apply their rules on calling, faxing, and texting. Given the uncertainties

surrounding the TCPA as a result of the FCC's extensive and confusing rulings, we work with clients across many industries, health care, retail, communications and financial services, on matters relating to the following issues:

Compliance: Our TCPA team routinely advises companies on compliance with federal and state sales and marketing requirements. We also know what type of consumer consent is needed for each type of call and how specific consents must be worded. We know when and how to apply a do-not-call list and when and how an opt-out provision must be afforded.

Consumer class action defense: We've been called upon to handle TCPA class actions across all industries and in federal courts across the nation. Our seasoned litigators know the serial plaintiffs and counsel well and are unfazed by their schemes. Fortunately for our clients, our team has succeeded in winning at the motion stage or earlier in the vast majority of TCPA matters we have defended. That is what truly sets us apart. And if a case must go to trial, we have the experience and strength to follow it to the end.

Insurance coverage disputes: We know the arguments insurers use to deny coverage in TCPA suits because we've defended against them. More important, we have a long track record of convincing carriers to fund the defense of these actions and, in some cases, to pay significant portions of settlements. Our goal is to help secure insurance protection and to see to it that carriers make good on their coverage obligations when a claim arises.