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TCPA & Consumer Calling

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Mintz Levin's TCPA and Consumer Calling Practice team has issued the second installment of its monthly newsletter to continue to keep you informed of the latest regulatory and legislative updates, class action developments, and trends. 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. You can click here to subscribe.

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Part I - TCPA: Regulatory

Calls By or on Behalf of the Federal Government

BY RADHIKA U. BHAT AND RUSSELL H. FOX

A number of organizations filed comments and/or reply comments regarding the **National Consumer Law Center ("NCLC")'s** Petition for Reconsideration of the *Broadnet Declaratory Ruling*, which asks that the FCC reconsider its determination that federal contractors acting as agents of the government are not covered by the TCPA. Below is a summary of the more notable comments and reply comments the Commission received.

- **Comments**
    - **NCLC, Consumers Union,** and the **States of Indiana and Missouri** filed in support of the petition. These commenters echoed points discussed in the initial petition. In particular, they argued that the Commission's determination in the *Broadnet Declaratory Ruling* that contractors acting on behalf of the federal government are not persons covered by sections 227(b)(1) of the TCPA is incorrectly reasoned, not supported by applicable law and contrary to the public interest, and will cause significant harm to consumers. As **NCLC** explained, the ruling appears to have relied on a fundamental misunderstanding of the language and holding in the *Campbell-Ewald Co. v. Gomez* case. NCLC asked that, if the Commission believes it necessary to allow such federal contractors' calls, the Commission should allow those calls only if they are free to the end user and subject to provisions to protect the called party's privacy rights. **Consumers Union** highlighted that the ruling compromises consumers' privacy and their right to protect themselves from unwanted robocalls by potentially opening a broad exemption for unwanted robocalls from federal contractors. Consumers Union also expressed particular concern about the ruling's impact on low-income consumers with limited-minute cell phone plans. **Indiana and Missouri** emphasized the ruling's incompatibility with the congressional intent behind the TCPA, and argued that it fails to give adequate deference to indications from Congress that there is not meant to be a contractor exemption to the TCPA.
    - **Broadnet Teleservices LLC ("Broadnet")**, **Eliza Corporation ("Eliza")**, and **RTI International ("RTI")** filed in opposition to NCLC's petition. Broadnet's rebuttal argued that (1) the ruling does not provide government contractors or others the unfettered ability to autodial wireless phones, as the ruling includes important limitations; (2) there is no evidence that citizens will actually be bombarded with unwanted calls made on behalf of federal government entities, and those entities actually have no incentive to allow conduct on their behalf that will annoy citizens; (3) to the extent that concerns are ever raised, the relevant federal government bodies themselves, rather than the TCPA and the Commission, are best suited to respond directly to citizens' concerns and restrict calling activities made on their behalf; (4) the FCC has already independently acted to restrict calls made to collect a debt owed to or guaranteed by the United States, the calls of most concern, regardless of whether such calls are made on behalf of the federal government; (5) the petition mistakenly challenges the legality of the ruling; and (6) the petition is procedurally defective. **Eliza** emphasized that the ruling was based on reasonable statutory interpretation, longstanding Commission precedent, and the *Gomez* case. **RTI** likewise said that the ruling was supported by a comprehensive record developed over nearly two years, and that NCLC failed to identify any compelling legal or policy reason for the Commission to reconsider the ruling.
- **Reply Comments**
    - **NCLC** filed reply comments in support of its petition. *First*, NCLC argued that real harm to consumers, especially low-income consumers, will result from allowing the unfettered calls requested by government contractors, which consumers will not have the ability to stop. *Second*, while the ruling states that it is only interpreting the word "person" in section 227(b)(1)(A) and applying that interpretation to federal contractors, the ruling provides no logical distinction between the use of "person" in that section, and the use of the word in other sections of the TCPA, nor is there anything to stop courts from using the logic of the ruling to extend the exemption to state contractors. *Third*, if the

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Commission believes that it is necessary to allow these types of calls to be made to cell phones without consent, the Commission has the power to allow these calls only if they are free to the end user. **Robert Biggerstaff** also filed reply comments in support of the petition. Biggerstaff noted that the *Broadnet Declaratory Ruling* is confusing and easily misinterpreted and, at the least, the Commission should stay the decision and clarify it with clear examples of how it intends for the decision to be implemented. Biggerstaff suggested that absent clear instructions from the government to the contrary, a government agent must act in accordance with the TCPA, and that the caller should bear the burden of proof to demonstrate it qualifies for any protection from liability. In addition, the Commission should not presume there is a need for this exemption without evidence from the federal agencies that purportedly need it. **Wireless Research Services, LLC** filed in support to highlight the availability of "free-to-end-user" voice calling technology and the ways to promote such technology.

- **Broadnet** filed reply comments in opposition to the petition, arguing that NCLC has not provided any concrete evidence that the *Broadnet Declaratory Ruling* will lead to consumers receiving new, unwanted, and actually harmful calls by or on behalf of federal government entities. Further, the Commission reasonably determined that context requires that the term "person" include those acting on behalf of the federal government to give force to its determination that the TCPA restrictions do not apply to the federal government. The ruling is also not inconsistent with the Bipartisan Budget Act, as that exemption is based on the purpose of the call, whereas the exemption in the *Broadnet Declaratory Ruling* applies based on the relationship between the caller and the federal government.

NCLC and Robert Biggerstaff filed *ex partes* regarding a meeting between NCLC representatives, Mr. Biggestaff, and staff from the Office of General Counsel, Consumer and Governmental Affairs Bureau, and Office of Strategic Planning. The parties discussed NCLC's Petition for Reconsideration of the *Broadnet Declaratory Ruling* and the issues covered in their comments. NCLC and Mr. Biggerstaff further contended that there will be little additional costs from requiring that government contractors use free to end user technology to make limited calls without consent, and in any event, and cost burden from these calls should fall on the government contractor, not the consumer.

Parties also filed comments on **Professional Services Council's ("PSC")** Petition for Reconsideration of the *Broadnet Declaratory Ruling*, 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.

- **PSC** stated that the Commission's recent *Report and Order* implementing the Budget Act exemption makes it appear the Commission did not knowingly intend its reference to a "common-law agency" analysis to mean anything more or less than (1) acting under a government contract and (2) consistent with the directions of the government. PSC also argued that the Commission should deny the NCLC Petition for Reconsideration and Petition for Stay.

- **NCLC** filed comments opposing the petition, for reasons explained in its own Petition for Reconsideration of the *Broadnet Declaratory Ruling*. If the Commission retains the decision that federal contractors are not persons under section 227(b) of the TCPA, it should not strike the agency relationship requirement because if this requirement is withdrawn from the Commission's ruling, the logic of the ruling would be irreparably undermined. NCLC also argued that the Commission's reliance on *Campbell-Ewald Co. v.*

Gomez is misplaced, as that decision held only that when a federal contractor violates the express instructions provided by the government it is not entitled to any immunity from liability under the TCPA – the existence of "derivative sovereign immunity" was not addressed. **Craig Cunningham**, a frequent TCPA plaintiff, noted that the Supreme Court has made clear that to the extent there exists any immunity for government contractors for following the government's instructions, that immunity does not cover circumstances where the government has instructed the contractor to violate clearly established law.

Calls Concerning Debt

Several organizations and individuals filed comments regarding the **Mortgage Bankers Association ("MBA")** petition to exempt residential mortgage-related calls from the TCPA's prior express consent requirements. Below is a brief overview of notable pleadings filed.

- The **American Bankers Association ("ABA")** and the **American Financial Services Association ("AFSA")** filed in support of the MBA petition. **ABA** argued that, while the TCPA's restrictions had merit in 1991, cell phones are now the primary means of communication for many consumers. With this change in consumer communications preferences, the prior express consent requirement harms mortgage borrowers by making it difficult for servicers to provide information regarding loan workouts and other foreclosure alternatives, as required by the Consumer Financial Protection Bureau. **AFSA** similarly argued that residential mortgage servicing calls are critical to ensuring that borrowers understand what options are available to avoid foreclosure. **HOPE NOW Alliance**, an alliance between counselors, mortgage companies, investors, regulators and other mortgage market participants, noted that loss mitigation calls made by either the servicer or counselor are not pre-recorded, but are instead human-to-human interactions intended to benefit the consumer and mandated by federal and state laws and regulations. Allowing the initial consent to carry through the loan to the servicer or a third party would help alleviate potential confusion and delays. In addition, offering a different and limited exemption for mortgage loans that are owed to or guaranteed by the United States creates an uneven playing field for customers needing assistance.
- Other parties, including **NCLC** and other public interest organizations, as well as various consumer protection-oriented attorneys and law firms filed in opposition to the petition. These organizations generally argued that mortgage servicers already call consumer-debtors far more than they should, routinely violating consumers' requests to stop calling their cell phones. Mortgage servicers' necessary contact with consumer-debtors does not require the use of robocalls. The organizations also provide several examples in their comments to demonstrate that robocalls from mortgage servicers need to be further limited, not further expanded. **Robert Bigerstaff**, an individual filing on his own behalf, also stated that he could find "no law nor any regulation with the force of law that mandated mortgage servicers employ robocalls in contacting borrowers."

MBA also filed a reply in support of its petition. MBA noted that its petition is intended to facilitate live communications between borrowers and their mortgage servicers – communications that are often required by federal regulators. MBA stressed that "the uncertainties and ambiguities of what constitutes an 'automatic telephone dialing system,' revocation of prior express consent, and the lack of actual knowledge of the reassignment of telephone numbers make it almost impossible for mortgage servicers to implement compliance systems that conform to the requirements of both the TCPA and federal and state regulations." Requiring manual dialing for these calls is unrealistic. The timing, frequency and content of mortgage servicing communications are heavily regulated, and consumers would not be left unprotected.

NCLC representatives met with staff from the Office of General Counsel, Consumer and Governmental Affairs Bureau, and Office of Strategic Planning to urge the Commission to reject MBA's petition.

Health Care Calls

Numerous organizations and individuals filed comments in support of the **Anthem**, *et al.* Petition for Expedited Declaratory Ruling and/or Clarification of the TCPA and the *2015 TCPA Order,* which 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." The vast majority of comments filed were in support of the petition. Below is a brief summary of the more notable comments the Commission received.

- Many members of the health insurance industry filed in support. **America's Health Insurance Plans ("AHIP"),** a health insurance trade association, stressed that non-marketing telephone contacts play an important role in efforts by health insurance plans to improve health outcomes for enrollees, and noted that in the case of certain government-funded programs, these communications are often required. The benefits of non-marketing healthcare communications are supported by clinical studies, and health plans have begun to implement innovative communications measures to promote enrollee well-being. **United Healthcare Services, Inc**., echoing the above, also stated that "HIPAA reflects Congress' appreciation that consumers should reasonably expect uniform standards governing the communication and privacy of health information" and as such the Commission should treat communications from HIPAA-regulated entities consistently. With regard to the purpose of the calls, "HIPAA does not recognize any distinction between communications made for treatment purposes on one hand, and those made for operational purposes on the other." **Envision Insurance Company** explained that autodialers have become an invaluable tool for improving medication adherence for enrollees in Medicare Part D Prescription Drug Plans. In addition, it is often difficult to obtain phone numbers for hard-to-reach populations through the normal enrollment processes, and as such plans should be able to use cell phone numbers obtained from any legitimately available source. In addition to discussing many of the points above, **AmeriHealth Caritas** highlighted that cell phones are often the best way to reach the seniors and low income individuals with which it works. The **National Association of Chain Drug Stores** argued that pharmacies provide patients with several types of important healthcare communications; that the FCC should, consistent with past practice, harmonize the *2015 TCPA Order* with HIPAA; and that the FCC should harmonize its decisions and rules internally, as many healthcare calls would qualify as exempt emergency calls. **Cardinal Health, Inc.** asked that the Commission's clarification with regard to prior express consent be broad enough to cover instances in which the number was provided to a covered entity or business associate by another covered entity's business associate (rather than by the other covered entity itself).
- Communications and health technology companies – for example, **Eliza Corporation**, **Silverlink Communications**, and **TracFone Wireless, Inc**. – also filed in support, generally discussing the positive impact patient health communication and engagement have on health outcomes and highlighting that, as written, the *2015 TCPA Order* would negatively impact wireless-only (and often low-income) households and is inconsistent with prior FCC orders and precedent. TracFone further asked that the Commission clarify that "provision of a telephone number to a HIPAA-covered entity or business associate,

'whether by an individual, another covered entity, or a party engaged in an interaction subject to HIPAA'" constitutes prior express consent for all "health care" calls, as "health care" is defined by HIPAA, and not just calls for treatment, payment, or health care operations.

- **Robert Biggerstaff** argued that the petition should be denied unless the Commission also requires that the entity collecting the consumer's phone number expressly provide a clear and conspicuous mechanism at the point of collection that allows the consumer to limit use of his or her phone number.

WellCare Health Plans, Inc. representatives met with advisors to Chairman Wheeler in support of the Anthem, *et al.* Petition and urged the Commission to take swift action.

Part II - TCPA: Litigation

"But it's an email!" — Potential Defense to TCPA Fax Blast Class Actions

BY JOSHUA BRIONES, CRYSTAL LOPEZ, AND GRACE ROSALES

A traditional fax machine is more and more giving way to email "desktop faxing" or efaxing. We know the TCPA covers the former, but does it also cover the latter? Understanding the subtle distinctions to this question and its answer can mean the difference between multimillion dollar liability or no liability.

The FCC's Decision In the Matter of Westfax Inc.

In the *Westfax* Decision,**[1]** the FCC clarified that faxes transmitted by conventional fax machines and converted into email for recipients (efaxes) are subject to the TCPA. The FCC noted that "Efaxes, just like paper faxes, can increase labor costs for businesses, whose employees must monitor the faxes to separate unwanted from desired faxes." The FCC reasoned that efaxes "[a]re sent over telephone lines, which satisfies the statutory requirement that the communication be a fax on the originating end." The FCC's analysis turned on whether the text or images (or both) were transmitted over a telephone line.

Notably, however, the FCC made a critical distinction that fax messages transmitted over the internet are **not** subject to the TCPA. The FCC specifically stated that "a fax sent as an email over the Internet — e.g., a fax attached to an email message or a fax whose content has been pasted into an email message — is not subject to the TCPA." So what about a fax that is not an email, but nevertheless originates digitally and is received by the intended recipient via email?

The Ryerson Petition

In November 2015, the FCC received a petition asking the Commission "to declare that alleged 'faxes' that initiate in digital form and are received in digital form do not fall within the TCPA." The petitioner, Joseph T. Ryerson & Son ("Ryerson"), is a distributor and processor of metals, involved in pending TCPA class action litigation for delivering an Internet fax through a third-party Web portal, which was then received by the intended recipient via email.

The *Ryerson* petition argues Internet faxes that are both sent and received digitally are more closely analogous to an email than a traditional fax and, therefore, should not be governed by the TCPA. The petition contends that

Congress's reasons for enacting the TCPA's fax restrictions (costs associated with the use of fax machines and paper; the time in which fax machines are unable to process actual business communications; and other "interference, interruptions and expense") are less compelling when applied to messages transmitted and received in digital form because "no paper, ink, or toner was used in the alleged transmission, and [the recipient's] phone line was not tied up for incoming business calls or faxes."

The petition also contends that applying the TCPA to digital fax transmissions would violate the First Amendment and would be void for vagueness under the First and Fifth Amendments. The petition argues that nothing in the express language of the TCPA or its legislative history suggests that the statute would or should apply to messages both initiated and received digitally, and thus such application would render the statute unconstitutionally vague.

Thirteen companies and individuals filed comments to the *Ryerson* petition. Comments opposing the petition suggest that even traditional emails are subject to the TCPA as long as they are sent with a system "capable of" sending an advertisement to a fax number. The *Ryerson* petition remains pending.

Practice Pointers

Businesses whose marketing or business practices involve delivering advertisements to consumers do well to consider not using conventional fax machines. Instead, companies might explore the various desktop faxing or efax options available as a way to potentially minimize the specter of a fax blast class action. For businesses already facing a class action, they do well to immediately consider whether the fax(es) at issue in the lawsuit were sent utilizing desktop faxing. If so, defendants have two additional strategies at their disposal: (1) filing a motion to dismiss on the grounds that the plaintiff does not have standing under the TCPA because the fax(es) at issue were digitally transmitted and received; (2) file a motion to stay pending the FCC's decision in *Ryerson*.

Author Biographies

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Grace Rosales is a Senior Analyst and Business Relations Specialist in the Los Angeles office at Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. She works collaboratively with firm clients to understand their business and help meet their legal needs.

Endnote

[1] https://apps.fcc.gov/edocs_public/attachmatch/DA-15-977A1.pdf

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Part III - TCPA: Legislative Updates

Interest Builds in Congress to Revisit the TCPA

BY ALEXANDER HECHT, RACHEL SANFORD NEMETH, AND SAM ROTHBLOOM

Congressional Hearings on the TCPA

Both the House Energy & Commerce Committee and Senate Commerce Committee have shown interest in updating the TCPA by holding hearings on the law. On September 22nd, the House Energy and Commerce Subcommittee on Communications and Technology held a hearing exploring ways to modernize the TCPA. Most of the witnesses argued Congress should clarify the TCPA's requirements for businesses seeking to comply with the law's restrictions on telemarketing. Richard Shockey, Principal of Shockey Consulting, and Shaun W. Mock, Chief Financial Officer of Snapping Shoals Electric Membership Corporation, urged Congress to establish a safe harbor for complying companies and adopt "good faith" provisions. Although members disagreed, mainly along party lines, over some specifics and the scope of possible legislative changes, many of them expressed openness to fine-tuning the law.

In addition, on September 27th, issues related to the TCPA came up during the Senate Commerce Committee's oversight hearing on the Federal Trade Commission. Testifying before the Committee, FTC Chair Edith Ramirez and Commissioner Maureen Ohlhausen pledged to continue to combat illegal robocalls by pursuing fraudulent telemarketers and disseminating educational materials on robocalls to consumers.

The oversight hearing followed a hearing that the Committee held on the TCPA back in May, coinciding with the law's twenty-fifth anniversary. Witnesses before the committee noted some of the legal developments and technological advances that have occurred since the law's passage that may warrant updates to the law. Witnesses discussed a range of issues, including the rise in TCPA litigation, the reassignment of phone numbers, and business' challenges complying with the TCPA. Chairman John Thune (R-SD) advocated that Congress revisit the TCPA and consider potential modifications that would clarify ambiguity for the business community and strengthen consumer protections.

Legislative Proposals to Update the TCPA

In addition to these recent hearings, several pieces of legislation to limit unwanted telephone communications are pending in the U.S. Congress. One of these bills — the Anti-Spoofing Act of 2015 (H.R. 2669) — passed the House Energy and Commerce Committee by voice vote in September. Sponsored by Representatives Grace Meng (D-NY) and Joe Barton (R-TX), H.R. 2669 would close a legal loophole that bad actors exploit to "spoof" (i.e., to present false caller ID information) in order to misrepresent themselves in calls with unsuspecting victims. The bill, which now awaits a vote on the House floor, has a companion in the Senate introduced by Senators Bill Nelson (D-FL), Ranking Member of the Senate Commerce Committee, and Deb Fischer (R-NE). The Nelson-Fischer bill has been referred to the Senate Commerce Committee but has not yet been considered at a markup.

Another pending anti-spoofing bill, the ROBOCOP Act, would require telecommunications carriers to block calls with falsified caller ID. Its House and Senate versions, authored, respectively, by Representative Jackie Speier (D-CA) and Senator Chuck Schumer (D-NY), are pending before the House E&C and Senate Commerce Committees. These bills are the legislative counterpart to the FCC's Robocall Strike Force noted in the regulatory section.

Also, in April of this year, Senator Steve Daines (R-MT), filed an amendment to the FCC Reauthorization Act that would permit companies that have compliance programs monitoring their independent third-party vendors or service providers to cite these measures as an affirmative compliance defense. The proposal stipulates that companies can invoke this defense only if their compliance program requires by contract that its third-party partner complies with the TCPA, implements third-party monitoring and review, and maintains records. Unlike previous TCPA-related proposals, Senator Daines' measure would not deny consumers a private right of action or cap potential damages, nor would it expand any telemarketing allowances under the TCPA. Representatives from industry and consumer groups have met to discuss Senator Daines' legislation. They last met at a multi-

stakeholder session convened by the Council for Better Business Bureaus, which focused on the state of TCPA litigation, the rise of the compliance industry, advances in technology, and specifically, on Senator Daines' legislative language.

Finally, the Professional Association for Customer Engagement (PACE) hosted an annual TCPA summit on September 19-20 in Washington, D.C. PACE is the only non-profit trade organization dedicated exclusively to the advancement of companies that use contact centers as an integral channel of operations. At the summit, speakers discussed a number of TCPA priorities, such as the language in Senator Daines' proposal. Following the conference, PACE and its members companies met with members of Congress and their staff to discuss the TCPA and potential modifications, including Senator Daines' amendment.

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.