

TCPA & Consumer Calling

Monthly TCPA Digest

MAY 2017

We are pleased to present the latest edition of our *Monthly TCPA Digest*, providing insights and news related to the Telephone Consumer Protection Act (TCPA). This month's issue features updates on the latest regulatory activities and an article on a potential ruling that could have major implications for pending and future TCPA cases.

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 reach out to an attorney on Mintz Levin's [TCPA and Consumer Calling Practice team](#).

Part I – TCPA: Regulatory

BY [RADHIKA U. BHAT](#) AND [RUSSELL H. FOX](#)

- The **Consumer and Governmental Affairs Bureau** issued a Public Notice seeking comment on a declaratory ruling filed by All About the Message, LLC (“AATM”), in which it asks that the Commission “declare that the delivery of a voice message directly to a voicemail box does not constitute a call” subject to the TCPA’s prohibitions on autodialers and pre-recorded and artificial voices. Alternatively, AATM seeks a retroactive waiver for AATM and its customers with respect to any voicemail messages it delivered by direct-to-voicemail insertion technology. Comments are due May 18, 2017, and reply comments are due June 2, 2017.
- **Commissioner O’Rielly** spoke at ACA International’s Washington Insights Conference on May 4, 2017. He discussed various reforms to the Commission’s TCPA rules that he hopes to see adopted under the Commission’s new leadership. He stressed that the TCPA was intended to protect consumers from illegal robocalls and abusive calling practices, but that all too often, the Commission’s approach has resulted in wanted or beneficial calls being considered harmful or a nuisance. He argued that (1) with regard to reassigned numbers, companies that follow industry practices to limit stray calls should be able to contact a person until they have actual knowledge that a number has been reassigned; (2) the Commission should not discriminate against valid telemarketing calls or texts from companies that make clear in their disclosures how a consumer’s information will be used and how to stop communications in the future; (3) the Commission should allow companies to include in their terms of service provisions stating that customers may receive promotional calls or texts; (4) the Commission must change the definition of an autodialer so that legitimate companies are not precluded from using modern dialing equipment; (5) the Commission should not prevent companies or government agencies from using third party contractors; (6) any new rules on revocation of consent should be standardized, clear, and convenient for consumers but also consistent with the standard best practices of legitimate companies; and (7) the Commission should focus its efforts on actual instances of harm and on stopping companies that are truly bad actors.

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Part II – TCPA: Class Action and Litigation Updates

BY JOSHUA BRIONES AND ESTEBAN MORALES

In a widely anticipated opinion, the D.C. Circuit has held that the Federal Communications Commission overreached when it required that solicited faxes include specific opt-out notices.^[1] The result will heavily impact the plaintiff's bar moving forward and will end many pending Telephone Consumer Protection Act cases premised on faxes sent with consent that contained allegedly deficient or no opt-out language.

The FCC Overstepped Its Authority

"Believe it or not," wrote Judge Kavanaugh for the majority, "the fax machine is not yet extinct." Harkening to the underlying litigation against Anda, Inc. that ultimately resulted in the opinion, the majority noted that "[m]any of the plaintiff pharmacies in that case admitted that they had expressly given permission to Anda to send fax advertisements But those plaintiffs nevertheless sought over \$150 million in damages from Anda because Anda's fax advertisements allegedly did not include opt-out notices that complied with the Solicited Fax Rule's requirements. Let that soak in for a minute: Anda was potentially on the hook for \$150 million for failing to include opt-out notices on faxes that the recipients had given Anda permission to send."

Before delving into the meat of the argument, the majority noted that the current Chairman of the FCC, Ajit Pai, previously described the FCC's decision to require opt-out language in solicited faxes as the result of "convoluted gymnastics." The D.C. Circuit agreed, pointing out that although the TCPA may require opt-out language for *unsolicited* faxes that in itself did not provide the FCC with authority to require businesses to include opt-out language in *solicited* faxes. The "FCC ... seem[ed] to suggest that the agency may take an action ...so long as Congress has not *prohibited* the agency action in question" but "ha[d] it backwards"—it "may only take action that Congress has *authorized*." With that, the D.C. Circuit vacated a 2014 FCC Order in which the FCC held steadfast to its interpretation of the TCPA.

The Saga Continues ...

Shortly after the decision, a set of intervenors filed a Petition for Rehearing En Banc raising two arguments. First, they claim that although the TCPA did not specifically authorize the FCC to require opt-out language in solicited faxes, the FCC's rule was proper because the TCPA grants the FCC broad general authority. Second, they argue that although Congress may have expressly authorized the FCC to act with respect to unsolicited faxes, this did not necessarily mean the FCC was foreclosed from mandating opt-out language for solicited faxes. On May 5th, the D.C. Circuit issued an order requiring the Defendant-Petitioners and Intervenors to file a joint response by May 22nd.

That a Petition seeking rehearing was filed by serial plaintiffs' attorneys is unsurprising. If the decision stands, it will effectively gut a legion of pending and future TCPA cases – and potential attorneys' fees – premised on allegedly imperfect faxes that were nonetheless sent with consent.

Endnote

[1] *Bais Yaakov of Spring Valley et al. v. F.C.C. and U.S.*, No. 14-1234 (D.C. Cir. filed Mar. 31, 2017 (Dkt. No. 1668739)).



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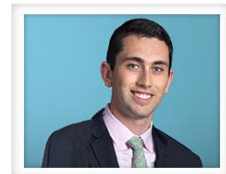
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About Our TCPA & Consumer Calling Practice

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.