

TCPA & Consumer Calling

Monthly TCPA Digest

SEPTEMBER 2017

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Ready for good news about TCPA litigation? In this edition of our *Monthly TCPA Digest* — providing insights on Telephone Consumer Protection Act (TCPA) cases and regulations — we point to a glimmer of hope for businesses. While TCPA litigation has increased by 46% since 2015 and damage claims continue to rise, recent developments suggest that the courts may be edging towards curtailment of the FCC's regulatory reach.

If you have suggestions for topics you'd like us to feature in this newsletter, or any questions about the content in this issue, please feel free to reach out to an attorney on Mintz Levin's [TCPA and Consumer Calling Practice team](#). You can [click here to subscribe to the Monthly TCPA Digest](#).

Part I – TCPA: Regulatory

BY [RADHIKA U. BHAT](#)

Commission Updates

- The **comment cycles** recently concluded on the following notices: (i) a Second Notice of Inquiry in which the Commission sought comment on a means for robocallers to verify whether a phone number has been reassigned from one consumer to another, so that robocallers may avoid inadvertently placing calls to the wrong consumer and incurring TCPA liability; and (ii) a Notice of Inquiry on methods to authenticate the source of telephone calls to reduce caller ID spoofing and unwanted and fraudulent telephone calls.
- The FCC's **Consumer Advisory Committee ("CAC")** this month adopted recommendations on unwanted call blocking. The CAC recommends that the Commission encourage voice service providers to (i) block robocalls in specified circumstances to protect subscribers from suspected illegal robocalls; (ii) block calls when the subscriber to the originating number has requested that calls be blocked; (iii) block calls originating from invalid numbers, numbers not allocated to any provider, and numbers that are allocated to a provider but not assigned to a subscriber, and inform current and potential subscribers of these practices in provider terms of service; and (iv) offer consumers additional optional tools to block robocalls. The CAC also recommends that the FCC (i) encourage stakeholders to work together to develop solutions for unintended blocking of legitimate callers; and (ii) study the implementation and effectiveness of blocking measures adopted.

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- The **Commission** has over the past few months taken a number of enforcement actions against entities that violated the TCPA and the Truth in Caller ID Act – specifically issuing a series of large fines. The FCC proposed a \$120 million fine against Adrian Abramovich for making 96 million spoofed robocalls during a three-month period, proposed an \$82 million fine against Best Insurance Contracts and its owner/operator, Philip Roesel, for making over 21 million spoofed robocalls, and imposed a \$2.88 million fine against Dialing Services, LLC for facilitating unlawful robocalls. Notably, Dialing Services is a platform provider. The FCC, however, determined that Dialing Services was so involved in placing the unlawful calls as to be directly liable for making them.

Part II – TCPA: Class Action & Litigation Updates

D.C. Circuit Reduces the Burden of TCPA Lawsuits. What Will the ACA International Ruling Bring Next?

BY [NICOLE OZERAN](#)

Since July 2015, TCPA litigation has increased 46%. TCPA cases now sprawl across the country, targeting companies in virtually every industry. Federal court dockets are inundated with TCPA claims, and well-intentioned businesses are being dragged into potentially business-ending suits. The behemoth of TCPA litigation seemed unstoppable, as plaintiffs' attorneys continued to bring complaints alleging ever-increasing damages claims.

A ray of hope, however, appeared in March 2017, when the U.S. Court of Appeals for the D.C. Circuit invalidated a 2006 Federal Communications Commission ("FCC") rule requiring businesses to include opt-out notices on fax advertisements sent with the express permission of the recipient. *Bais Yaakov of Spring Valley et al. v. FCC*, 14-1234 (D.C. Cir. Mar. 31, 2017). The D.C. Circuit appeared appalled at what TCPA litigation had become. It noted, "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." *Id.* at 6. It provided reasoning for its opinion, declaring that the "FCC may only take action that Congress has authorized. Congress has not authorized the FCC to require opt-out notices on solicited fax advertisements. And that is all we need to know to resolve this case."

Shortly thereafter, intervenors filed a petition for rehearing en banc, arguing that, for one, the Court's ruling "irreconcilably conflicts ... with binding precedent." Intervenors' Pet. for Reh'g En Banc, No. 14-1234, at 1-4 (D.C. Cir. Apr. 28, 2017). Defendant petitioners and intervenors filed a response to the petition, contending that no "extraordinary circumstances [exist] that would warrant granting [inventors'] request." Class Action Def. Pet'rs' and Intervenors' Resp. to Pet. for Reh'g En Banc, No. 14-1234, at 2 (D.C. Cir. May 19, 2017).

To no one's dismay, the D.C. Circuit denied the petition for rehearing in a one sentence opinion. Order, *Yaakov v. Federal Communications Commission*, No. 14-1234, at 1 (D.C. Cir. June 6, 2017).

On September 5, 2017, Petitioners, as intervenors on the side of the FCC in the proceedings, filed a petition for writ of certiorari with the United States Supreme Court. Pet. Brief, *Bais Yaakov of Spring Valley v. Anda, Inc.*, 2017 WL 3977650 (U.S.), 9. The FCC waived its right to pursue an



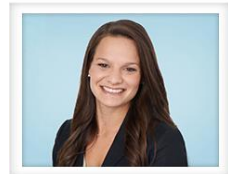
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appeal. Therefore, it appears likely that the March 2017 ruling will remain intact.

Prior to the March 2017 ruling, Plaintiffs' attorneys largely sought to certify classes based on violations of the opt-out notice requirement for solicited faxes because doing so eliminated the inherently individualized issue of whether the fax was solicited or not. Therefore, unsurprisingly, the ruling's abolition of the opt-out notice requirement for solicited faxes was expected to have a profound impact on litigation under the TCPA, disposing of numerous frivolous lawsuits. It was anticipated that plaintiffs' attorneys would shy away from basing their complaints on such allegations, as they would face an increased number of motions to strike class allegations and/or motions to dismiss the complaints for failure to state a claim.

While plaintiffs' attorneys nonetheless continue to press forward with these claims, arguing that the D.C. Circuit Court's ruling is not binding on trial courts outside of Washington D.C., or, alternatively, that the faxes at issue were unsolicited, the *Yaakov* decision is considered a significant victory for businesses. It signals the courts' edging towards curtailment of the FCC's regulatory reach. Whether this curtailment continues will be determined by *ACA International v. FCC*, No. 15-1211 (D.C. Cir.), a second case pending before the D.C. Circuit.

There is hope that *ACA International v. FCC*, No. 15-1211 (D.C. Cir.), will resolve some of the FCC's most controversial interpretations of the TCPA. Specifically, the *ACA International* petitioners challenge (1) the FCC's July 10, 2015 Omnibus Declaratory Ruling and Order's ("2015 Order") definition of "automatic telephone dialing system" ("ATDS"), (2) the regulations outlined in the 2015 Order concerning calling reassigned numbers, and (3) the 2015 Order's guidelines for revocation of consent by called parties.

Definition of Automatic Telephone Dialing System

The TCPA prohibits calls "using any automatic telephone dialing system" to nonconsenting recipients. 42 U.S.C. § 227(b)(A). The TCPA defines ATDS as "equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 42 U.S.C. § 227(a). In its 2015 Order, the FCC defined "capacity" to mean present or potential ability to autodial.

The *ACA International* Petitioners challenge this definition, arguing that this definition is impermissibly vague, ambiguous and overbroad. Pet. Br., pp. 21-39. They allege that the definition is so broad that it includes smartphones, which presently lack the ability to autodial, but could potentially autodial in the future. *Id.*

The FCC, in opposition, argues that this is simply Petitioners' attempt to distract the Court from important issues, and that there have been no actual TCPA suits involving the use of smartphones. Resp. Br., pp. 26-53.

Reassigned Numbers

The 2015 Order also interpreted the statute's term "consent of the called party" to mean the consent of the *current* subscriber of the number. Thus, if the reassigned subscriber of a telephone number did not consent to the call, a well-intentioned company may be in violation of the TCPA when it dials the number.

Petitioners contended that "called party" should instead mean the "expected recipient," and also take issue with the FCC's one-call safe harbor rule. They argue that the rule, which permits callers a single call to discover the reassignment of telephone number before facing liability, is arbitrary

and capricious. Pet. Br., pp. 41-46, 50-53. The FCC argues that one call is a reasonable and balanced approach given the TCPA intention to protect consumers. The FCC further contends that it is the responsibility of companies to perform more diligent searches before calling numbers. Resp. Br., pp. 54-61.

Revoking Consent

Lastly, petitioners challenged the FCC's order regarding revocation of consent. Pet. Br., pp. 54-63. The 2015 Order proclaimed that consent by a called party can be revoked by any means and at any time, i.e., that consumers do not need to comply with a company's specific revocation procedure. Petitioners argue that this is an unworkable rule and that a standardized method of revocation should be established. *Id.*

Despite hearing a lengthy oral argument, and asking detailed questions, the D.C. Circuit panel still has not issued a ruling. As we approach the one-year anniversary of the oral arguments in *ACA*, it is unclear how the Court will rule on the above issues. Plaintiffs' attorneys and businesses in America and abroad impatiently await the Court's decision, as the impending decision will have serious ramifications on TCPA litigation.

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.