

TCPA & Consumer Calling

Monthly TCPA Digest

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BY [JOSHUA BRIONES](#), [RUSSELL FOX](#), [ALEXANDER HECHT](#), [RADHIKA BHAT](#), [JENNIFER L. KELLY](#), [E. CRYSTAL LOPEZ](#), [ESTEBAN MORALES](#), [NICOLE OZERAN](#), AND [GRACE ROSALES](#)

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 examines a ruling from the US Court of Appeals for the Third Circuit, which held that plaintiffs can use affidavits to help meet the standard for TCPA class certification. In addition, we cover a US Senate hearing on the Do Not Call Registry and Commission activity related to robocalls and different aspects of the TCPA's prior express consent requirements.

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

FCC Releases

- **The Federal Communications Commission** ("FCC") released a draft Report and Order which would adopt rules allowing voice service providers to block robocalls that appear to be from telephone numbers that do not or cannot make outgoing calls. The Commission would allow providers to block calls from numbers (i) used only for inbound calls, when the subscriber to the number authorizes it to be blocked; (ii) purportedly originating from invalid numbers under the North American Numbering Plan; or (iii) purportedly originating from numbers that are not allocated by the North American Numbering Plan Administrator or the Pooling Administrator to any provider, or that are allocated but currently unused. Providers would not need consumer consent to block these types of calls or be required to count these blocked calls when calculating their call completion rates on FCC Form 480. The Commission would also clarify that Section 222 of the Communications Act and its implementing rules allow carriers to use, disclose, or permit access to customer proprietary network information for the purposes of robocall traceback, sharing a subscriber's request to block an inbound-only number, and protecting carriers and users from fraudulent, abusive, or unlawful behavior. The Commission is scheduled to vote on adopting the Report and Order at the [November 16, 2017 Open Commission Meeting](#).
- The **Consumer & Governmental Affairs Bureau** issued a Public Notice seeking comment on a petition for declaratory ruling filed by the Credit Union National Association ("CUNA"). CUNA requests that the Commission adopt an established business relationship exemption from the TCPA's prior express consent requirements for

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[Joshua Briones](#), Member



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informational calls made by or on behalf of credit unions to their members. Alternatively, CUNA requests that the Commission exempt such calls from the prior express consent requirements when they are free to the called party. Comments are due November 6, 2017, and reply comments are due November 21, 2017.

Notable Filing

- **ContextMedia, Inc. d/b/a Outcome Health** filed a petition for clarification or declaratory ruling, asking that the Commission clarify or declare that a company making good faith efforts to comply with the TCPA's prior express consent requirements is not subject to liability for noncompliance resulting from an unknown and inadvertent technical error. In its petition, Outcome Health states that despite its comprehensive, good faith efforts to comply with the TCPA, a technical error temporarily prevented some consumers who had subscribed to text messages from Outcome Health from later opting out of those messages via text. Outcome Health claims that this technical glitch was discovered and remedied as soon as a consumer complaint alerted it to a possible problem.

Part II – TCPA: Legislative

Senate Aging Committee Addresses Robocalls

BY [JENNIFER L. KELLY](#) AND [ALEXANDER HECHT](#)

On October 4, the Senate Special Committee on Aging held a hearing to examine why Americans who signed up for the Do Not Call Registry are still receiving robocalls and explored options of what could be done to stop these calls. Witness at the hearing were Lois Greisman, Associate Director, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission; The Hon. Josh Shapiro, Attorney General, State of Pennsylvania; Kevin Rupy, VP for Law & Public Policy, USTelecom; and Genie Barton, President, Better Business Bureau (BBB) Institute for Marketplace Trust.

All four witnesses agreed that increasing consumer education and outreach is essential to prevent seniors from falling victim to scams. Most of the discussion focused on Internal Revenue Service ("IRS") scams and Congress's recent authorization of the IRS's delegation of debt collection calls to third parties. Mr. Shapiro said that 67% of today's seniors are "online" and are the wealthiest generation of seniors. The Pennsylvania Attorney General's office receives 20,000 complaints per year about telephonic scams. IRS scams are at the top of that list. Last year, his office received 881 IRS scam complaints, 62% of which targeted seniors. During the hearing, Chair Collins expressed frustration that although the government has tried to implement rules to cut down on the number of robocalls, they still haven't ended. Ms. Greisman responded that the technology is not up to speed yet because many call authentication methods are still being beta tested. Mr. Shapiro also emphasized that collaboration between local, state, and federal law enforcement was key to tracking down those making robocalls and punishing them.

Part II – TCPA: Class Action & Litigation Updates

Class Certification: Affidavits and Ascertainability Analysis



[Radhika Bhat](#), Associate



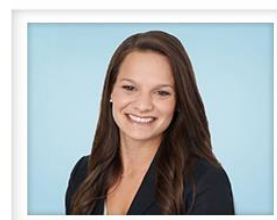
[Jennifer Kelly](#), Member



[E. Crystal Lopez](#), Associate



[Esteban Morales](#), Associate



[Nicole Ozeran](#), Associate



[Grace Rosales](#), Senior Analyst
and Business Relations
Specialist

The US Court of Appeals for the Third Circuit recently vacated a district court's denial of class certification. *City Select Auto Sales Inc. v. BMW Bank of North America Inc.*, 867 F.3d 434 (3d Cir. 2017). The Court rejected the district court's conclusion that Defendant's database, combined with affidavits, could never meet the required ascertainability standard.

In late 2012, Creditsmarts used a vendor to send approximately 21,000 fax advertisements for BMW to car dealerships. However, neither Creditsmarts nor the vendor retained a list of fax recipients. *Id.* at 437. Plaintiff, who allegedly received one of the faxes, filed a complaint asserting TCPA claims on behalf of a putative class consisting of "All auto dealerships that were included in the Creditsmarts database on or before December 27, 2012, with fax numbers identified in the database who were sent one or more telephone facsimile messages between November 20, 2012 and January 1, 2013, that advertised the commercial availability of property, goods or services offered by [BMW]." *Id.*

During the course of class certification discovery, the district court denied Plaintiff's motion to compel production of the Creditsmarts database because Plaintiff (i) previously agreed not to seek production of the database before a ruling on class certification, (ii) delayed in seeking to compel such production, and (iii) had not shown that disclosure of the entire database was necessary for addressing certification, as defendants had already produced exemplar pages from the database. *Id.* & n.1. The district court subsequently denied Plaintiff's motion for class certification, reasoning that there was no reliable and administratively feasible way to determine who was actually sent the faxes at issue. *Id.* at 438.

The Third Circuit vacated the class certification denial, finding that (i) the district court was wrong to hold that affidavits can never be used in the ascertainability analysis, and (ii) the failure to produce Creditsmarts's database in discovery denied Plaintiff of the opportunity to demonstrate the existence of a reliable, administratively feasible method of ascertaining the class based, in whole or in part, on the database. *Id.* at 440-41. Plaintiffs need not establish "that a single record, or set of records, conclusively establishes class membership," but rather must only establish that there are "objective criteria for class membership" and "a reliable and administratively feasible means of determining whether these criteria are met" at the class certification stage. *Id.* at 441. The Court also observed that "[a]ffidavits, in combination with records or other reliable and administratively feasible means," may be one way to meet this standard. *Id.*

Class action plaintiffs may argue that the *City Select* decision weakens the Third Circuit's ascertainability standard for class certification. However, the Third Circuit emphasized that "[t]he determination [of] whether there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition must be tailored to the facts of the particular case," and that "[t]he amount of over-inclusiveness . . . of the proposed records is a critical consideration." *Id.* Further, the court cautioned that "[a]ffidavits from potential class members, standing alone, without 'records to identify class members or a method to weed out unreliable affidavits,' will *not* constitute a reliable and administratively feasible means of determining class membership." *Id.* at 441 (emphasis added).

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.