

TCPA & Consumer Calling

Monthly TCPA Digest

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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 four recent rulings from Seventh Circuit trial courts regarding an FCC rule under the TCPA that mandates opt-out language on solicited faxes, or those sent with the recipient's consent. The first two district court rulings rejected the D.C. Circuit's holding invalidating the rule, while the two most recent rulings upheld the appellate decision. In addition, we cover FCC activity related to robocalls and whether mortgage holders' calls to borrowers in disaster-affected areas violate the TCPA's 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 [RADHIKA U. BHAT](#)

Commission Releases and Actions

- On November 16, 2017, the **Federal Communications Commission** ("FCC") adopted a *Report and Order and Further Notice of Proposed Rulemaking* aimed at combatting illegal robocalls.
 - The newly-adopted rules in the *Report and Order* grant voice service providers the option of blocking robocalls that appear to be from telephone numbers that do not or cannot make outgoing calls. Specifically, rules allow providers to block calls (i) from numbers 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 do not need consumer consent to block these types of calls, and they are not required to count these blocked calls when calculating their call completion rates on FCC Form 480. The rules do not allow providers to block emergency calls. In addition, recognizing the possibility that legitimate calls could be

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unintentionally blocked, the FCC encouraged providers to implement a simple mechanism for subscribers to challenge a blocked number. The FCC further clarified 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.

- In the *Further Notice of Proposed Rulemaking*, the FCC seeks comment on (i) potential mechanisms and requirements to ensure that erroneously blocked calls can be unblocked quickly and without undue harm to callers and consumers; and (ii) ways to measure the effectiveness of the FCC's and industry's robocalling efforts, such as through a reporting obligation. Comments and reply comments are due January 23, 2018, and February 22, 2018, respectively.
- The FCC also directed the Consumer and Governmental Affairs Bureau, in consultation with the Federal Trade Commission's Bureau of Consumer Protection, to prepare a report within a year on the state of robocalling and efforts to combat robocalling in the United States.
- On November 17, 2017, the **Consumer and Governmental Affairs Bureau** issued a Public Notice seeking comment on a request for clarification or, in the alternative, declaratory ruling filed by the Federal Housing Finance Agency ("FHFA"). The FHFA asks that the FCC clarify that calls made by mortgage holders to borrowers in disaster-affected areas, where the called individual previously provided the phone number, do not violate the TCPA's consent requirements. The FHFA petition also suggests that such calls could constitute calls made for emergency purposes under the TCPA, arguing that "mortgage servicers for FHFA's regulated entities need to contact borrowers immediately where they are impacted by declared disasters – regardless of express consent – to provide important information about mortgage assistance." Comments and reply comments are due December 1, 2017, and December 8, 2018, respectively.



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Part II – TCPA: Class Action & Litigation Updates

Solicited Faxes: The Turning Tide in the Seventh Circuit

BY JOSHUA BRIONES, NICOLE OZERAN, AND ESTEBAN MORALES

Earlier this year, the D.C. Circuit in *Bais Yaakov v. FCC*, 852 F.3d 1078 (D.C. Cir. Mar. 31, 2017) invalidated an FCC rule requiring opt-out language on solicited (i.e., sent with consent) faxes under the Telephone Consumer Protection Act. As the Sixth Circuit subsequently noted in *Sandusky Wellness Ctr., LLC v. ASD Speciality Healthcare, Inc.*, 863 F.3d 460 (6th Cir. 2017), because the D.C. Circuit became "the sole forum for addressing . . . the validity of the FCC's rule" in accordance with "the procedural mechanism Congress has provided for challenging agency rules," the decision is binding throughout the country. *Id.* at 467 (internal quotations omitted).

Because of the challenges *Bais Yaakov* now creates – particularly at class certification – the plaintiffs' bar has predictably contended that *Bais Yaakov* is not binding outside of the D.C. Circuit.

Though fundamentally at odds with the Sixth Circuit's reasoning in *Sandusky*, the argument initially gained some traction in the Seventh Circuit. In *Physicians Healthsource, Inc. v. Allscripts Health Sols.*, No. 12 C 3233, 2017 U.S. Dist. LEXIS 84689 (N.D. Ill. June 2, 2017), for example, the Northern District of Illinois determined that as a result of a prior appellate holding that "did not even mention the FCC rule, but relied exclusively on the statute, itself," the D.C. Circuit's ruling was not controlling. *Id.* at *7 (relying on *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682 (7th Cir. 2013)). Similarly, in *Orrington v. Scion Dental, Inc.*, No. 17-CV-00884, 2017 U.S. Dist. LEXIS 104101 (N.D. Ill. July 6, 2017), the Northern District of Illinois again held that "under binding Seventh Circuit precedent, opt-out notices are still required under the TCPA, even for solicited faxes." *Id.* at *6.

Two decisions in the Northern District of Illinois have now bucked the trend. Most recently, in *Alpha Tech Pet, Inc. v. Lagasse, LLC*, Nos. 16 C 513 and 16 C 4321, 2017 U.S. Dist. LEXIS 182499 (N.D. Ill. Nov. 3, 2017), the Northern District of Illinois granted a motion to deny class certification as a result of *Bais Yaakov*. Following *Sandusky's* lead, the court concluded that because petitions challenging the Solicited Fax Rule had been consolidated in the D.C. Circuit, the D.C. Circuit's decision striking down the Solicited Fax Rule became binding elsewhere. *Id.* at *7.

Notably, the court refused to follow *Turza*, on which *Physicians Healthsource* and *Orrington* relied, because its broad reading espoused by plaintiffs' counsel "is not the law." *Alpha Tech*, 2017 U.S. Dist. LEXIS 182499 at *9 (internal quotations omitted). And in doing so, *Alpha Tech* pointed to *Brodsky v. Humanadental Ins. Co.*, No. 10-cv-03233, 2017 U.S. Dist. LEXIS 137608 (N.D. Ill. Aug. 28, 2017), the first decision in the Northern District of Illinois to disagree with *Physicians Healthsource* and *Orrington*. Quoting from *Brodsky*, the court pointed out that "[t]he absence of a specific cite to the Solicited Fax Rule [in *Turza*] cannot be read out of context." *Id.* at *10. "The portions of the TCPA cited at this point in *Turza* never mention solicited messages at all; instead, they refer to the FCC's ability to promulgate additional rules regarding opt-out notices (such as the Solicited Fax Rule)." *Id.* (internal quotations omitted). Moreover, "*Turza* did not even involve solicited faxes; [t]he only question on the merits [wa]s whether' unsolicited faxes 'contained ads.' *Turza*, 728 F.3d at 685." *Id.* at *10.

Consequently, the *Alpha Tech* court determined that "[t]he holding in *Bais Yaakov* striking down the Solicited Fax Rule is controlling here. And even if it was not controlling, this Court finds its holding persuasive and would follow it." *Id.* at *11. Applying *Bais Yaakov*, the court went on to find that "to determine whether any putative member of the proposed class had a TCPA claim, the Court would first be required to determine whether that proposed class member 'solicited,' or consented to, 'the faxes it received.'" *Id.* at *12 (citations omitted). Relying on "consent-related evidence," the court held that the requisite individualized inquiry doomed plaintiffs' claim – "the evidence produced by defendants shows that assessing consent would require 'manually cross-checking' the thousands of identified 'consent forms' and 25,000 fax numbers in the . . . database [at issue] 'against the [many thousands of] potential class members.'" *Id.* at *16. Though plaintiffs' counsel may argue the law is unsettled, the tide in the Seventh Circuit at the district court level is shifting toward recognition that *Bais Yaakov* is binding there and across the country.

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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.



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