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TCPA & Consumer Calling

# Monthly TCPA Digest

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Greetings from our TCPA & Consumer Calling team at Mintz Levin. In this issue of our newsletter, we cover recent TCPA regulatory, litigation, and judicial developments. Our **Regulatory Update** features a discussion on the *Second Further Notice of Proposed Rulemaking* (FNPRM) released by the FCC earlier this month. The FNPRM proposes the creation of a database of reassigned phone numbers. By making it easier for businesses to check which numbers have been reassigned to new owners, the database could cut down on unwanted robocalls. In our **Class Action & Litigation Update**, we feature an article on the status of post-*Spokeo* challenges to Article III standing in TCPA cases. Following a recent ruling by the Ninth Circuit, many are hoping the Supreme Court will grant certiorari to develop and clarify pleading requirements. Finally, in our **Judicial Update**, we report on the release of a long-awaited decision on an appeal of the 2015 TCPA Declaratory Ruling and Order.

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*.

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## Part I – TCPA: Regulatory Update

### FCC Releases *Second Further Notice of Proposed Rulemaking*

BY RUSSELL H. FOX AND ELANA R. SAFNER

On March 1, 2018, the Federal Communications Commission ("FCC" or "Commission") released a draft *Second Further Notice of Proposed Rulemaking* ("FNPRM") aimed at combatting illegal robocalls through use of a reassigned numbers database. The full Commission will vote on whether to adopt the FNPRM at its monthly meeting on March 22, 2018.

The draft FNPRM addresses one of the fronts in the Commission's battle against unwanted robocalls – reassigned numbers. When a consumer disconnects her number, and that number is later reassigned to a different consumer, businesses to which the original consumer gave prior express calling consent frequently have no way to learn of the reassignment. This leads to annoying and unsolicited calls to the number's new owner, and exposes legitimate businesses to potential liability as well as wastes their time and resources. While the TCPA was amended in 2015 to include a one-call safe harbor for calls made to reassigned numbers, businesses still lack the information they need to determine if a number has been reassigned in the event that the new owner of the number does not answer the call or does not indicate to the business that the number has been reassigned. In the draft FNPRM, the Commission attempts to address this issue by proposing the creation of a comprehensive and current database of reassigned numbers. This proposal, which was raised previously in the *July 2017 Reassigned Numbers Notice of Inquiry* as a response to the concerns of businesses that there was no guaranteed method to discover all reassignments, received broad support from a range of commenters, including callers and associated trade organizations, consumer groups, cable and Voice over Internet Protocol ("VoIP") service providers, and data aggregators.

The draft FNPRM would seek comment on the type of information that should be included in the reassigned number database in order to be useful to callers. It would also seek comment on how service providers should report that information and how callers should access it, as well as how comprehensive and timely the database should be. The Commission would consider three different options for compiling the database:

1. Requiring service providers to report reassigned number information to a single, FCC-designated database;
2. Requiring service providers to report that information to one or more commercial data aggregators; or
3. Allowing service providers to report that information to commercial data aggregators on a voluntary basis.

The Commission would also seek comment on whether and how it should adopt a safe harbor from liability under the TCPA for callers who use the reassigned numbers database. Finally, the Commission would ask how such a safe harbor would interact with the private right of action under the TCPA.

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**Notable Filing**

On February 19, 2018, Inovalon, Inc. ("Inovalon"), a cloud-enabled healthcare platform, filed a *Petition for Expedited Declaratory Ruling Clarifying Unsolicited Advertisement Provision of Telephone Consumer Protection Act and Junk Fax Prevention Act*. Inovalon asks the Commission to clarify that faxes sent by the designee of a health plan to a patient's medical provider, pursuant to an established business relationship between the health plan and provider, requesting patient medical records are not "unsolicited advertisements" subject to TCPA or Junk Fax Prevention Act liability. It also asks the Commission to find that faxes offering the free collection and/or digitization of patient medical records, and which do not offer any commercially available product or service to the recipients, are not advertisements under the TCPA. The Commission has not yet responded to the petition.

## Part II – TCPA: Class Action & Litigation Update

### Are Post-*Spokeo* Challenges to Article III Standing in TCPA Cases Dead?

BY JOSHUA BRIONES

The U.S. Supreme Court's *Spokeo v. Robins* decision held that plaintiffs do not have standing to sue under Article III based solely on technical violations of the Fair Credit Reporting Act. Ever since the Supreme Court's 2016 decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1536, defendants have filed motions to dismiss putative TCPA class actions for lack of subject-matter jurisdiction. But while defendants have argued in such cases that a single call (or text or fax), without more, is not enough to qualify as a "concrete" injury for Article III standing purposes, the argument has not gained significant traction. *See Manuel v. NRA Group LLC*, 2018 WL 388622 (3d Cir. Jan. 12, 2018); *Susinno v. Work Out World Inc.*, 862 F.3d 346 (3d Cir. 2017); *Florence Endocrine Clinic, PLLC*, 858 F.3d 1362 (11th Cir. 2017); *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037 (9th Cir. 2017); *Hossfeld v. Compass Bank*, 2017 WL 5068752 (N.D. Ala. Nov. 3, 2017). *But see Winner v. Kohl's Dep't Stores, Inc.*, 2017 WL 3535038 (E.D. Pa. Aug. 17, 2017) (granting Rule 12(b)(1) motion to dismiss for lack of standing in TCPA case where the plaintiff had consented to receive the defendant's commercial text messages).

The Ninth Circuit recently threw a wrench in the mix with its ruling on remand of *Spokeo* that the plaintiff's alleged injury was sufficiently concrete to meet the court's new standard. *Spokeo* petitioned for certiorari again. It argued that there has been "widespread confusion" in application of the standing requirements and that the plaintiff's injuries in *Spokeo* are too speculative. That confusion is well-illustrated by the fact that on a single day in January of this year, the Third Circuit revived a putative class action under the FCRA based on a data breach with no alleged misuse of the data (*In re Horizon Healthcare Services, Inc.*), and the Seventh Circuit affirmed dismissal of a class action under the Cable Communications Policy Act because former customers had not alleged any concrete injury stemming from improper retention of personal information. (*Gubala v. Time Warner Cable).*

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We hope that the Supreme Court grants certiorari to develop and clarify the "concrete and particularized" pleading requirements of Article III standing as soon as another case with a similar issue is before the court.

## Part III – TCPA: Judicial Update

### "You're Only Half Right!" – D.C. Court Sets Aside Commission's Ruling on Two Issues, Upholds Its Position on Two Others

BY JOSHUA BRIONES, RUSSELL H. FOX, ARAMEH O'BOYLE, ESTEBAN MORALES, AND ELANA R. SAFNER

The U.S. Court of Appeals for the District of Columbia released its long-awaited opinion on the Telephone Consumer Protection Act ("TCPA"), reversing in part and upholding in part the Federal Communications Commission ("FCC") 2015 TCPA Declaratory Ruling and Order ("*2015 R&O*"). The *2015 R&O*, decided under former FCC Chairman Tom Wheeler, was met with some controversy – particularly surrounding its expansive interpretation of what constitutes an Automatic Telephone Dialing System ("ATDS") – and drew vigorous dissents from then-minority Commissioners Ajit Pai and Michael O'Rielly.

Four main issues were raised in the appeal of the *2015 R&O*: 1) the FCC's determination regarding the equipment that constitutes an ATDS; 2) the FCC's approach to reassigned numbers; 3) the FCC's approach to the revocation of consent; and 4) the scope of the FCC's exemption for time-sensitive healthcare communications. The Court set aside the FCC's ruling on the first two issues and upheld its position on the final two.

**1. Devices that Constitute an ATDS**

The TCPA generally makes it unlawful to call wireless numbers using an ATDS, unless the caller obtains prior express consent from the called party. The statute defines an 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." In its *2015 R&O*, the FCC determined that "capacity" means not only present capacity, but also "potential functionalities" or "future possibility." This interpretation had the impact of broadening the scope of equipment subject to the TCPA to potentially sweep in all common smartphones, which had the "capacity" to become autodialers with basic modifications such as software and application downloads. A number of parties and the dissenting Commissioners specifically raised this issue, arguing that mere text messages from a personal iPhone could be subject to the minimum $500 penalty. The FCC responded not by disputing the concerns, but by accepting this conclusion.

Despite its position in the *2015 R&O*, the Commission argued to the Court that the *2015 R&O* left open the possibility that smartphones did *not* meet the definition of an ATDS. The Court found that, because the Commission's *2015 R&O* could not reasonably be read to support this conclusion, the Commission's position is "arbitrary and capricious" under the *Chevron* framework.

The Court also found that the *2015 R&O* did not provide clear guidance on ATDS actions that constitute TCPA violations – whether a device must have the *capacity* to generate lists of random or

sequential numbers, or actually dial them. It found the competing FCC views on this question in past TCPA orders failed the requirement of reasoned decision making, and set aside the Commission's findings.

**2. Calls to Reassigned Numbers**

The FCC found in the *2015 R&O* that calls to reassigned numbers violated the TCPA, except for a one-call, post-reassignment safe harbor. Although the Court agreed that the FCC could interpret the TCPA to prohibit calls without consent to the "called party" rather than the "intended recipient," it set aside the FCC's interpretation on the grounds that the one-call safe harbor was arbitrary and capricious.

The FCC had earlier declined to adopt a strict liability standard for reassigned numbers because it interpreted a caller's ability under the statute to rely on a recipient's prior express consent to mean "reasonable reliance." Yet the one-call safe harbor, the Court concluded, is inconsistent with the reasonable reliance approach because the first call or text may give the caller absolutely no indication that the number has in fact been reassigned. In such a case, the Court determined, "a caller's reasonable reliance on the previous subscriber's consent would be just as reasonable for a second call." Because the FCC gave no reasoned "explanation of why its safe harbor stopped at the seemingly arbitrary point of a single call or message," the Court set aside the one-call safe harbor, and hence the FCC's broader approach to reassigned number liability under the TCPA.

**3. Revocation of Consent**

In the *2015 R&O*, the FCC found that "a called party may revoke consent at any time and through any reasonable means"—orally or in writing—"that clearly expresses a desire not to receive further messages." The Court upheld this "reasonable means standard," rejecting arguments that the uncertainty in revocation methods will force callers to take exorbitant precautions. The Court pointed out that creating clearly defined and easy-to-use standard opt-out methods will reduce efforts by consumers to sidestep such methods in favor of idiosyncratic ways of revoking consent, and if they do, that choice might well be seen as unreasonable, shielding the caller from liability. The Court noted that the FCC did not address whether callers and called parties could contractually agree on acceptable revocation procedures.

**4. Wireless Healthcare Communications**

The *2015 R&O* established an exemption from the TCPA's prior consent requirement for certain healthcare-related calls to wireless numbers. The FCC limited this exemption to "calls for which there is exigency and that have a healthcare treatment purpose, specifically: appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, and home healthcare instructions." It explicitly chose not to exempt healthcare-related telemarketing, solicitation, billing, and other financial content. Seeking to also exempt additional healthcare communications such as medical billing, Rite Aid challenged this exemption, arguing that the Commission improperly limited its scope, leading to a conflict with the Health Insurance Portability and Accountability Act ("HIPAA"). The Court upheld the scope of the FCC's exemption, finding that the TCPA operates on its own force, and the FCC was not required to exempt

communications merely because they are permissible under HIPAA. The Court also found that it was acceptable to have different approaches to calls made to wireline and wireless phones.

## 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.

 