

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 we consider the Ninth Circuit's pending *Crunch* ruling and how the decision may affect parties defending TCPA cases. You'll find the story in our Class Action & Litigation Update. Our Legislative Update offers a quick review of the recent US House and Senate hearings on illegal robocalls. For a roundup of TCPA-related developments at the FCC, please see our Regulatory Update.

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 & Consumer Calling Practice Team](#). You can [click here to subscribe to the Monthly TCPA Digest](#).

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Part I – TCPA: Regulatory Update

BY [RUSSELL H. FOX](#) AND [ELANA R. SAFNER](#)

Second FNPRM Comment Deadline Set

Comments on the FCC's [Second Further Notice of Proposed Rulemaking](#) (FNPRM) are due on June 7, and replies are due by July 9. The second FNPRM was adopted at the March Commission Meeting and seeks input on the adoption of a reassigned numbers database that businesses could check to avoid making unwanted calls to a new subscriber whose number was previously assigned to a consumer who had consented to receiving their calls.

FCC-FTC Joint Expo on Technological Solutions to Stop Illegal Robocalls

On April 23, the FCC and FTC hosted a [joint expo](#) aimed at stopping illegal robocalls through technological solutions. The expo showcased innovative technologies, devices, and applications that minimize or eliminate the number of illegal robocalls consumers receive. The expo was held one month after the FCC and FTC's Joint Policy Forum on fighting illegal robocalls, and in between the Senate Commerce and House Energy & Commerce Committee hearings on the same topic. The expo featured many prominent exhibitors, including service providers such as AT&T, Comcast, T-Mobile, and Verizon, as well as third party developers offering unique solutions. Some of the exhibitors, such as First Orion Corp. and Nomorobo, also testified at the House Energy and Commerce [hearing](#) on April 27. Opening remarks were presented by FTC Chief of Staff Svetlana Gans and FCC Chief of Staff Matthew Berry, who [summarized](#) recent legislative developments and emphasized the need for collaboration between the FCC and FTC.

NANC Presents Call Authentication Report to FCC

The North American Numbering Council (NANC), a federal advisory committee established by the FCC, delivered a call authentication [report](#) to the FCC on May 3. The report was developed by the Call Authentication Trust Anchor Working Group (CATA WG) and approved by NANC on April 27. It "details a framework for call authentication that can more quickly be established than various alternatives, while obtaining the broadest participation of industry." The report recommends that over the next year, industry should set up a governance authority and identify a policy administrator to oversee the industry-developed "SHAKEN/STIR" framework and protocols for authenticating calls. According to the report, an industry-developed governance authority can begin work immediately without an FCC rulemaking, and will have the flexibility to respond to evolving threats.

"SHAKEN/STIR" is an acronym for Signature-based Handling of Asserted Information Using toKENs (Shaken) and Secure Telephone Identity Revisited (Stir). The SHAKEN procedures utilize STIR protocols to allow communications service providers to cryptographically "sign" with a trusted Secure Telephone Identity certificate in a way that allows verification of the caller's information. As the NANC report explains, "SHAKEN/STIR provides the foundation for the development of a real-time authentication of a telephone number which can prevent illegal spoofing and robocalling by identifying any number that cannot be sufficiently attested."

The report identifies actions the Commission may wish to take to ensure that milestones and timelines are met, but does not propose a specific deadline for provider adoption of the framework.



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This report responds to the FCC's July 14, 2017 Notice of Inquiry seeking comment on the FCC's role in promoting the SHAKEN/STIR framework, and directing CATA WG to investigate various issues associated with the SHAKEN/STIR system. NANC will consider separate draft reports on nationwide number portability and toll-free number assignment modernization at a May 29 meeting, and submit final versions to the FCC by June 7.

Notable Filings

On May 3, the Peer-to-Peer Alliance (P2P Alliance) filed a [Petition for Clarification](#) asking the FCC to clarify that P2P text messages to mobile numbers are not subject to TCPA restrictions. It explained that P2P messaging is often used by universities, nonprofits, businesses, and political organizations to communicate with individuals with whom they already have a relationship. Additionally, all messages "transmitted using a P2P platform must be individually sent from a single sender to a single recipient." P2P Alliance therefore contends that 1) "P2P text messaging does not involve the use of equipment that constitutes an automatic telephone dialing system," 2) P2P non-political messages involve a prior relationship between the parties and consent to receive messages, and 3) P2P political messages are "manually dialed by an individual and do include not (sic) 'telephone solicitations' as defined by the TCPA." The Commission has yet to respond.



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Part II – TCPA: Class Action and Litigation Update

Autodialers in the Ninth Circuit: Strategies and Considerations in Light of *ACA and Crunch*

BY [ESTEBAN MORALES](#)

As we wrote in a [previous post](#), on March 16, 2018 the US Court of Appeals for the District of Columbia Circuit released its highly anticipated decision in *ACA International v. Federal Communications Commission*. Among other things, the DC Circuit set aside the Commission's explanation of which devices qualified as Automatic Telephone Dialing Systems under the Telephone Consumer Protection Act. Though the decision has been out for less than two months, courts in the Ninth Circuit have taken notice.

Days after the opinion was released, the Ninth Circuit asked the parties in *Marks v. Crunch San Diego, LLC*, No. 14-56834, to submit a supplemental briefing "addressing the effect, if any, of *ACA International* [] on the issues raised in this case." The appeal stems from an October 2014 decision by the US District Court for the Southern District of California granting summary judgment in favor of the defendant on the ATDS issue. Crunch argued that the technology at the center of the case is not an ATDS because it did not have the capacity to create telephone numbers. The Court agreed, noting that the language of the statute is clear and that the FCC does not have the authority to modify that language.^[1] "If the statute meant to only require that an ATDS include any list or database of numbers, it would simply define ATDS as a system with 'the capacity to store or produce numbers to be called'; 'random or sequential number generator' would be rendered superfluous."^[2] Because the system at issue did not have the present capacity (or potential capacity

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since it was a third-party platform) to generate telephone numbers, it did not qualify as an ATDS.^[3] The supplemental briefing requested by the Ninth Circuit has now been completed and non-party Sirius XM Radio was also allowed to submit an amicus brief in line with Crunch's position.

At least one district court in the Ninth Circuit, however, has decided not to wait for a decision in *Crunch*. On March 30, 2018, the US District Court for the District of Nevada granted the defendant's motion for summary judgment in *Marshall v. CBE Group, Inc.*, No. 2:16-cv-02406, concluding that the technology at issue was not an ATDS.^[4] The Court took note of *ACA International* and "in light of th[e] ruling [did] not stray from the statute's language which mandates that the focus be on whether the equipment has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator."^[5] At issue in the case was "a Manual Clicker Application ('MCA'), which is a web-based software by which a CBE agent clicks a bull's-eye on a computer screen and a call is placed. [It] works in conjunction with LiveVox, a cloud-based connectivity pass-through [] connecting a CBE agent with the person to whom the call is placed."^[6] Without more, concluded the Court, there was no genuine issue of material fact that the system at issue did not have the capacity to operate as an ATDS.

In light of the pending issues in *Crunch*, parties in the Ninth Circuit defending TCPA cases should consider whether to try and stay their cases pending the Ninth Circuit's forthcoming decision. As demonstrated by *CBE Group*, however, parties need to also consider the forum in which they are litigating and the posture of their case, as it may be advantageous to continue litigating the merits.

Endnotes

1 *Marks v. Crunch San Diego, LLC*, 55 F.Supp.3d 1288, 1291 (S.D. Cal. 2014).

2 *Id.* at 1292.

3 *Id.*

4 *Marshall v. CBE Grp., Inc.*, No. 2:16-cv-02406-GMN-NJK, 2018 U.S. Dist. LEXIS 55223 (D. Nev. Mar. 30, 2018).

5 *Id.* at *12 (internal quotations omitted).

6 *Id.* at *12-*13.

Part III – TCPA: Legislative Update

House and Senate Hold Hearings on Illegal Robocalls

BY [ALEX HECHT](#) AND [JENNIFER LYNN KELLY](#)

Every month, robocalls make up the majority of Do Not Call registry complaints at the Federal Trade Commission (FTC). The FCC estimated that in March 2018 approximately 3 billion robocalls were placed. In an effort to combat these illegal robocalls, the Senate Commerce Committee and the

House Energy & Commerce Committee each held a hearing regarding these illegal robocalls and asked witnesses for ideas on how to combat this rampant problem.

Actions in the Senate

On April 18, the Senate Commerce Committee held a hearing entitled, "Abusive Robocalls and How We Can Stop Them," focused on ongoing public and private efforts that have been made to address robocalls, as well as emerging challenges of preventing robocalls. The first panel featured Mr. Adrian Abramovich, who testified about the 2017 FCC action against him, which resulted in a fine of \$120 million for illegal spoofing. Throughout the questioning, lawmakers were very clear that one of the FCC's primary jobs is protecting consumers from illegal robocalls and voiced support for the fines levied on Mr. Abramovich, even though many times Mr. Abramovich invoked his Fifth Amendment rights and refused to answer the Committee's questions. In Mr. Abramovich's brief statements, he did discuss how smaller VoIP providers enable robocalls by specifically marketing that they allow them. Many lawmakers later noted that carriers that allowed and marketed for these types of callers were compromising the privacy of families across America.

The second panel of witnesses to the hearing featured Ms. Lois Greisman, Associate Director of the Marketing Practices Division at the FTC; Ms. Rosemary Harold, Chief of the Enforcement Bureau at the FCC; Mr. Scott Delacourt, a representative of the US Chamber of Commerce; Mr. Kevin Rupy, Vice President of Law and Policy for the US Telecom Association; and Ms. Margot Saunders, Senior Counsel at the National Consumer Law Center. During their testimonies, each of the witnesses described the harm illegal robocalls can have on unsuspecting customers and challenges of preventing these calls. Ms. Greisman noted that the FTC has been asking Congress for over a decade to repeal the common carrier exemption because it impedes the FTC's ability to provide robust enforcement regarding robocalls. Many of the witnesses agreed that advances in technology have made it more difficult for the government to track down illegal robocallers. Ms. Harold mentioned that the recently passed omnibus includes language that allows the FCC to go after bad actors in other countries, which is a good starting point in preventing illegal robocalls.

During the hearing, Sen. Blumenthal (D-CT), along with five other Democrats, announced the introduction of the Repeated Objectionable Bothering of Consumers of Phones (ROBOCOP) Act. This legislation would direct the FCC to require phone companies to offer free tools to block robocalls and verify that caller ID information is accurate, and authorize the FCC to create a nationwide system to ensure consumers are in control of the calls and texts they receive as well as giving consumers a right of action against carriers that violate the law. Rep. Jackie Speier (D-CA) introduced companion legislation in the House.

Also introduced on April 18 was the Robocall Enforcement Enhancement Act of 2018, by Sen. Brian Schatz (D-HI) along with eleven Democratic cosponsors. The legislation seeks to help the FCC prosecute violations of the automated telemarketing rules by increasing the statute of limitations from one to three years. It also extends the statute of limitations in regards to spoofing, or using false caller ID. There is currently no House companion bill.

Actions in the House

On April 27, the House Energy and Commerce's Subcommittee on Digital Commerce and Consumer Protection held a hearing entitled, "Do Not Call: Combating Robocalls and Caller ID

Spoofing.” This hearing featured testimony from Mr. Aaron Foss, Founder of Nomorobo; Mr. Ethan Garr, Chief Product Officer of RoboKiller; Mr. Scott Hambuchen, Executive Vice President of Technology and Solution Development for First Orion Corp.; and Ms. Maureen Mahoney, Policy Analyst at Consumers Union. Mr. Garr and Mr. Foss both discussed the challenges their companies faced in preventing robocalls and getting consumers and carriers to use their technology. The witnesses all agreed that Congress should play a role in ensuring that the FCC has the tools it needs to prevent illegal robocalls.

During the hearing, Ranking Member Frank Pallone, Jr. (D-NJ) mentioned that he had released the Stopping Bad Robocalls Act discussion draft, which would give the FCC more enforcement tools to use against robocallers. He also announced the introduction of Rep. Anna Eshoo’s (D-CA) HANGUP Act, which would require federal debt collectors to get consumers’ permission before robocalling them to collect on a debt, as well as a discussion draft of the CEASE Robocalls Act introduced by Rep. Debbie Dingell (D-MI), which would lift the common carrier exemption in the FTC Act to permit the FTC to bring enforcement actions against telecom carriers and VoIP providers when they engage in deceptive practices with respect to illegal robocalls.

Lawmakers at these hearings urged the FCC to continue enforcing current rules that work to prevent robocalls and spoofing, and encouraged the FCC to share ideas of how they can improve consumer protections against robocalls. We will continue to monitor any legislation related to the TCPA that moves through Congress.

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

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