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Top 10 TCPA Highlights of 2019

The Year That Was

Overview

Will 2019 prove to be a "year of miracles" (*annus mirabilis*) or a"horrible year" (*annus horibilis*) regarding the Telephone Consumer Protection Act (TCPA)? Only time will tell. But, in the meantime, we can recount the top ten most important TCPA-related events and developments of 2019.

The table below includes hyperlinks to additional information about each of these highlights from DNC.com.

Did You Know?

More than 3,200 TCPA lawsuits were filed in 2019, with nearly one third of those being class actions.

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Top 10 TCPA Highlights of 2019

1 TRACED Act Signed Into Law

The most significant TCPA development of the year was when President Donald Trump signed the TRACED Act into law on December 30, 2019. The bill had passed both houses of Congress with near-unanimous, bipartisan support. The act—whose name is an acronym for Telephone Robocall Abuse Criminal Enforcement and Deterrence—is a major piece of new legislation overhauling the regulation of robocalls.

The TRACED ACT modifies sections of the TCPA, which is itself an amendment to the Communications Act of 1934, codified as 47 U.S.C. § 227.

The law requires telephone carriers to implement no-cost call-authentication and robocall technology. It also includes a number of provisions specifically geared toward Federal Communications Commission (FCC) enforcement, including:

- A requirement to enact rulemaking to prevent consumers from receiving unwanted calls or texts from unauthenticated numbers
- An extension of the statute of limitations from one year to four years for FCC enforcement of illegal robocall violations
- An authorization of FCC penalties of up to $10,000 per call for violations
- A requirement for the FCC to provide an annual report to Congress on the enforcement of robocall regulations
- A requirement to convene an interagency task force with the Federal Trade Commission (FTC), Department of Justice, Department of Commerce, State Department, Department of Homeland Security, Consumer Financial Protection Bureau (CFPB), and state attorneys general to study government prosecution of robocall violations

The bill will likely guide how the TCPA regulates robocalls for the foreseeable future.

Did You Know?

The TRACED Act was sponsored by South Dakota Republican Senator John Thune and New Jersey Democratic Congressman Frank Pallone.

2 Pennsylvania, California, Mississippi, Indiana, and New York Pass New Telemarketing Regulations

In addition to the major federal legislation, legislative reforms to telemarketing regulations occurred at the state level in 2019. Like the TRACED Act, these bills largely focused on robocalls. But they also included such provisions as updates to state Do Not Call (DNC) restrictions, disclosure requirements, prohibitions against calls on holidays, and other reforms. Callers would be well served to familiarize themselves with the specific details of these laws if they intend to call any of these states.

3 FCC Delays Implementation of Recycled Number Database

In December 2018, the FCC announced a plan to create a reassigned number database. Callers would be able to scrub their number lists against this database in order to remove any numbers that have been reassigned to new users, thus decreasing the possibility of incurring TCPA violations by calling these new users. Additionally, there would be a safe harbor as long as callers conduct scrubs from the database every 30 days. This database was scheduled to be available sometime in 2019 but delays plagued the process. Problems relating to the technical aspects of the database caused the FCC to delay the implementation until sometime in mid-2020.

4 CFPB Update Could Allow Unlimited Texts and Emails to Consumers

While not technically a TCPA development, the CFPB proposed a rule change in 2019 regarding debt collection that is TCPA-adjacent. The rule change would relate to the Fair Debt Collection Practices Act (FDCPA) and could allow debt collectors to send unlimited text messages, emails, and private messages on social media. The public comment period ended in September 2019 and a final decision on this rule change, known as Regulation F, could come some time next year.

Caution

The FCC's 2015 TCPA Omnibus Declaratory Ruling and Order established a one-call safe harbor for reassigned phone numbers. In 2018, the D.C. Circuit Court's ruling in *ACA International v. FCC* struck down this safe harbor, finding it "arbitrary and capricious." However, the court did not offer any remedy for how recycled numbers should be handled. As a result, there is currently no safe harbor for reassigned numbers. As long as the recycled number database is not implemented, it is unlikely that there will be a reassigned number safe harbor.

5 TCPA Debt Exemption Ruled Unconstitutional

In July 2015, the FCC issued a TCPA Omnibus Declaratory Ruling and Order that overhauled and updated a number of aspects of the statute. Among the changes was a debt exemption that permitted automated calls to cellphones when the calls were for the collection of government-backed debt such as a student loan.

However, in the Spring of 2019, the Fourth Circuit found this exemption to be unconstitutional on free speech grounds. In fact, in finding the exemption to be a content-based restriction that favored a select group, the court nearly invalidated the TCPA as a whole. The court was able to avoid invalidating the entire statute only by severing the "flawed exemption" from the rest of the TCPA.

Did You Know?

The Supreme Court will hear a case—*William P. Barr et al. v. American Association of Political Consultants, Inc. et al.*—in 2020 that could potentially challenge the entire TCPA on free speech grounds. It is possible that SCOTUS, unlike the Fourth Circuit, could invalidate the entire statute.

6 FCC Chairman Pai Announces SHAKEN/STIR Robocall Summit

Much of the TCPA action in 2019 has focused on robocalls. One of the key components of the regulatory discussion on robocalls is a call authentication framework known as SHAKEN/STIR—an acronym for Signature-based Handling of Asserted Information Using toKENs (SHAKEN) and the Secure Telephone Identity Revisited (STIR). The protocol digitally validates a phone call as it passes through the complex web of telecom networks, allowing phone providers to verify that the call is actually coming from whoever appears to be placing the call. In July 2019, FCC Chairman Ajit Pai held a public summit to discuss SHAKEN/STIR—an important event in a yearlong process that culminated in the inclusion of SHAKEN/STIR provisions in the TRACED Act.

7 Western District of Michigan Court Decision Produces Intrastate Split on What Constitutes an ATDS

The text of the TCPA defines an Automatic Telephone Dialing System (ATDS)—colloquially known as an autodialer—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 the nearly 30 years since the TCPA's passage, a long history of case law and FCC rulemaking has centered on how to interpret the meaning of the word "capacity" in that definition. These differences of interpretation have significant consequences for TCPA litigation as the outcomes of many cases turn on whether or not a defendant uses an ATDS.

Without delving too deeply into the whole history of this issue, the general state of play for TCPA litigation in 2019 was such that the definition of what devices constitute an ATDS varies by court jurisdiction. To vastly oversimplify the situation, some circuits follow the precedent of a more narrow, statutory definition—set forth by the Third Circuit in the 2018 case *Dominguez v. Yahoo*—that an autodialer must have the present capacity to both generate and dial numbers either randomly or sequentially. Other circuits follow the precedent of the 2018 Ninth Circuit decision in *Marks v. Crunch San Diego, LLC* which defines an ATDS more broadly, essentially designating any device that has the capacity to automatically dial numbers that are stored in a list as an ATDS.

While multiple 2019 court decisions have further muddled the definitions of ATDS, none illustrates this absurdity better than *Allan v. Pennsylvania Higher Education Assistance Agency*. The decision in this case, from the Western District of Michigan, cites the broader ATDS definition from *Marks*. What makes it unusual is it directly contrasts with two 2018 decisions from the Eastern District of Michigan—*Gary v. TrueBlue, Inc.* and *Keyes v. Ocwen Loan Servicing*—that follow the narrower, statutory definition from *Dominguez*. As a result, there are two different definitions of an ATDS being used in different districts within the same state.

Fun Fact

Much of the conflict regarding the definition of an autodialer stems from the aforementioned D.C. Circuit ruling in *ACA International v. FCC*. Like the recycled number safe harbor, the court struck down a portion of the FCC's 2015 TCPA Omnibus Declaratory Ruling and Order due to it being "arbitrary and capricious." In this case, the provision of the Order that the court vacated was its definition of an ATDS, setting the stage for the current landscape of competing definitions.

8 TCPA Class Action Brought Against President Trump's Campaign

A TCPA class action—*Dan Pederson, Connor Olson and Shell Wheeler v. Donald J. Trump For President, Inc.*—was filed this year in the District Court for Minnesota. In general, it is a fairly standard case that stems from alleged TCPA violations relating, in part, to text messages sent via ATDS to advertise for a political rally. What makes it notable—as can be inferred from the named defendant—is that the rally in question was President Trump's October 10, 2019 campaign event in Minneapolis. If the president isn't immune from the risks of committing potential TCPA violations, nobody is.

Did You Know?

This is not the first time President Trump has faced TCPA litigation. In 2017, he paid $200,000 to settle a lawsuit stemming from TCPA violations allegedly committed by his 2016 presidential campaign.

9 California Jury Renders $267 Million TCPA Verdict Against a Debt Collector

Another TCPA case from September 2019 is notable because of the staggeringly high amount of damages rendered in the jury verdict. The debt collection case, involving a defendant that called individuals through skip tracing and called individuals who had no accounts with the collector, resulted in a $267,000,000 verdict for violations on 534,000 calls.

10 District Court Rules the Plaintiff Cannot Revoke Consent Through Strategies Such as the Use of a Fake British Accent

This case—*Johnson v. Capital One Servs.*—was notable for the technique that the plaintiff attempted in order to manufacture TCPA violations: trying to revoke consent by speaking with a fake British accent and telling the defendant's agent that they were calling a "wrong number." This gambit was unsuccessful, as was another attempt by the plaintiff to make a bogus claim that she revoked her consent in September 2017 because she could not make her payments in the aftermath of Hurricane Irma. The court ruled in favor of the defendant.