

Chapman Client Alert

April 17, 2017

Current Issues Relevant to Our Clients

TCPA Update 2017: The First Quarter in Review

2016 was a record year for filings under the Telephone Consumer Protection Act of 1991 (“TCPA”). In 2016, litigants filed 4,860 TCPA lawsuits, an increase of nearly 32% from 2015. But what does 2017 hold? What can companies who call customers to service or collect debts expect?

While TCPA filings in the first quarter of 2017 have slowed slightly in comparison to the last months of 2016, it is not a cause for relief; in fact, signs still point to another banner year for TCPA filings. January 2017 saw an 11.7% increase in TCPA filings over January 2016, and February 2017 saw a 5.3% increase in TCPA filings over February 2016. As with last year, the U.S. District Court for the Northern District of Illinois continues to be one of the districts with the heaviest TCPA traffic.

However, recent developments with respect to the TCPA have created uncertainty in TCPA litigation. These developments include court challenges to Federal Communications Commission (“FCC”) orders and new petitions before the FCC regarding the TCPA, and changes in FCC leadership.

Court Challenges

As explained in [previous Chapman Client Alerts](#), the U.S. Court of Appeals for the District of Columbia Circuit is still contemplating its ruling in *ACA International v. Federal Communications Commission*, No. 15-1211 (D.C. Cir. 2015), in which industry groups challenged the FCC’s 2015 order that dramatically changed its interpretation of the TCPA.¹ While oral arguments occurred last October, to date the D.C. Circuit has yet to rule on the case. Many TCPA suits were begun in the last quarter of 2016 only to be stayed pending the outcome of the *ACA International* case, which has the potential to significantly impact ongoing TCPA litigation.²

FCC Petitions

In addition, new petitions have been filed before the FCC asking for more stringent TCPA consent rules. In January 2017, two Petitions for Rulemaking and Declaratory Ruling Regarding Prior Express Consent

under the TCPA (CG Docket Nos. 02-278 and 05-338) (the “Petitions”) were filed before the FCC. The Petitions urge the FCC to create a rule requiring prior express written consent for all calls made to wireless and residential phone lines under TCPA. Currently, prior express written consent is required only for telemarketing calls, and not debt collection calls. If the Petitions are granted, it would drastically increase the burden on those companies that are calling to collect debts.

In February 2017, the FCC asked for public comment on the Petitions.³ In March 2017, industry groups, including the U.S. Chamber of Commerce, the U.S. Chamber Institute for Legal Reform, ACA International, the Consumer Bankers Association, American Financial Services Association, Credit Union National Association, Financial Services Roundtable, National Association of Federally-Insured Credit Unions, and the Electronic Transactions Association all submitted comments opposing the Petitions.⁴ However, the FCC has not yet responded, and it remains to be seen how the Petitions will progress in front of the FCC and whether the *ACA International* case might affect the FCC’s treatment of the Petitions.

Leadership Changes

As mentioned in an [earlier Chapman Client Alert](#), the new administration has selected a new Chairman of the FCC, which may signal a change in the way the FCC handles TCPA rulemaking in the future. New FCC Chairman Ajit Pai authored a strong dissent⁵ as an FCC Commissioner in the 2015 FCC order that is the subject of the *ACA International* case, arguing that other efforts such as enforcement of federal Do-Not-Call rules would be more effective at combating the rise of unwanted telephone calls. Chairman Pai also spoke at the FCC’s

Consumer Advisory Committee on Friday, January 27, 2017 and made clear that one of his priorities will be to address “robocalls.”

The first quarter of 2017 has seen a flurry of activity regarding the TCPA, both in terms of new filings and new actions in front of the FCC. With the D.C. Circuit’s decision in *ACA International* expected soon, financial institutions and other companies calling consumers to collect debts need to stay abreast of the changes that, either through FCC action or the courts, are likely to come.

For More Information

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- 1 See previous Chapman Client Alerts explaining the *ACA International* case.
- 2 See, e.g., *Ankorn v. Kohl’s Corp.*, 15-CV-1303, 2017 WL 395707, at *2 (N.D. Ill. Jan. 30, 2017) (granting stay pending appeal in *ACA International*); *Rajput v. Synchrony Bank*, No. 3:15-CV-1595, 2016 WL 6433150, at *1, *8 (M.D. Pa. Oct. 31, 2016) (granting stay pending the D.C. Circuit’s disposition of *ACA International*); *Frable v. Synchrony Bank*, No. 16-CV-0559 (DWF/HB), 2016 WL 6123248, at *4 (D. Minn. Oct. 17, 2016) (staying TCPA case until the D.C. Circuit Court of Appeals issues a decision in *ACA International*).
- 3 *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Rulemaking and Declaratory Ruling Regarding Prior Express Consent Under the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 02-278 and 05-0338, DA 17-144 (Rel. Feb. 8, 2017).
- 4 See *ACA International* comments at <https://www.acainternational.org/assets/tcpa-regulatory-advocacy/aca-comments-tcpa-pet-for-rulemaking-pec-3-10-17-final.pdf>, the Consumer Bankers Association comments at <http://consumerbankers.com/sites/default/files/Joint Trade TCPA Express Consent Letter 3-10-17.pdf>, and U.S. Chamber of Commerce comments at <http://www.instituteforlegalreform.com/uploads/sites/1/U.S. Chamber and ILR Comments Re In the Matter of Petition for Rulemaking and Declaratory Ruling filed by Craig Cunningham and Craig Moskowitz.pdf>.
- 5 For example, in then-Commissioner Pai’s dissent to the 2015 FCC order, he discussed “shutting down the abusive lawsuits by closing the legal loopholes that trial lawyers have exploited to target legitimate communications between businesses and consumers.” For more detail, see http://www.chapman.com/insights-publications-FCC_Chairman_Pai_TCPA.html.

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