

In The News

Talking TCPA: What is the Best-Case Scenario for Mitigating Illegal Robocalls?

09.03.19

ACA International

ACA International member attorneys Christopher Jordan and Michael Harvey from Munsch Hardt Kopf & Harr P.C. discuss their outlook on reconciling House and Senate legislation on robocalls and balanced FCC regulations to help consumers and business.

After Congress returns to Capitol Hill next week, it's expected discussions on robocalls will resurface; especially with the passage of two sweeping bills, the Stopping Bad Robocalls Act (H.R. 3375) and the Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act (S. 151.)

Both bills include varying directives to the Federal Communications Commission to enforce the Telephone Consumer Protection Act and define terms like called party and an automatic telephone dialing system (ATDS), while recommending penalties for bad actors and suggestions for safe harbors.

The Stopping Bad Robocalls Act, sponsored by Chairman U.S. Rep. Frank Pallone Jr., D-N.J., and Ranking Member U.S. Rep. Greg Walden, R-Ore., was approved with a 429-3 vote in July. The bill directs the FCC to act to define an ATDS within six months and clarifies that there should be no cost to callers for unblocking calls and that unblocking should be done in a transparent way.

The TRACED Act, introduced by Senate Majority Whip John Thune, R-S.D., along with U.S. Sen. Ed Markey, D-Mass., expands the FCC's authority to mitigate and enforce rules around illegal robocalls. It passed 97-3 in May. In general, it would require call authentication and blocking adoption, among other changes, related to the FCC's enforcement authority.

The FCC, meanwhile, in a third notice of proposed rulemaking, seeks to encourage implementation of a SHAKEN/STIR framework for authenticating calls by proposing a safe harbor from liability under the call completion rules for voice service providers that choose to block calls, or a subset of calls, that are not authenticated under that framework. In June, the FCC approved a Declaratory Ruling allowing voice service providers to use call blocking programs unless consumers opt-out of the service June 6.

ACA International member company Munsch Hardt Kopf & Harr P.C. Associate Christopher Jordan and Shareholder Michael Harvey in Houston recently talked with ACA about their thoughts on the best-case scenario for the House and Senate legislation coupled with FCC regulations and impact on clients and the accounts receivable management industry.

Q. What impact on TCPA cases are you seeing at the court level?

A. "I think it's a bit of a mixed bag. Some courts have decided they want to wait, and some are choosing to interpret the definition of an autodialer on their own," Jordan said. "There are also instances where district courts in the same states reach contradictory conclusions in their cases. From one chamber to the next, they're reaching completely contradictory positions on what devices are and what devices are not an ATDS. That is part of that power struggle and in fact they probably should be waiting to determine what Congress does and the

FCC does since everyone knows they're considering clarification on this right now and are certainly moving forward toward clarification."

Q. What does the best-case scenario for legislation against illegal robocalls look like? A. Harvey said he believes the debate on reconciled robocalls legislation will be lengthy, but the industry wants and needs guidance.

"We need a bright line rule. Something we can point to on the compliance side and say 'this is the law' and if you follow it, you know you're safe or you know you're not. It's impossible for us to tell our clients currently with 100% clarity what falls within the TCPA and what doesn't. We definitely would like to see a bright-line test and we certainly would like it to be something that goes back to the original intent of the TCPA to prevent telemarketers from using random sequential number generators to call you."

At the same time, Jordan added, the attention to stopping illegal robocalls is one good thing coming out of the legislation and regulations on Capitol Hill.

"It is not all bad. The good news is that people have the attention now that we need to stop illegal robocalls. The best part of both bills is the attention to education. Now where that becomes a slippery slope and can be very dangerous is the default call blocking. I think if you rely on call authentication alone, that's a huge mistake, because unauthenticated does not mean illegal, and legitimate calls could be blocked. Taking the decision about calls they want to receive and not receive away from consumers walks a very fine line. Cutting back on illegal robocalls and empowering consumers with certain tools like authentication and empowering the FCC to do its job and levy fines against actual illegal robocallers is great; but we don't want legitimate businesses caught in the mix."

The full article can also be viewed by [clicking here](#).

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