

THE
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5 TCPA Class Action Trends to Watch in 2018 - Legislation, Administrative Law & Litigation

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1. Have the GOP's Hopes for Enacting the Fairness in Class Action Litigation Act Been Dashed? - Passed in March 2017 by the U.S. House of Representatives, the Fairness in Class Action Litigation Act of 2017, H.R. 985, has stalled in the Senate. Among other things, the House bill would dictate the method by which to calculate attorneys' fees in a class action and significantly limit recoverable attorneys' fees to a "reasonable percentage of (1) any payments received by class members; and (2) the value of any equitable relief." (H.R. 985, § 103) The bill also installs a stringent "ascertainability" rule that would likely result in more denials of class certification. On March 13, 2017, the House bill was sent to the Senate Judiciary Committee, but the Committee has not taken any further actions to advance the bill. In the current political climate, there may be a tailwind for this legislative effort in 2018.

2. The FCC's Progress and Speed in Resolving the Backlog of TCPA Petitions - Several petitions for declaratory ruling were filed with the FCC in late 2016 and 2017 requesting clarification on issues relating to the meaning of "prior express consent" under the TCPA. After soliciting and receiving comments from the public, those petitions are ripe for decision by the FCC. See *In the Matter of Credit Union Nat'l Ass'n Petition for Declaratory Ruling*, Dkt. No. 02-278 (filed Sept. 29, 2017) (requesting FCC to exempt from the TCPA all informational calls made by credit unions to cell phones where the wireless subscriber has an established business relationship with the credit union, or the called party is not charged for the call); *In the Matter of Petition for Expedited Declaratory Ruling of Bebe Stores, Inc.*, Dkt. No. 02-278 (filed Nov. 18, 2016) (requesting retroactive waiver of TCPA's "prior express written consent" requirement for robocalls for calls made by Bebe from October 16, 2013, to October 7, 2015). At least two petitions for declaratory ruling were filed by defendants in pending TCPA fax class actions last year, and those petitions also await decision from the FCC.

3. Will Courts Continue to Snuff Out Flu-Shot Reminder Call Class Actions? - The Second Circuit has already issued two decisions this year affirming dismissals of putative TCPA class actions because the calls in question conveyed a "health care message." In *Zani v. Rite Aid Headquarters*, No. 17-1230-cv, 2018 WL 992309 (2d Cir. Feb. 21, 2018), the Second Circuit affirmed the district court's summary judgment ruling in Rite Aid's favor and held that its flu shot reminder calls were "health care messages" exempt from the TCPA's written consent requirement. The *Zani* decision follows on the heels of another recent Second Circuit decision affirming summary judgment in a case involving flu-shot text message reminders. In *Latner v. Mount Sinai Health System, Inc.*, 879 F.3d 52 (2d Cir. Jan. 9, 2018) (as amended), the Second Circuit upheld summary judgment in defendant's favor because the reminder text at issue constituted a "health care message" exempt from the TCPA.

4. The Supreme Court Considers Cert. Petition in TCPA Class Action Seeking Resolution of the "Ascertainability" Circuit-Split - The lingering circuit split among the federal courts of appeals regarding proper interpretation of the so-called "ascertainability" requirement under Rule 23 seems ripe for resolution by the Supreme Court. On November 30, 2017, plaintiffs in a TCPA fax case challenged their class certification defeat in the Sixth Circuit by seeking Supreme Court review on the question of whether the trial court's ability to identify class members qualifies as a prerequisite to Rule 23 class certification under the rubric of ascertainability, predominance, or superiority. See *Sandusky Wellness Center, LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460 (6th Cir. Sept. 1, 2017), as corrected on denial of reh'g en banc (affirming denial of TCPA plaintiffs' motion for class certification because plaintiffs could not satisfy ascertainability requirement), petition for cert. filed (U.S. Nov. 30, 2017) (No. 17-803).^[1] The Supreme Court's resolution of the nettlesome ascertainability standard would provide

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much-needed clarity on the standard a plaintiff must satisfy to prove that a class can be identified for certification purposes. The defendant filed its opposition to the cert. petition on February 8, 2018.

5. The Extinction of Post-Spokeo Challenges to Article III Standing in TCPA Cases? – 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 plaintiff had consented to receive defendant’s commercial text messages). Looking ahead, future remains uncertain for the viability of such challenges.

[1] Plaintiff’s cert. petition is available for download [here](#).

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