

A Closer Look at Pai's Dissent in the 2015 TCPA Declaratory Ruling

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With the D.C. Circuit still considering the appeal of the FCC's 2015 TCPA Declaratory Ruling and Order, Chairman Pai is limited (for now at least) in what he can do to pursue his vision of the TCPA. Nevertheless, with a partial remand of the 2015 Order at least a possibility, it is worthwhile to take a look back at then-Commissioner Pai's dissent in that proceeding as an indicator of where a Pai-led FCC might take the TCPA.

Autodialers: Pai made clear in his dissent that he believes that under the TCPA's definition of an "automatic telephone dialing system" ("ATDS") only equipment that has the capability to dial sequential numbers or random numbers qualifies as an autodialer. "If a piece of equipment *cannot* do those two things—if it *cannot* store or produce telephone numbers to be called using a random or sequential number generator and if it *cannot* dial such numbers—" Pai asked, "then how can it possibly meet the statutory definition? It cannot." The principal issue addressed in the 2015 order was whether the statute's reference to the "capacity" of ATDS equipment referred to the potential capabilities of the equipment. On this front, Pai's view was clear: He believed that the statutory definition of an ATDS was limited to the equipment's "present capacity," not to its potential or theoretical capacity, and his dissent spends much time explaining why the concept of potential capacity was a bridge too far for him.

But one point that can sometimes be missed in that discussion is Pai's focus on what sort of capacity is relevant. Pai's interpretation of the statute closely hues to the two specific capabilities listed – the ability to dial random numbers or to dial sequential numbers. The FCC's interpretation, Pai charged, "transforms the TCPA from a statutory rifle-shot targeting specific companies that market their services through automated random or sequential dialing into an unpredictable shotgun blast covering virtually all communications devices." Pai was willing to claim victory for the "rifle-shot" set, stating that if today's callers have abandoned random or sequential dialers due to the TCPA's prohibition, then the TCPA has "accomplished the precise goal Congress set out for it" and, if parties want to address more modern types of abusive dialing equipment, they should go to Congress for action.

Thus, it seems that, if given the chance to re-assess autodialers, Chairman Pai would focus more narrowly on equipment prominent in the early 1990s when the TCPA was passed and would be less inclined to apply the TCPA's restrictions to predictive dialers, which Chairman Pai appears to consider as more akin to speed dialers that the FCC's 1992 TCPA orders concluded were not within the scope of the TCPA's prohibition.

Reassigned Numbers: Commissioner Pai also dissented from the FCC's interpretation of "called party" in the context of telephone numbers that have been reassigned from one subscriber to another. Commissioner Pai noted that, with the prevalence of reassignments today, "even the most

well-intentioned and well-informed business will sometimes call a number that's been reassigned to a new person." Pai rejected the idea that the TCPA imposes strict liability on a caller for calls that reach someone other than the intended recipient of the call. Instead, Pai endorsed the interpretation that the "called party" in the statute refers to the caller's expected recipient of the call. He argued that this interpretation was clearer and easier for caller to administer, while giving the actual recipient that ability to stop unwanted calls by informing the caller that they've reached the wrong party.

Since his dissent, Chairman Pai has indicated his support for the creation of a database to identify reassigned numbers. Such a database, he believes, is within the Commission's plenary authority over telephone numbers, although he has indicated that Congressional appropriations to run the database may be necessary. Such a database has a long way to go, but it appears that a Pai-led FCC would at least be open to exploring the possibility.

Revocation of Consent: On the issue of revocation of consent, Commissioner Pai objected to what he considered to be an unworkable approach. While Pai supported a consumer's ability to stop unwanted calls from occurring, he raised concerns with the open-ended process that the 2015 Declaratory Ruling allowed. His dissent famously mocked the FCC's conclusion, wondering whether a customer at a McDonald's drive-through could declare "I'm not lovin' it" and seek to revoke consent to be contacted via an autodialer or robocall. It appears that Chairman Pai would prefer to leave it to the parties to determine reasonable methods to revoke consent, if given the opportunity.

Industry-specific Exemptions: Finally, it is noteworthy that Commissioner Pai also dissented from the portions of the 2015 Declaratory Ruling that created certain exemptions for particular industries or types of calls. He objected to the exemption created for prison phone calls, and questioned whether the specific interpretations supporting it might lead to more robocalls, not fewer. In particular, Commissioner Pai took issue with the interpretation that calls "to set up a billing relationship" were not advertising or telemarketing calls. If this interpretation were followed more broadly, he asked, "What telemarketer will continue to hock goods the old-fashioned way when it can escape the TCPA's particular constraints on telemarketing by claiming to just set up billing relationships for services not yet performed?" Commissioner Pai's comments – and his subsequent dissent to the implementing order addressing calls to collect government-backed debts – suggest that the approach of creating specific exemptions to TCPA rules will not be favored by a Pai-led FCC.