TCPA Tracker - Decision Summary - March 2018

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TCPA Reset? D.C. Circuit Rules Against FCC On Autodialer Definition and Treatment of Reassigned Wireless Numbers

On March 16, 2018, the U.S. Court of Appeals for the D.C. Circuit issued its long-awaited decision reviewing the FCC's 2015 TCPA Declaratory Ruling and Order. In the case of *ACA International v. FCC*, Case No. 15-1211, the Court, in a 3-0 opinion authored by Judge Srinivasan, granted in part and denied in part the various petitions for review. The decision was a significant victory for challengers to the 2015 Declaratory Ruling and Order, setting aside the FCC's clarifications of an automatic telephone dialing system (ATDS or autodialer) and its one-call safe harbor for reassigned wireless numbers. The court upheld the FCC's approach to revocation of consent and the exemption for certain "healthcare treatment" calls, and the case will now be remanded to the FCC where the Commission will have an opportunity to reconsider the issues and address the court's criticisms into the Commission's ongoing "robocall" related efforts.
In this Advisory, we discuss the details of the court's decision and analyze on its implications for current and future TCPA litigation and related compliance.

I. FCC's 2015 Autodialer Definition Was Too Broad

The most significant element of the decision concerned the FCC's expansive definition of equipment that falls within the scope of the TCPA's wireless-related restrictions. In the 2015 Declaratory Ruling and Order, the FCC defined equipment to be an autodialer or ATDS, if it contained the potential "capacity" to dial random or sequential numbers, even if that capacity could be added only through specific modifications or software updates (so long as the modifications were not too theoretical or too attenuated). The FCC noted that smartphones could be included within the definition and only categorically ruled out a rotary-dial phone from the definition. In briefing and during oral argument, Petitioners asserted that this definition differs from the statutory definition and express purpose of 47 U.S.C. § 227(a)(1), where an autodialer encompasses "equipment which has the capacity" to "store or produce telephone numbers to be called, using a random or sequential number generator" and to dial such numbers.

The D.C. Circuit unambiguously agreed with Petitioners in concluding that the FCC adopted an overly expansive and unreasonable view of the definition of what constitutes an "automatic telephone dialing system." Although the court did not clarify the requisite "capacity" needed – present or future – to be an autodialer, the court deemed the reach of the FCC's definition "eye-popping" and declared that "*the TCPA cannot reasonably be read to render every smartphone an ATDS subject to the Act's restrictions*." The court's decision likely will have significant effects on ongoing (and future)

litigation and compliance efforts involving autodialed calls and texts.

1. ATDS "Capacity" Cannot Sweep In All Smartphones.

The FCC's 2015 Declaratory Ruling and Order, which aimed to clarify the TCPA's definition of an ATDS, construed the term "capacity" as relating to a device's potential functionalities or future possibility, which included modifications such as software changes, instead of its present capacity. 2015 Declaratory Ruling and Order, 30 FCC Rcd. at 7974 ¶ 16. Under this revised interpretation, any equipment that could be modified to dial numbers randomly or sequentially would be an ATDS – and thus subjected the caller to potential liability under the statute.

The court resolved that it would be an "unreasonably expansive interpretation of the statute" to subject ordinary calls from any conventional smartphone to the TCPA's coverage. The court's concern relating to how the 2015 Order imposed liability on smartphone users was presaged during oral argument, as Judge Pillard notably inquired as to whether she would be at risk of strict liability for using a smartphone to call her parents and Judge Edwards held up his smartphone while asking if he would violate the statute by calling his sister if he didn't have her consent to make the call.

The court clearly was troubled by the "eye-popping" reach of the 2015 Order's interpretation, and found that such a reach could not be squared with Congress's findings in enacting the TCPA and that the FCC's interpretation was "utterly unreasonable in the breadth of its regulatory [in]clusion." The court rejected the FCC's justification that a broad reach was necessary to encompass "modern dialing equipment," concluding that Congress need not be presumed to have intended the term ATDS to apply "in perpetuity" and citing paging services as an example of TCPA provisions that have ceased to have practical significance.

In sum, the court determined that the FCC's ruling caused all smartphones to fall within the statutory definition, which was unreasonable. It therefore set aside the interpretation, but the FCC will be permitted to consider other ways to define the reach of the TCPA's ATDS definition. In particular, the court suggested that the FCC could use its authority to establish exemptions to the TCPA's calling prohibitions to rein in the scope of the ATDS's broad definition. Statements from FCC Chairman Pai, however, suggest that the agency as now comprised may be amenable to a far less expansive definition of an ATDS.

2. ATDS Features Will Be Re-Examined, Including Predictive Dialers.

The court also found that the confusion over the term "capacity" as it relates to the ATDS definition was multiplied by the FCC's insufficient explanation of the requisite features that the covered ATDS equipment must possess.

Under the statute, an ATDS is defined as a device with the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator" and "to dial such numbers." 47 U.S.C. § 227(a)(1)(A)-(B). According to the court's decision, the 2015 Declaratory Ruling and Order fell short of reasoned decisionmaking in "offer[ing] no meaningful guidance" as to the seminal questions of whether a device (1) must itself have the ability to generate random or sequential numbers to be dialed, (2) must dial numbers without human intervention or (3) must "dial thousands of numbers in a short period of time." The court found the 2015 Declaratory Ruling and Order "of two minds" on these questions.

In criticizing the FCC's discussion of the requisite capabilities, the court addressed the FCC's pronouncements on predictive dialers. In orders issued in 2003 and 2008, the FCC concluded that predictive dialers were included within the definition of ATDS, but the rulings left significant uncertainty about the precise functions that a predictive dialer must possess to meet the definition.

Several parties asked the FCC to clarify the definition of an autodialer on this count or to enter into a new rulemaking proceeding to address predictive dialers. The court found the FCC's response to these requests to have re-opened the issue, and thus the FCC's treatment was reviewable. On the merits, the court found that the FCC gave no clear answer as to whether predictive dialers must be able to generate random or sequential numbers and then dial them, or whether merely calling from a pre-set list was sufficient. The court's disposition vacates the 2015 Order's conclusions (which purported to reaffirm the 2003 and 2008 decisions) and requires the FCC to re-examine the predictive dialer conclusion.

The court's opinion also raised – but did not decide – an issue that Judge Edwards had raised at oral argument. The TCPA contains two provisions relating to autodialers. The first defines what an ATDS is, while the second provision makes it unlawful to "make any call using" an ATDS (absent consent or an exemption). As described by the court, the second provision requires an interpretation of whether the prohibition on "making any call using" an ATDS applies only to calls that actually use the equipment's ATDS functionality or whether it applies to equipment possessing the requisite capacity, even if the functionality is not used in the call in question. On this point, the court noted that the 2015 Order read the provision broadly to encompass any equipment with the capability (even if the capability was not used in a call), while Commissioner O'Rielly, in dissent, read the provision to require use of the ATDS functionality in the call. Because Petitioners had not presented this issue to the court, however, the court declined to address the question. It concluded with an invitation for the FCC to "*revisit the issue in a future rulemaking or declaratory order*."

II. "Safe Harbor" For Calls to Reassigned Wireless Numbers Is Arbitrary

The court also reviewed the FCC's treatment of calls to a reassigned wireless phone number. In the 2015 Declaratory Ruling and Order, the FCC determined that, if a caller initiates a phone call (or sends a text message) to a phone number for which the caller had previously obtained consent from a subscriber, but the phone number has been reassigned to another subscriber, the caller is liable for such unauthorized call or message, subject to a one-call "safe harbor." The Commission read the statutory term "called party" to mean the current subscriber to the phone number (or authorized user), and not the party that the caller intends to reach when placing the call.

As a threshold matter, the court concluded that it was permissible for the FCC to interpret "called party" under the TCPA to be the current subscriber, or actual recipient, of a call or message, rather than the intended recipient. To support its conclusion, the court cited the Seventh Circuit's holding on this issue in *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637 (7th Cir. 2012). In that case, the court found that "the phrase 'called party' appears" seven times in the TCPA, and "[f]our of those instances 'unmistakably denote the current subscriber,' not the previous, pre-assignment subscriber … Of the three remaining instances, 'one denotes whoever answers the call (usually the [current] subscriber),' and the other two are unclear." The court found *Soppet* persuasive "insofar as it supports concluding that the Commission was not *compelled* to interpret 'called party'" to mean the intended recipient. The D.C. Circuit thus rejected Petitioners' assertion that the statute prohibited the FCC's "current subscriber" interpretation. (It did not find that the interpretation was required by the statute, however. Rather, the interpretation fell within the agency's customary zone of discretion.)

On the issue of liability for calls to reassigned numbers, however, the court sided with the Petitioners, finding that the one-call safe harbor adopted in the 2015 Declaratory Ruling and Order was arbitrary and capricious. Specifically, the court explained that, although the FCC consistently

applied a "reasonable reliance" standard throughout the Order for purposes of determining whether prior express consent was received, the FCC "*gave no explanation of why reasonable-reliance considerations would support limiting the safe harbor to just one call or message. That is, why does a caller's reasonable reliance on a previous subscriber's consent necessarily cease to be reasonable once there has been a single, post-reassignment call*?" The court further observed that the one-call safe harbor "*is hard to square with the Commission's concession that the first call may give no notice of a reassignment, or with the Commission's disavowal of any expectation that a caller should 'divine from the called consumer's mere silence the current status of a telephone number*.'" The court made clear that it was setting aside not only the one-call safe harbor, but the Commission's treatment of reassigned wireless numbers as a whole because *"[the court] cannot say without any substantial doubt that the agency would have embraced the 'severe' implications of a pure, strict-liability regime even in the absence of any safe harbor*." As a result, the court set aside both the FCC's interpretation of "called party" and its one-call safe harbor.

Finally, the court observed that the FCC "*is already on its way to designing a regime to avoid the problems of the 2015 ruling's one-call safe harbor*." In particular, the FCC will vote at its March 2018 open meeting on a Notice of Proposed Rulemaking through which the FCC is considering establishing a database of reassigned numbers that callers could consult before placing calls, as well as potentially adopting a safe harbor from TCPA liability for those callers that choose to use a reassigned numbers database. The court noted that these proceedings would bear on the "called party" question and its decision appears to give the FCC the discretion to address the issue in those proceedings.

III. Revocation of Consent Standard Upheld

The final major issue that the court addressed was the FCC's conclusion in the 2015 Declaratory Ruling and Order that "a called party may revoke consent at any time and through any reasonable means." The court rejected the Petitioners' arguments that the FCC's decision was arbitrary and capricious. However, the court's decision relied on FCC clarifications limiting the scope of "reasonable" means of revoking consent and also noted that the 2015 Order does not address situations where parties have contracted to specify the means for revoking consent.

The two limitations noted by the court may be significant in assessing the reasonableness of a revocation of consent. The court first noted that the 2015 Declaratory Ruling and Order "*absolves callers of any responsibility to adopt systems that would entail 'undue burdens' or would be 'overly burdensome' to implement*." Accordingly, the court concluded that "*callers would have no need to train every retail employee on the finer points of revocation. And callers will have every incentive to avoid TCPA liability by making available clearly-defined and easy-to-use opt-out methods*." Second, the court cited with approval the FCC's statement that it was relevant to consider whether the consumer "had a reasonable expectation" that he or she could effectively communicate the revocation request through a particular method. Relying upon this statement, the court noted that "*any effort to sidestep the available methods [of revocation] in favor of idiosyncratic or imaginative revocation requests might well be seen as unreasonable*." As a result, the court's decision potentially preserves substantial protections against unreasonable revocation requests.
Finally, the court narrowed the reach of the FCC's determination, noting that, in its briefing, the FCC "*correctly concedes … that the ruling [does not address contractual provisions limiting revocation]*." Therefore, while the 2015 Declaratory Ruling and Order prevents callers from unilaterally limiting the manner in which revocation may occur, "*it does not address revocation rules mutually adopted by contracting parties. Nothing in the Commission's order thus should be understood to speak to*

parties' ability to agree upon revocation procedures." This clarification could lead to more entities specifying reasonable means of revoking consent in contracts and terms of service provisions.

IV. Challenge to TCPA Consent Standard for Healthcare Calls Rejected

Petitioner Rite Aid challenged the FCC's treatment of certain healthcare calls. It asserted that the FCC improperly limited the exemption for calls made for a "healthcare treatment purpose" to a narrower set of calls than are covered by HIPAA's privacy restrictions. The court, however, upheld the FCC's determination and found that the limitation on exempt calls in the 2015 Declaratory Ruling and Order was not arbitrary and capricious.

The 2015 Declaratory Ruling and Order recognized an exemption from the TCPA for calls and messages "for which there is exigency and that have a healthcare treatment purpose," such as appointment reminders, pre-operative instructions and lab results. Rite-Aid asserted that this exemption erroneously was limited to "treatment" calls and omitted other healthcare communications permitted under HIPAA (such as billing or account-related communications). During oral argument, Rite Aid's counsel questioned why the FCC adopted a different approach to these HIPAA-approved calls in the 2015 Order as compared to the 2012 Order and argued that the FCC has never explained its different reasoning.

The court found that HIPAA regulations have no effect on the FCC's "*authority to exempt (or refrain from exempting) certain kinds of calls from the TCPA's consent requirement*," and that the FCC adequately explained the limitations it adopted. And, in backing the FCC's reasoning, the court agreed that the Commission was permitted to adopt narrower exemptions for calls to wireless numbers than would apply to calls to landline numbers and found reasonable the FCC's conclusion that billing and account were not made for "emergency purposes." Thus, the court concluded that the TCPA's consent regime need not be suspended for "*advertisements, solicitations and post-treatment financial communications*" and that the FCC was empowered to draw the distinction in the manner that it did.

V. Reaction to the Ruling and Next Steps

Following the release of the D.C. Circuit's order, four of the five FCC Commissioners issued statements in response. Unsurprisingly, Chairman Pai and Commissioner O'Rielly, who both voted against the 2015 Declaratory Ruling and Order, praised the decision as correcting a misstep by the previous Commission, and reiterated the FCC's commitment to addressing ongoing issues surrounding unwanted robocalls. Commissioner Brendan Carr echoed his Republican colleagues in a similar statement. Democratic Commissioner Jessica Rosenworcel did not directly criticize the court, but in her statement said "*One thing is clear in the wake of today's court decision: robocalls will continue to increase unless the FCC does something about it*."

With respect to pending TCPA litigation, the D.C. Circuit's decision is likely to affect cases differently depending on the procedural posture of the case and the venue. First, parties will have an opportunity to seek rehearing or rehearing *en banc* (by the whole court). Grants of rehearing are rare, and given that the court's decision was unanimous, grant of such a petition may be more difficult than usual. Parties also may seek review by the U.S. Supreme Court, although the FCC seems an unlikely petitioner given Chairman Pai's statement in response to the ruling.
After a period to allow for petitions for rehearing or *en banc* review, the case will be remanded to the FCC. The court's decision vacates the interpretation of an ATDS and the "called party"

interpretation. On these issues, we expect the FCC to seek comment, perhaps via a new rulemaking proceeding, on how to interpret these provisions and how to address the court's criticisms. In particular, because the FCC already has moved forward to examine the creation of a reassigned number database, it seems logical for the Commission to fold questions about the proper interpretation of the "called party" into that proceeding.

With respect to the revocation of consent issue, the Commission may take this issue up on its own motion, or parties may bring a new petition to further address revocation procedures (such as to address how consumers may agree in contracts to particular revocation methods). Similarly, given the court's highlighting of the issue, it is possible that parties may seek clarification on whether Section 227's provision prohibiting the "making of any call using" an ATDS requires use of the ATDS features in the call, or otherwise may seek to clarify aspects of the issues via a new petition.

At a minimum, we expect Chairman Pai to continue his chosen approach to addressing robocall issues – namely, developing technical solutions for the industry such as call blocking and call authentication standards, and pursuing enforcement actions against egregious violations of the TCPA.

VI. Decision's Impact on Pending Litigation and Compliance

In the courts, it is uncertain how the case will affect pending TCPA litigation. Many courts have issued stays of cases while awaiting the D.C. Circuit appeal. With the remand of that decision to the FCC, it is not clear whether courts will continue the stay or will proceed potentially in parallel to the FCC's own examination of the issues. It also is not clear what effect the court's treatment of certain issues, such as the reasonableness of revocation of consent, will have on class allegations and the ability of plaintiffs to satisfy the class certification requirements. We expect these issues to be addressed individually and with some degree of variability, unless the FCC takes interim action to provide clarity or uniformity pending its re-examination of the issues.

From a compliance perspective, until and if there is clarity from the FCC on the definition of an ATDS and calls to reassigned wireless numbers (and any additional TCPA interpretation issues that the agency takes on), the risk of TCPA litigation will continue to be ever present on such issues, with likely varied determinations by the courts. Notably, the D.C. Circuit opinion does not change the existing TCPA requirement to have Prior Express Written Consent for autodialed telemarketing calls to wireless numbers (and prior express consent for non-telemarketing calls). Companies would be wise to continue to ensure that, where they are making calls that could potentially be viewed as autodialed calls, that they have the required level of consent. Moreover, there is an opportunity for businesses to develop updated clear standards around reasonable processes for revocation of TCPA consent, keeping the court's discussion of such points in mind. We expect such updated consent revocation processes will be challenged in future TCPA lawsuits over their reasonableness, and best practices to emerge as a result.

Kelley Drye will continue to follow these issues and provide updates through its monthly TCPA Tracker. Please contact us to join our list or if you have any questions concerning these issues.