

TCPA Tracker - Special Update - March 2018

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Today, 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. It set aside the FCC's clarifications of an ATDS and its one-call safe harbor for reassigned numbers but upheld the FCC's approach to revocation of consent. 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.

We are reviewing the decision in detail and will have a more comprehensive summary available soon. In addition, Kelley Drye will be hosting a free webinar to discuss the implications of the decision and the future of TCPA reform efforts at the FCC and in Congress. More details will follow in the next few days.

Oral Argument

Oral argument before the D.C. Circuit took place on October 19, 2016. The oral argument lasted nearly three hours in front of Judges Pillard and Srinivasan and Senior Judge Edwards. Additionally, the court took 17 months to render its decision – a significant increase from the “traditional” period of about two months following oral argument to reach a decision. During oral argument, the Panel sharply questioned the FCC's counsel relating to several important issues, most notably the Order's broad autodialer definition, and the one-call safe harbor provision for calls made to reassigned wireless numbers. The same issues, in turn, received the most analysis in the court's decision.

Summary of the Issues

In prior briefing and during oral argument, Petitioners and Intervenor challenged the Order's considerable expansion of the scope of the TCPA. Petitioners and Intervenor focused on three main issues from the 2015 Declaratory Ruling and Order: (1) the expanded definition of what types of equipment serve as an autodialer, leading to liability under the TCPA for using such technology to place calls, (2) the called party/reassigned number provision, which mandates the imposition of strict liability for any call beyond the first call to a reassigned number, and (3) whether the FCC must give clearer guidance relating to how consumers can revoke consent to receive calls or text messages. In the 2015 Order, the FCC asserted that equipment should be defined as an autodialer if it has the potential “capacity” to dial random or sequential numbers, even if that capacity could be added only through certain modifications or software updates. Petitioners argued that this interpretation deviates from the statutory definition in 47 U.S.C. § 227(a)(1), where an autodialer is defined as “equipment which has the capacity” to “store or produce telephone numbers to be called, using a random or sequential number generator” to dial such numbers.

During oral argument, the court's principal source of questions centered on the FCC's autodialer interpretation. All of the judges questioned how the language in the Order could encompass a smartphone, if the smartphone, for example, has the “capacity” to be used as an ATDS through an app that allows for autodialing but is not traditionally used in that manner. The judges seemed

concerned at the prospect of imposing liability on a person who used his or her smartphone to make a standard call to family or friends, without prior consent.

This concern was obvious in the Court's opinion, as the Court reasoned: "The Commission adopted an expansive interpretation of 'capacity' having the apparent effect of embracing any and all smartphones: the device routinely used by the vast majority of citizens to make calls and send messages (and for many people, the sole phone equipment they own." See Page 14 of Opinion. With that in mind, "[i]f every smartphone qualifies as an ATDS, the statute's restrictions on autodialer calls assume an eye-popping sweep." Page 16. Thus, according to the Court, it would be "unreasonable and impermissible" to interpret the statute to render every smartphone an ATDS subject to the Act's restrictions. Page 16-17.

Under the reassigned numbers provision, the 2015 Order states that a caller must have the consent "not of the intended recipient of the call, but of the current subscriber (or nonsubscriber customary user of the phone)." The Order permits a one-call safe harbor, which allows businesses to send one call or text to a reassigned phone number. After the one call safe harbor, a caller is "deemed" to possess constructive knowledge that the number no longer belongs to the person who previously gave express consent. During oral argument, the judges indicated that they strongly disagreed with the view that "constructive knowledge" of a reassigned number should attach after one phone call or text message – no matter if the caller receives an answering machine, dial tone, hang up, or live person. Judges Edwards and Srinivasan commented that the safe harbor provision appears to be deficient because there are certain ways in which it would be nearly impossible for a business to learn that the subscriber's identity had changed (an unanswered text message, for example).

Based on those concerns, the Court's opinion set aside the FCC's interpretation on the ground that the one-call safe harbor provision is arbitrary and capricious. In doing so, the Court also reasoned that if it were to excise the FCC's one-call safe harbor alone, that would leave in place the FCC's interpretation that a called party refers to a new subscriber – which would mean that a caller is "strictly liable for all calls made to the reassigned number, even if she has no knowledge of the reassignment." Page 39. Because the Court could not state without substantial doubt that the agency would have embraced a pure, strict-liability regime in the absence of any safe harbor, it decided to set aside the FCC's treatment of reassigned numbers as a whole. Page 40.

The revocation of consent issue centered on the definition of "reasonableness." In the 2015 Order, the FCC determined that consumers may revoke consent for receiving calls "in any reasonable manner." While Petitioners and Intervenors claimed that this standard is unclear, during oral argument, FCC counsel gave several means by which consumers could revoke consent, including a direct call from the consumer to the company or a specific request from the consumer to the company at an in-store bill payment location. Thus, the Court determined that Petitioners and Intervenors' concerns relating to revocation of consent were "overstated" as the FCC's ruling absolves callers of any responsibility to adopt systems that would entail undue burdens or would be overly burdensome to implement. Page 41.

Next Steps

The case will now be remanded to the FCC, where the Commission will have an opportunity to reconsider all of the issues and address the court's criticisms. The FCC has changed leadership since the 2015 order, and it is reasonable to assume that the current FCC will be more receptive to the arguments that petitioners made in opposition to the FCC order. (Two of the current Commissioners dissented from the 2015 order).

The FCC has also delved into a number of TCPA issues since the 2015 declaratory ruling. Most notably, the FCC is considering whether to adopt a database for reassigned numbers, and the court's

remand opens the full breadth of that issue for review. In addition, the current FCC is targeting methods to block or prevent prohibited calls from occurring, through carrier blocking services and advanced call authentication methods. The Commission will now have the question of what types of equipment fall within the statute's prohibition.

We expect the FCC to invite comments on the Court's decision, either in new notices in one or more proceedings or in a broad public notice seeking comment on the opinion. Please reach out to us if you would like to confer on the best way to participate in these remand proceedings.