# TCPA Tracker-Special Update-October 2016

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## FCC in the Hot Seat: D.C. Circuit Questions FCC at Oral Argument on Challenge to 2015 TCPA Declaratory Ruling and Order

On October 19, 2016, the United States Court of Appeals for the D.C. Circuit heard oral argument in the consolidated appeal of *ACA International, et al. v. FCC* , Case No. 15-1211, in which Petitioners challenged the FCC's 2015 Declaratory Ruling and Order (the "Order") expanding the overall scope of the Telephone Consumer Protection Act. The oral argument lasted nearly three hours in front of Judges Pillard and Srinivasan and Senior Judge Edwards. Although it is difficult to forecast how a panel of judges will rule in any argument of this nature, 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. Our more detailed summary follows.

### I. Petitioners' Challenge

Petitioners (as supported by Intervenors) primarily assert that the 2015 Order sweeps too broadly, exposing many traditional business calling practices to TCPA liability. While the FCC's 2015 Order was designed to clarify outstanding concerns with the TCPA, Petitioners claim that many provisions are impossible to decipher and infeasible to implement. The argument focused on three significant areas of concern. For more background information, see our previous TCPA Trackers here and here.

#### A. Autodialer Definition

Petitioners' counsel contended at the hearing that the FCC's definition of an autodialer is so expansive that it exceeds the statutory definition established by Congress. The judges questioned the Order's apparent conclusion that the ATDS provision 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 even if it is not traditionally used in that manner. The judges seemed to be taken aback that the traditional use of a smartphone (calling a family member, for example) would be covered by the TCPA based on the device's mere capacity to be used as an ATDS. Further, the FCC's counsel faced challenging questions from all three judges on the FCC's interpretation of the TCPA's prohibition on making calls with a device that has the "potential" to be used as an ATDS, even if the device did not actually possess that functionality. The argument also included considerable debate about whether technological equipment that

dials numbers from a preselected list serves as an autodialer, or whether the equipment must generate numbers in a random or sequential fashion.

**B. Reassigned Wireless Numbers**

Under the reassigned wireless number provision at issue, the 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)." Thus, an autodialed call to a wireless number for which the caller received consent but which has subsequently been reassigned to a new user would violate the TCPA. The Order establishes a one-call safe harbor exception to this rule, which allows businesses to send one call or text to a reassigned phone number without incurring liability. After the one call or text, a caller is deemed to possess "constructive knowledge" that the number no longer belongs to the person who previously gave express consent – even if the one call or text did not reach a live person but instead led to a voice message or dial tone.

The judicial panel questioned applying such a stringent constructive knowledge standard and subjecting callers to future liability. Judge Srinivasan specifically remarked that fears of liability may cause companies to shy away from making the types of calls that consumers want to receive, based on the threat of liability for mistakenly calling a reassigned number. All of the judges indicated disagreement with the view that "constructive knowledge" of a reassigned number should attach in all instances after one phone call or text message – no matter if the caller receives an answering machine, dial tone, hang up, or live person. It appeared that the judges were troubled by the idea that liability could attach after calls that could not reasonably be expected to provide notice to the caller of reassignment. 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). Judge Edwards also expressed disagreement with the FCC's claim that certain asserted "best practices" to identify reassigned wireless numbers were practical or viable. In all, the FCC faced a line of skeptical questioning regarding this ruling in the Order.

**C. Revocation of Consent**

Argument pertaining to the "revocation of consent" issue centered on the definition of reasonableness as applied to the consumer's attempt to revoke consent to receive autodialed or prerecorded message calls to their wireless phone numbers. While Petitioners' counsel asserted that this standard is unclear and that businesses need more definitive guidance on how consumers can effectively revoke consent, the judicial panel appeared comfortable with the specific examples offered by FCC counsel at the hearing. In sum, the FCC argued that a business shouldn't be able to ignore a consumer's requests to stop being called just because the consumer didn't say certain "magic words" to revoke consent.

In the briefing, the FCC conceded that the Order did not preclude businesses and consumers from agreeing to methods through which revocation of consent could be obtained. At the argument, the FCC's counsel attempted to tighten this concession, arguing that the reasonableness of the method and the nature of the "negotiation" between the parties would be relevant. It did not appear that the judges were particularly concerned with the possibility of abuse of contractual limits on revocation of consent, however.

### D. Healthcare Treatment Call Exemption

Counsel for Rite Aid and other healthcare-sector petitioners argued that the FCC should defer to the consumer communications framework in the Health Insurance Portability and Accountability Act of 1996 (HIPAA) relating to healthcare calls. Counsel argued that the FCC had a duty to minimize any conflict with HIPAA and, in any event, retreated from a 2012 order that granted an exemption for all HIPAA calls without providing a rational explanation for the change. The 2015 Order adopts a more limited standard than HIPAA and only exempts calls with a "healthcare-treatment purpose" from the TCPA, although the meaning of "healthcare treatment purpose" is not defined in the Order. The judges questioned how the HIPAA provisions should interact with the TCPA, asking whether the two statutes actually conflicted. They appeared more receptive to the argument that the Order did not explain changes in position from the 2012 order, but they spent little time probing this issue with the FCC.

## II. Now What?

The D.C. Circuit typically takes about two months to reach a decision following the oral argument. Under the traditional standard of review for agency decisions, the court will defer to the FCC's interpretation, provided the statute is ambiguous and the agency interpretation is reasonable (even if other reasonable interpretations exist). If, however, the court determines that the TCPA precludes the agency's interpretation, it can vacate the Order, in whole or in part. Finally, if the court determines that the agency failed to adequately explain its reasoning or failed to address significant concerns, it could decide to remand certain portions of the Order back to the FCC, with the instructions that the FCC provide greater clarification and direction. A remand would mean that the issues could remain open for a year or more, while the FCC (likely with at least some new personnel) conducts further proceedings. The court's questioning indicated that a remand is more than a theoretical possibility.

For these reasons, and given the significant monetary exposure associated with the ever increasing number of lawsuits filed over non-compliance, businesses would be wise to take reasonable steps to confirm that their current calling and texting practices (and those of their business partners and vendors) comply the 2015 Order. For information on calling and texting litigation, compliance or other advice, please reach out to any of Kelley Drye's TCPA practice co-chairs: Alysa Hutnik, and Lauri Mazzuchetti.