Hold the Phone – The D.C. Circuit Finally Speaks on the TCPA – And It's Mainly Good News!

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On Friday, March 16, 2018, the D.C. Circuit Court of Appeals issued an opinion partially striking down key aspects of the July 2015 Telephone Consumer Protection Act (TCPA) Omnibus Declaratory Ruling and Order (the 2015 Order) issued by the Federal Communications Commission (FCC). See ***ACA International, et al. v. Federal Communications Commission***, No. 15-1211 (D.C. Cir Mar. 16, 2018) (the ACA Opinion). The ACA Opinion vacated the FCC's interpretation of an automatic telephone dialing system (ATDS) and its approach to reassigned numbers and upheld the provisions of the 2015 Order regarding revocation of consent and the healthcare exemption, with important caveats discussed below. All in all, the ACA Opinion is the first step in returning the TCPA to its intended scope and providing meaningful opportunities for businesses to comply without fear of litigation. While the opinion is helpful, many questions remain, including what the FCC may do next.

Our thoughts on the most important takeaways are provided below. For more information about what your business should do in response to the ACA Opinion or how the ACA Opinion may impact your litigation strategy, please call us.

First, Some Background

As litigation under the TCPA exploded beginning in 2008, many impacted businesses and trade groups began to seek clarification and relief from the FCC. By 2015, dozens of TCPA petitions were pending before the agency on issues ranging from the definition of an ATDS to requests for specific exemptions from the consent rules.

On July 10, 2015, the FCC ruled on 21 separate petitions, addressing more than a dozen discrete issues. The 2015 Order was widely criticized for grossly expanding the scope of the TCPA, failing to create meaningful opportunities for compliance, politicizing the petition resolution process, and further sparking frivolous litigation. Two of the strongest critiques came from within the agency in the form of dissents by Commissioners Ajit Pai and Michael O'Rielly. We discussed the 2015 Order in detail in a previous client alert found **here**.

ACA International, along with several other companies and industry trade associations, filed petitions for review in the D.C. Circuit almost immediately after the FCC issued the 2015 Order. The D.C. Circuit assessed whether the challenged provisions of the 2015 Order were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. At long last on Friday, the court unanimously vacated two portions of the 2015 Order – the FCC's interpretation of ATDS and its approach to reassigned telephone numbers – and upheld the agency's approach to revocation of consent and the exemption for time-sensitive healthcare calls.

Definition of ATDS

The TCPA prohibits calls made to cell phone numbers using an ATDS or artificial or prerecorded voice unless the call is made for emergency purposes or with the prior express consent of the called party. The TCPA defines the term ATDS as "equipment which has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."

The FCC expanded the scope of this definition considerably in the 2015 Order. Under the FCC's interpretation, telephone equipment met the definition of an ATDS if it had the ***potential capacity*** to store or produce and dial random or sequential numbers, even if it was not presently used for that purpose or did not have the current capacity, including when calling a set list of consumers. The FCC determined that predictive dialers fell within this definition.

The D.C. Circuit found the statutory ATDS definition raises two sets of questions: (1) when does a device have the capacity to perform the functions enumerated by statute? and (2) what precisely is the content of those functions?

With respect to the first question, the D.C. Circuit found the FCC's interpretation of ATDS within the 2015 Order unreasonably expansive and/or arbitrary and capricious for failure to articulate a comprehensible standard. Applying the FCC's interpretation of ATDS to smartphones to demonstrate the absurdity of the result, the D.C. Circuit concluded:

It is untenable to construe the term 'capacity' in the statutory definition of ATDS in a manner that brings within the definition's fold the most ubiquitous type of phone equipment known, used countless times each day for routine communications by the vast majority of people in the country. It cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in fact.

ACA Opinion, at 17. The court found that extending the FCC's interpretation to its logical conclusion rendered the agency's interpretation unreasonably expansive. If the 2015 Order could be read to exclude smartphones, it would be arbitrary and capricious for failure to articulate a comprehensible standard through reasoned decision-making.

Regarding the second question, the D.C. Circuit found the FCC's interpretation of the functions required to constitute an ATDS similarly fell short of reasoned decision-making. As a threshold matter, the FCC argued this functionality was addressed in its 2003 and 2008 declaratory rulings, which were not timely appealed; however, the court found the 2015 Order purported to provide clarification on the definition of ATDS and denied the petition for rulemaking on the issue, which permitted the review of the issue. In its review, the D.C. Circuit found the FCC's explanation of the requisite ATDS functionality irreconcilably conflicting. For example, the 2015 Order reaffirmed the FCC's 2003 order that a predictive dialer qualifies as an ATDS. However, the court found the FCC's rationale internally inconsistent, as it concluded both that a device must be able to generate and dial random or sequential numbers ***and*** that a device could meet the definition even if it lacks the capacity to generate and dial random or sequential numbers (and instead can only dial from an externally supplied list of numbers).

Similarly, the FCC espoused conflicting guidance with respect to the capacity to automatically dial. The 2015 Order stated that the basic function of an ATDS is the ability to dial numbers without human intervention, but, at the same time, the FCC declined a request to clarify that a device is not an ATDS unless it has the capacity to dial numbers without human intervention. The court found the FCC's lack of clarity about which functions qualify a device as an ATDS compounded the unreasonableness of the FCC's interpretation of the requisite capacity needed to satisfy the statutory definition. Accordingly, the court "set aside the [FCC's] treatment of those matters."

Finally, the D.C. Circuit highlighted an additional aspect of the statutory ATDS definition that was not raised – the meaning of "to make any call … using any [ATDS]." The 2015 Order endorsed a broad understanding that the TCPA prohibits any call made from a device with the potential capacity to function as an ATDS, regardless of whether the requisite statutory functionality is used to make the call. In the oral argument and in the unanimous decision, the D.C. Circuit signaled its interpretation, consistent with Commissioner O'Rielly's dissent from the 2015 Order, that a caller violates the prohibition only when he makes a call using the requisite statutory ATDS functionality. As the D.C. Circuit noted, this interpretation would significantly diminish the practical significance of the FCC's interpretation of capacity. However, the issue was not raised in the consolidated petitions for review, leaving open the possibility that the FCC could revisit this issue.

Calls to Reassigned Numbers

In the 2015 Order, the FCC was asked to clarify whether a caller making a call to a reassigned number would be liable for violating the TCPA. The FCC concluded that the TCPA requires consent from the "called party" (defined by the FCC in the 2015 Order as either the actual subscriber or the nonsubscriber customary user) and that callers who make calls without knowledge of reassignment and with a reasonable basis to believe that they have valid consent to make the call should be able to initiate one call after reassignment without violating the TCPA.

The D.C. Circuit vacated both the one-call safe harbor and the FCC's interpretation of "called party" as the new subscriber of the reassigned number. The FCC previously supported its one-call safe harbor based on its interpretation that the TCPA anticipates the caller's ability to ***reasonably rely*** on prior express consent given by the previous subscriber. However, the D.C. Circuit found the one-call safe harbor to be arbitrary, noting that the FCC provided no explanation of why reasonable-reliance considerations support limiting the safe harbor to just one call, particularly when the call does not provide the caller with actual knowledge of the reassignment.

However, the D.C. Circuit did not stop there. It acknowledged that vacating the one-call safe harbor would have left the FCC's interpretation of "called party" to include the new subscriber of the reassigned number and would have exposed callers to liability for ***all*** calls made to the reassigned number. As the D.C. Circuit had no assurance that the FCC would have adopted that rule, it vacated the interpretation of "called party," setting aside the FCC's treatment of reassigned numbers as a whole.

Revocation of Consent

Like reassigned numbers, the 2015 Order addressed another practical issue that was not addressed by the TCPA or its implementing regulation – whether consent may be revoked. In the 2015 Order, the FCC confirmed a called party may revoke consent at any time and through any reasonable means and that a caller may not limit the manner in which revocation may occur.

The D.C. Circuit upheld the ability of a called party to revoke consent but provided the ultimate clarification sought in the underlying petition – the ability to provide a specific method for revocation to mitigate against the flood of litigation based solely on unsubstantiated claims of verbal revocation of consent. Under the court's interpretation of the 2015 Order, businesses have every incentive to make available clearly-defined and easy-to-use opt-out methods, which, if not used by consumers, may make the alleged revocation attempt unreasonable and, thus, ineffective.

The court also confirmed that the FCC conceded in its briefing that the 2015 Order did not address whether contracting parties can select a particular revocation procedure by mutual agreement. Rather, the D.C. Circuit confirmed that the 2015 Order does not speak to parties' ability to agree upon revocation procedures contractually.

Exemption for Healthcare Calls

Finally, the court sustained the scope of the FCC's exemption from the consent requirements for time-sensitive healthcare calls. In its 2015 Order, the FCC declined to extend the exemption to certain types of healthcare calls, specifically excluding advertising, billing, and debt collection.

The D.C. Circuit rejected the arguments that the healthcare exemption created a conflict with the Health Insurance Portability and Accountability Act (HIPAA) and that it is arbitrary and capricious. Instead, the court found no obstacle to complying with both the TCPA and HIPAA, as the statutes provide separate protections. The court also found that the FCC was justified in narrowing the scope of the healthcare exemption from its 2012 exemption from the residential landline protections. The court explained that the TCPA itself treated calls to residential landlines differently and noted that all healthcare calls are not made for "emergency purposes." Unlike the ATDS interpretation and reassigned number approach, the court found the FCC was empowered to draw the distinctions it made with respect to healthcare calls and appropriately explained its reasons for doing so.

What To Do Now?

The two immediate takeaways from the ACA Opinion are to: (1) reconsider your strategy for all pending TCPA litigation; and (2) reconsider your strategy for complying with the TCPA.

Litigation Strategy

1. **Consider Your Stay Strategy:** Determine whether any pending stay order requires you to inform the court of the ACA Opinion within any particular timeframe and whether to seek an extension of a stay based on further potential action by the FCC or otherwise.

2. **Review Your Answers:** Review all answers on file and consider potential amendments based on the ACA Opinion, where applicable.

3. **Reconsider Potential Defenses:** The ACA Opinion calls into question the FCC's prior interpretations of an ATDS with respect to predictive dialers and restores the pre-2015 Order state of the law regarding the meaning of an ATDS. The ACA Opinion also provides new opportunities for defenses regarding the scope of an ATDS.

With respect to reassigned numbers, the ACA Opinion vacates the 2015 Order as a whole, allowing litigants to raise the argument that "called party" means the "intended recipient" and not the current subscriber. However, this argument may be rejected, depending on the circuit in which your case in pending. Consider how the ACA Opinion may impact your current defense strategy and how to best leverage the opinion.

4. **Consider Petitioning the FCC:** Many TCPA petitions filed with the FCC were based on actual litigation. Consider whether to seek clarification or relief for the specific claims asserted and how filing a petition may impact your stay strategy.

Compliance Strategy

1. **Review Your Contracts:** The ACA Opinion confirms that the 2015 Order does not speak to parties' ability to agree upon revocation procedures contractually. Review your current contracts and determine whether to amend them to include specific methods for revocation.

2. **Review Policies and Procedures:** Whether you decide to amend your contracts to include revocation methods or not, we recommend reviewing TCPA policies and procedures and making any necessary amendments to stay current with respect to legal developments and actual business practices.

3. **Review Your Approach Regarding ATDS:** While the ACA Opinion does not define ATDS, review your current approach to whether telephone equipment constitutes an ATDS and whether to amend your approach based on the opinion.

4. **Revisit How to Stay Current on TCPA Developments:** As we have seen, particularly within the last five years, the state of the law with respect to the TCPA can change rapidly. The ACA Opinion vacates key provisions of the 2015 Order that may provide courts with new opportunities to fill the significant gaps left by the statute and regulation. As discussed below, we also anticipate further FCC action. We recommend reviewing processes to track these developments to best mitigate against TCPA risks.

What to Expect from the FCC

The procedural posture of this opinion is important to remember. Unlike a traditional appeal in which an aspect of a lower court's order is vacated and the case is remanded to the lower court for further action, the FCC is not obligated to take any further action and there is no prescribed time period for taking action, if any. However, given Chairman Pai and Commissioner O'Rielly's prior public comments regarding the 2015 Order and their immediate comments about the ACA Opinion, the future is promising.

If we were to attempt to predict how the current FCC may approach ATDS and reassigned numbers in the wake of the ACA Opinion, we would look to what the Commissioners have said publicly. With respect to ATDS, Chairman Pai explained in his dissent to the 2015 Opinion that the FCC should:

[R]ead the TCPA to mean what it says: Equipment that cannot store, produce, or dial a random or sequential telephone number does not qualify as an [ATDS] because it does not have the capacity to store, produce, or dial a random or sequential telephone number.

Similarly, Commissioner O'Rielly explained in his dissent that the definition of an ATDS applies only to equipment that has the capacity to function as an ATDS when the call is made, not at some undefined future point in time; that the equipment must, in fact, be used as an ATDS to make the call; that the telephone numbers must be stored or produced using a random or sequential number generator; that calling off a contact list or from a database of customers does not fit the ATDS definition; and that non-de minimis human intervention disqualifies a device from being an ATDS.

With respect to reassigned numbers, Chairman Pai previously explained, "We should interpret the works of the statute in the way most would and make clear that 'prior express consent' means the prior express consent of the party the caller expects to reach." Commissioner O'Rielly has agreed, explaining the common-sense approach of interpreting "called party" to mean "intended recipient" and that it is not unreasonable to expect the new subscriber of a reassigned number to inform the caller through an opt-out mechanism that could provide a safe harbor for the caller.

The FCC could address these issues by ruling on pending petitions or through its current efforts regarding reassigned numbers and call-blocking options. Once again, there are more than 20 TCPA petitions pending before the FCC, including the Credit Union National Association petition for exemption, the Cunningham and Moskowitz petition to require written consent for non-telemarketing calls, the Federal Housing Finance Authority petition regarding calls made by mortgage servicers to borrowers during and in the wake of emergencies (like hurricanes), as well as various petitions for reconsideration of certain aspects of the 2015 Order and other past orders. Action on all of these pending petitions has been waiting on the ACA Opinion. While it is impossible to predict the timing, we anticipate the FCC will address these petitions in groups similar to the approach taken with the 2015 Order.

In addition, the FCC is currently considering whether to adopt a database for reassigned numbers and is targeting methods to block or prevent prohibited calls, including through carrier blocking services and advanced call authentication methods. The FCC could use these opportunities to address the issues raised by the ACA Opinion.

We note that the FCC and Federal Trade Commission (FTC) recently announced two joint events focused on "robocalling" issues. This Friday, March 23, 2018, the agencies will co-host a Policy Forum at FCC headquarters to discuss the regulatory challenges posed by illegal robocalls and what the FTC and FCC are doing to protect consumers and encourage the development of private-sector solutions. On April 23, 2018, the FTC and FCC will co-host a Technology Expo for consumers that will feature technologies, devices, and applications to minimize or eliminate illegal robocalls.

How Can We Help You?

Our multidisciplinary team of seasoned compliance lawyers and litigators has substantial TCPA experience, including advising clients on TCPA compliance strategies, filing two TCPA petitions with the FCC, and litigating numerous individual and class action lawsuits alleging TCPA violations. Please let us know how we can help you navigate the latest TCPA developments.

Please reach out to the authors of this alert or another member of the firm's Consumer Financial Services Compliance or Consumer Financial Services Litigation teams with any questions regarding this alert.

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Anthony J. Rollo, Jr.

Jeffrey R. Seewald