

Chapman Client Alert

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Current Issues Relevant to Our Clients

D.C. Circuit Hears Challenge to FCC's Interpretation of the Telephone Consumer Protection Act

The U.S. Court of Appeals for the D.C. Circuit heard oral argument yesterday, October 19, 2016, in a consolidated case arguing that the Federal Communications Commission (“FCC”) exceeded its authority in its most recent interpretation of the Telephone Consumer Protection Act (“TCPA”).¹ The panel consisted of Circuit Judges Sri Srinivasan, Cornelia T.L. Pillard and Harry T. Edwards.

At issue in *ACA International v. Federal Communications Commission et al.*, case number 15-1211, is the TCPA, which was originally enacted in 1991 to stem the costs and nuisance of unwanted telemarketing. Congress created a law that prohibited calls using an Automated Telephone Dialing System (“ATDS”), commonly referred to as an autodialer, to call certain types of phones without prior consent. Different restrictions were developed for residential landlines and cell phones, because at the time the law was developed, most cell phone plans required subscribers to pay by the minute for calls. As such, telemarketing calls literally wasted cell phone subscribers’ money, and for that reason, Congress sought to protect consumers from unwanted calls. As part of the TCPA, prior consent (and in the case of telemarketers, prior written consent) is required where a company makes a call using an autodialer or uses a pre-recorded message in a call to a cell phone.² Prior consent is also required for some landline telemarketing calls where the call uses a pre-recorded message.³

However, many non-telemarketing companies that used an autodialer got caught up in the TCPA’s regulations, including companies collecting on debts and those with whom subscribers did business. Over time, the FCC has issued several Rules and Orders that attempt to explain exactly what the TCPA applies to and to whom it applies, especially with respect to debt collection.⁴ This maze of regulation continues to be difficult to navigate, and has become even more so with the promulgation of the FCC’s most recent guidance on the TCPA.

On July 10, 2015, the FCC promulgated a Declaratory Ruling on the Telephone Consumer Protection Act (“2015 Order”), which changed the playing field for companies that use autodialers to collect debts or do telemarketing.⁵ In the days after the 2015 Order was released, several entities petitioned courts for review of the order. The first was *ACA Int'l v. FCC*,

No. 15-1211 (D.C. Cir. Filed July 10, 2015). Next was *Sirius XM Radio, Inc. v. FCC*, No. 15-1218 (D.C. Cir. Filed July 14, 2015), and then *Professional Association for Customer Engagement, Inc. v. FCC*, No. 15-2489 (7th Cir., filed July 14, 2015). These cases, along with others, were consolidated since filing and the U.S. Panel on Multidistrict Litigation randomly selected the U.S. Court of Appeals for D.C. Circuit to hear the matters.

The petitions all argue that the FCC in its 2015 Order has acted without authority, and made it very difficult for companies to comply with the TCPA. The petitions focus on four issues: (1) the FCC’s interpretations of the TCPA are inconsistent, unclear and ambiguous, which necessitated this suit; (2) “capacity” as defined by the TCPA refers to an instrument’s present capacity, and not what it could be modified to do; (3) the definition of “called party” under the statute is ambiguous due to the frequency of “ported” numbers; and (4) the revocation of consent rules are impractical and unjustified.⁷ Many of these issues were forecast in FCC Commissioner dissents from the 2015 Order, including the definition of capacity and other issues related to the definition of an autodialer.

Prior TCPA Guidance is Inconsistent and Unclear

These issues cut to the heart of the difficulties with TCPA compliance. As recently as 2008 and 2012, companies have requested additional clarification and guidance from the FCC in the form of Rules or Declaratory Orders that would help businesses comply with the TCPA in the 21st Century.⁸ Much has changed in technology, business, and in the way that cell phones are billed that undermines or creates grey areas with respect to the definitions and scope of the TCPA. As technology expands, instruments that the TCPA drafters may not have been able to conceive are now a normal part of

business. In oral argument, counsel for petitioners reiterated that the agency doesn't settle on any one hard definition of what exactly constitutes an autodialer, and that ambiguity is very problematic.

The FCC's Expansion of the Definition of "Capacity" is Unfair and Impractical

Under the 2015 Order, any system that has the present *or future* capacity to be an autodialer counts as one for the purposes of the TCPA.⁹ As the Petitioners have argued, this would sweep in devices like smartphones that, with the ability to install and use certain applications, could be included in the definition of autodialer. Indeed, as dissenting Commissioners have pointed out,¹⁰ it is hard to imagine a device that would not fall under this broad definition besides a rotary phone that would be more at home in an antique shop than in a modern business. Thus, the parties dispute what types of devices should qualify as an autodialer, with the petitioners arguing for a narrower scope. In oral argument, the panel seemed skeptical of the FCC's argument, and said the 2015 Order does seem to ensnare smartphones.

"Ported" Number Safe Harbor Is Insufficient

With respect to "ported" numbers, there are many phone lines that used to be associated with a residential landline that have now been "ported" to ring on a cell phone. The FCC in the 2015 Order allows for a "one-call safe harbor" whereby a company that is calling what it thinks is a landline has one chance to ascertain if the number has changed to a cell phone, as the compliance requirements for cellular phones are much more stringent than those for landlines.¹¹ However, the Petitioners argue that the purported safe harbor is not effective, and does not help the companies comply with the TCPA. In oral argument, the petitioners again assailed this rule, calling it "completely irrational." The FCC countered, however, that it takes time to reassign numbers, and in that period, when those numbers are contacted, they emit tones and "undeliverable" text messages, making it clear to the caller that the number is being reassigned.

New Rules Regarding What Constitutes "Revocation" of Consent Too Difficult to Implement

In addition, under the 2015 Order, consent to be called, one of the main defenses to TCPA litigation, has become easier to revoke. Some courts had previously held that because the TCPA was silent regarding revocation, it was impossible to revoke consent to be called.¹² Others disagreed, and pointed to the Fair Debt Collection Practices Act's requirement that requests to cease and desist calling be in writing.¹³ The 2015 Order, however, allows consent to be revoked by "any reasonable means."¹⁴ Thus, a very difficult burden is placed on companies who now have to make a decision and create new policies on whether an attempted revocation is "reasonable," and can no longer require that revocation be in writing. Petitioners made this point in oral argument, and in addition, argued standardized methods of revocation should be codified. In response to the revocation arguments, Judge Pillard inquired about callers creating clear, easy, and accessible methods for consumers to revoke consent. In response, petitioners noted that even in instances where easy revocation pathways were made clear by a caller, lawsuits about individualized revocations have still been filed.

While a decision may not be released for several months, consumer actions under the TCPA will likely continue to explode. Companies that are subject to new TCPA suits have requested stays pending the resolution of this case, pointing to the unsettled nature of the law. Many courts have obliged,¹⁵ and the oral argument reinforced the reasons a company may wish to consider requesting a stay.

For More Information

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1 47 U.S.C. § 227.

2 47 U.S.C. § 227(b)(1)(A)(iii).

3 47 U.S.C. § 227(b)(1)(B); 47 C.F.R. § 64.1200.

4 See e.g. *See In re Rules & Regs. Implementing the TCPA of 1991*, 7 FCC Rcd. 8752, 8769 (Oct. 16, 1992); *In re Rules & Regs. Implementing the TCPA of 1991*, 27 FCC Rcd. 1830, 1838 (Feb. 15, 2012).

5 See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order*, CG Docket No. 02-278, FCC 15-72, at ¶¶ 49, 52 (July 10, 2015).

- 6 *ACA International, et al. v. Federal Communications Commission*, Case No. 15–1211, at ECF No. 1568219 (D.C. Cir., Aug. 17, 2015).
- 7 *ACA International, et al. v. Federal Communications Commission*, Case No. 15–1211, at ECF No. 1599016 (D.C. Cir., Feb. 16, 2015).
- 8 *In re Rules & Regs. Implementing the the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559, 563 (2008); *See In re Rules & Regs. Implementing the the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 1830, 1838 (Feb. 15, 2012).
- 9 *See Rules and Regs. Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order*, CG Docket No. 02-278, FCC 15-72, at ¶ 16 (July 10, 2015).
- 10 *See Dissenting Statement of Commissioner Ajit Pai* (“The Order dramatically expands the TCPA’s reach.”); *Statement of Commissioner Michael O’Rielly Dissenting In Part and Approving In Part* (“[e]quipment that could conceivably function as an autodialer in the future counts as an autodialer today.”).
- 11 *In re Rules and Regs. Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, 19 FCC Rcd 19215 (2004); *See Rules and Regs. Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order*, CG Docket No. 02-278, FCC 15-72, at ¶ 54 (July 10, 2015).
- 12 *See Gager v. Dell Financial Services, LLC*, 727 F.3d 265, 270 (3rd Cir. 2013) for discussion of previous court interpretations of consent.
- 13 *Id.*
- 14 *See Rules and Regs. Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order*, CG Docket No. 02-278, FCC 15-72, at ¶ 54\5 (July 10, 2015).
- 15 *See, e.g., See Fontes v. Time Warner Cable Inc.*, CV14-2060-CAS(CWX), 2015 WL 9272790, at *4 (C.D. Cal. Dec. 17, 2015) (discussing the FCC dissenting opinions and staying decision pending appeal of the FCC’s 2015 Order).

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