

PUBLICATION

The Evolving Landscape of the TCPA

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On October 20, 2016, the United States Court of Appeals for the District of Columbia Circuit heard the much-anticipated oral arguments in *ACA International, et al. v. Federal Communications Commission*, No. 15-1211 (ACA Lawsuit). The ACA Lawsuit arose out of the Federal Communications Commission's (FCC) June 2015 Declaratory Ruling and Order (2015 Order), which interpreted certain aspects of the Telephone Consumer Protection Act (TCPA). In the ACA Lawsuit, the petitioners challenge the FCC's 2015 Order and argue that it is overly broad and arbitrary. The three-judge panel which heard arguments consisted of Judges Cornelia T.L. Pillard, Sri Srinivasan and Harry Edwards. The three main issues they considered were:

1. The FCC's interpretation of the definition of an automatic telephone dialing system (ATDS) and the meaning of "capacity" of an ATDS;
2. The FCC's overly broad standard for revocation of consent;
3. The issue of a "called party" in the reassigned number context and the one-call safe harbor rule;

While the D.C. Circuit has yet to rule on any of these issues, it is expected to shortly. The determination of these issues, discussed in more depth below, will undoubtedly be important to clients involved in collection activities and hopefully provide some clarity on the TCPA.

Interpretation of an ATDS and the Meaning of "Capacity"

The TCPA defines an 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." In its 2015 Order, the FCC opined that Congress intended a broad definition of ATDS and thus concluded that an ATDS need only have the "capacity" to dial random and sequential numbers, rather than the "present ability" to do so. "In other words, the capacity of an autodialer is not limited to its current configuration but also includes its potential functionalities."

In an attempt to show that its interpretation of an ATDS was not without bounds, the FCC stated further that "the definition of autodialer does not extend to every piece of malleable and modifiable dialing equipment that conceivably could be considered to have some capacity." "[T]here must be more than a theoretical potential that the equipment could be modified" to satisfy the "autodialer" definition. The FCC used a rotary phone as the only example and stated that while "it might be theoretically possible to modify a rotary-dial phone to such an extreme" that it would satisfy the definition of "autodialer," such a possibility is too attenuated for a rotary-dial phone to have the requisite "capacity" and be considered an autodialer.

In the ACA Lawsuit before the D.C. Circuit, a major focus of discussion was the FCC's broad interpretation of "capacity" and the definition of an autodialer. During oral argument, the petitioners maintained that the FCC's broad definition would include even ordinary smartphones because they have the capability to install and use applications to autodial. The panel recognized the petitioners' concerns and agreed that the FCC's definition could produce senseless results. The judges even raised the issue of whether a simple call made to someone's relative using a smartphone would expose someone to potential liability under the statute. The

judges acknowledged the difficulty of applying a 25-year-old statute to modern methods of communication that fall within the scope of the TCPA.

Establishing Consent and Revocation of Consent

Although prior express consent is required for autodialed calls, a caller need not obtain such prior express consent through any specified means. Indeed, the FCC confirmed that a caller could even obtain a consumer's prior express consent through an intermediary. Based on a prior FCC order from 1992, the FCC reaffirmed in its 2015 Order that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary."

As to the revocation of that consent, the FCC recognized in the 2015 Order that the TCPA does not speak directly to the issue. But, relying on the TCPA's purpose, the FCC found that "any silence in the statute as to the right of revocation should be construed in favor of consumers." "[C]onsumers may revoke consent in any manner that clearly expresses a desire not to receive further messages, and that callers may not infringe on that ability by designating an exclusive means to revoke." Thus, according to the FCC, consumers have a right to revoke consent, using any reasonable method either orally or in writing, and callers may not limit a consumer's right to revoke consent. The FCC further stated that if any question arises as to whether prior express consent was provided by a call recipient, the burden is on the caller to prove that it obtained the necessary prior express consent.

At oral argument before the D.C. Circuit on this issue, the petitioners argued that the FCC's 2015 Order is arbitrary and capricious and creates an undue burden on callers to keep track of the various modes by which consumers might try to revoke consent and that allowing consent to be revoked at any time and by any means does not reasonably inform companies of such revocation. The judges seemed to indicate agreement by acknowledging that companies may have trouble compiling individualized consent revocations. The panel further questioned whether such a task had a chilling effect on businesses making protected communications to customers who wanted to receive the communications.

The Meaning of "Called Party" and Reassigned Cell Phone Numbers

The TCPA states that it "shall be unlawful" to "make any call" using an autodialer or an artificial or prerecorded voice, absent certain exceptions, without the prior express consent of the "called party." However, in the 2015 Order, the FCC acknowledged that the TCPA does not define "called party." Based on "the structure of the TCPA," the FCC interpreted "called party" to mean "the subscriber to whom the dialed wireless number is assigned" and "a non-subscriber customary user," both of whom can give prior express consent to be called at that number. In arriving at this definition, the FCC rejected "called party" to mean the "intended recipient" or "intended called party." The FCC supported its rejection by finding caller intent absent from the TCPA.

Problems with consent and revocation of consent arise, however, when a number has been reassigned to another user. In the FCC's analysis, a caller may rely on the valid consent of a consenting party until that consenting party revokes the consent and opts out of calls, but the subscriber or customary user of a reassigned number has never consented. The FCC further reasoned that the consumer who inherits the wireless number neither expects nor desires these calls. However, the FCC recognized that making calls to reassigned numbers subject to liability under the TCPA could chill expected and desired communications. Thus, the FCC found that the first call to a wireless number after reassignment should not be subject to liability, absent actual knowledge of reassignment, but rather may act as an opportunity for the caller to obtain constructive or actual knowledge of reassignment. In balancing the caller's interest in having an opportunity to learn of reassignment against the privacy interests of consumers who have a reassigned number, the FCC found a one-call safe harbor:

[W]here a caller believes he has consent to make a call and does not discover that a wireless number had been reassigned prior to making or initiating a call to that number for the first time after reassignment, liability should not attach for that first call, but the caller is liable for any calls thereafter. The caller, and not the called party, bears the burden of demonstrating: (1) that he had a reasonable basis to believe he had consent to make the call, and (2) that he did not have actual or constructive knowledge of reassignment prior to or at the time of this one-additional-call window we recognize as an opportunity for callers to discover reassignment.

The FCC went on to say that when the new subscriber to a reassigned number has not consented to the calls, the caller may reasonably be considered to have constructive knowledge – if not actual knowledge – of the revocation of consent provided by the original subscriber when the caller makes the first call without reaching that original subscriber.

If the FCC's statement regarding actual or constructive knowledge seems unworkable, it has been challenged as such. During oral argument before the D.C. Circuit panel, the petitioners characterized the imposition of liability when no one answers the "one call" as "completely irrational" because it does not necessarily provide actual or constructive knowledge. For example, a caller could reach voicemail that does not disclose the recipient's identity. The judges, seemingly in agreement, questioned whether there is sufficient constructive knowledge of reassignment when a call is made to a reassigned number and the call goes to voicemail with no identifying information or ability of the caller to identify the current cellphone subscriber.

Conclusion

The D.C. Circuit is expected to issue a decision in the forthcoming months on these issues, and hopefully will scale back the FCC's overbroad interpretation of the scope of the TCPA and provide the business community some necessary clarity. The D.C. Circuit's opinion is obviously of great importance to clients with internal collection departments or engaged in debt collection. Stay tuned.