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Hold the Phone – Debt Collectors Challenge FCC's Take on TCPA

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Businesses across America are waiting with bated breath for a ruling in *ACA International, et al. v. FCC*, a case brought by a debt collection industry group challenging the FCC's order interpreting the Telephone Consumer Protection Act with an extraordinarily broad brush. A three-judge panel from the United States District Court for the District of Columbia heard oral argument late last year and a decision is expected any day now.

Generally, the TCPA places limits on a company's ability to contact consumers by facsimile or via the consumer's cellular telephone using an automated telephone dialing system.

The challenged order was issued by the FCC in June, 2015 and ACA International filed its petition for review within hours of its issuance. In the Order, the FCC reached a number of conclusions that industry groups including ACA International claimed expanded the TCPA's scope well beyond Congress' intent. Chief among these was the FCC's extremely broad definition of an automated telephone dialing system to essentially include any computer assisted dialing technology or calling device with the future potential to include automated dialing capabilities, even if that capability is not active at the present time. Memorably, the FCC provided a single example of a dialing system that would not constitute an ATDS under the TCPA: a rotary phone.

ACA International also challenged the FCC's position that companies needed only a single call to a re-assigned cellular phone number in order to have constructive knowledge of the re-assignment. ACA International argued that both conclusions (as well as several others not covered here) were arbitrary, capricious, unduly vague and constituted abuses of the FCC's interpretive discretion.

Courts have provided little guidance on these issues thus far. In one exception, the United States District Court for the Southern District of Florida found that a company's dialing system which included a 'manual clicker application' requiring an employee to physically click a key in order for a call to be made did not fit the TCPA's definition of an automated dialing system, the FCC Order notwithstanding.

The TCPA is of critical importance to the financial industry and to the wider economy as a whole for two primary reasons. First, its prohibitions apply across the board to essentially any company that contacts its customers or the public by facsimile or telephone. Second, it provides a private right of action and the number of lawsuits filed by consumers each year has increased dramatically. According to recent reporting, 44 TCPA lawsuits were filed in 200; 1,136 in 2012; and 4,860 in 2016. Industry observers expect that TCPA lawsuits will easily cross the 5,000 mark this year.

If you have any concerns about the TCPA, its application to your business or are facing a TCPA complaint or lawsuit, please give us a call.