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TCPA Update: Financial Industry Keeps Up the Pace in Challenging FCC, Alleged Violations

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The most important ruling by a court on the TCPA is one that has not quite happened yet. The D.C. Court of Appeals is currently considering ACA International's challenge to the ultra-expansive interpretation of the TCPA reached by the Federal Communications Commission in its July 10, 2015 Omnibus Declaratory Ruling and Order. Among other things, ACA International objected to the FCC's conclusion that any telephone system with the future ability to make auto-dialed calls constitutes an auto dialer, as well as its conclusion that a consumer could revoke consent to automated telephone calls by any reasonable method. The D.C. Court of Appeals is expected to issue a ruling any day now.

Financial industry players are particularly hopeful as the D.C. Court recently demonstrated its willingness to undercut the FCC in another case, *Yaakov of Spring Valley, et al. v. Federal Communications Commission, et al.* Therein, the Court invalidated another FCC order, which in part required opt-out notices to be included on faxes sent with the recipient's consent. The FCC argued that although the statute at issue only required opt-out notices on unsolicited faxes, it possessed plenary authority to issue regulations implementing the statute and this authority included the ability to require opt-out notices on solicited faxes as well. The Court rejected this interpretation, notably finding that "good policy does not change the statute's text." The industry is hopeful that this is a classic example of foreshadowing and that the decision in the ACA case will follow similar logic.

Even if the D.C. Court of Appeals ultimately upholds the FCC's expansive 2015 Order, there is some hope that 2018 may bring a re-examination of that Order by the FCC itself. Republicans now hold a 3-2 majority on the Commission under a new Chairman, Ajit Pai, who, as a commissioner, entered a strenuous dissent to the 2015 Order.

While businesses across the country are intensely focused on these developments in the D.C. Circuit Court, courts around the country continue to press on with the yeoman's work of applying logic to the complex provisions of the TCPA. The primary issue on which the courts are focusing appears to be the consumer's right to revoke consent and the effectiveness of various revocation attempts.

Notably, in *Reyes v. Lincoln Automotive Financial Services*, the United States District Court for the Second Circuit concluded that a consumer could not unilaterally revoke consent where the consent was given as a bargained for term of the contract. This decision was based less on the specific TCPA statutory language and more on the common law of contracts.

Other courts have focused on attempts by various consumers to manufacture liability based on creative methods for revoking consent designed to circumvent a business's technology for identifying and implementing revocations. In two related cases, *Epps v. The Gap, Inc.* and *Epps v. Earth Fare Inc.*, the United States District Court for the Central District of California found that a consumer's attempt at revoking consent was unreasonable where the consumer used needlessly complicated language in a clear attempt to create TCPA liability. The District Court of New Jersey reached the identical conclusion in a nearly identical case in *Viggiano v. Kohl's Department Stores, Inc.* In *Viggiano*, the consumer had agreed to use a single word to revoke

consent like 'stop' and then used sentences-long requests which, according to the Court, made it difficult or impossible for the business to honor the borrower's request.

While these and other recent decisions made 2017 an important year for the TCPA, we fully expect 2018 to be momentous.