

# PUBLICATION

---

## TCPA Update: Impact of D.C. Circuit's Ruling on 2015 FCC Order

Authors: Eve Alexis Cann

April 19, 2018

**After hearing the oral argument in the case of *ACA International v. FCC* in October 2016, the U.S. Court of Appeals for the D.C. Circuit finally issued its long-awaited and lengthy ruling on March 16, 2018, addressing the FCC's 2015 Declaratory Ruling and Order which sought to clarify various aspects of the Telephone Consumer Protection Act (TCPA), including the definition of an "autodialer" and the ability of a called party to revoke consent.**

In its 51-page opinion, the D.C. Circuit partially upheld and partially set aside challenges made to four specific provisions of the 2015 Order. The Court set aside and vacated the expansion of the definition of "autodialer" or "ATDS" and the treatment of reassigned cell phone numbers, while upholding the broadening of the called party's ability to revoke consent and the exemption for certain time-sensitive health care communications. While addressing some of the concerns raised by the Petitioners' challenges to the 2015 Order, the Court's ruling does not offer much clarity on the provisions it set aside, and as such, this decision will not likely result in a downturn in new TCPA litigation.

For those not deeply involved in the TCPA, a brief refresher on the statute and the 2015 Order is warranted. The statute itself was enacted to help prevent calls, text messages, and faxes to consumers through the use of an autodialer without the prior express consent of the party being called. Damages for violation of the TCPA can range from \$500 to \$1,500 *per call*, which means large-dollar judgments for plaintiffs if liability is found. The 2015 Order, while designed to clarify certain ambiguities contained in the TCPA, was considered from a defensive standpoint to create more problems than it clarified, including spurring more TCPA lawsuits, which was not the FCC's intended result. Upon its release in July 2015, the 2015 Order was immediately challenged by a number of different regulated entities.

With respect to the expanded autodialer definition contained in the 2015 Order, the Court took issue with the inclusion of a device's "potential functionalities" or "future possibility" and found that, if a device could be modified via a software change or an app download, this would make every smartphone an ATDS under the TCPA. With this expansive impact, the Court found that the attempt to construe the term "capacity" as used in the statutory definition of ATDS was untenable. It held that allowing such expansion would mean "that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact." The Court ultimately ruled that the 2015 Order's expansion of the definition of "capacity" was an unreasonable and impermissible interpretation of the TCPA, and when considered in combination with the lack of clarity about which functions qualify a device as an autodialer, the Court found that this portion of the 2015 Order had to be set aside.

The other provision of the 2015 Order that the Court set aside was the treatment of circumstances in which a consenting party's cell phone number has been reassigned to another person. Under the 2015 Order, the FCC allowed a one-call safe-harbor provision to the caller, despite recognizing that a single call is often not enough to allow the caller to become informed of the dialed number's reassignment. The Court found that this limited safe-harbor provision was arbitrary and capricious, as there was no explanation as to why the safe harbor period was set at a single call. Further, because the mere setting aside of this provision would then mean that the caller is strictly liable for *any* call to a reassigned number, it held that the 2015 Order's entire treatment of

reassigned cell phone numbers had to be vacated to protect the intent of the FCC in instituting the safe-harbor protection.

The Court devoted much less discussion to the two provisions of the 2015 Order it upheld in the face of the Petitioners' challenges. The Court found that the expansion of a called party's ability to revoke consent through any reasonable means and at any time, so long as the party clearly expresses a desire not to receive further messages, made the opt-out methods more clearly defined and easy to use. The Court did make an important notation that nothing in the 2015 Order precludes the parties' ability to agree on specific revocation procedures.

The last challenge – to the 2015 Order's exemption of certain time-sensitive health care-related calls from the TCPA's prior express consent requirement to calls to cell phones – was also denied. The Court rejected several arguments asserted by the Petitioners that this exemption conflicted with HIPAA, concluding that the FCC simply declined to make certain exchanges of health care information less burdensome than they would be by default under HIPAA.

This rollback of the regulation concerning the definition of an autodialer is significant, to say the least. Many a TCPA lawsuit was stayed pending the Court's decision because of the implications of what "potential functionalities" could mean for the defense of such actions. The setting aside of this broadened definition is a setback for TCPA plaintiff's lawyers and could potentially mean both limited new lawsuits to those where there is clear use of an "autodialer," as well as more limited discovery into the issue of what constitutes such a telephone system. The upholding of the "any reasonable means" for revocation of consent, on the other hand, will conversely impact defendants in TCPA litigation. However, those defending TCPA lawsuits should keep in mind that the Court specifically left standing the ability of the parties to agree upon revocation procedures, and as such, the recent case law concerning contractual limitation on consent outlined in *Reyes v. Lincoln Automotive Financial Services* remains in effect and good law.