

## Consumer Finance Litigation



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### D.C. Circuit Sets Aside FCC's Expansive Interpretation of the Telephone Consumer Protection Act

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*In a significant ruling for businesses, technological progress, and the economy at large, the D.C. Circuit Court of Appeals unanimously granted in part, and denied in part, various petitions for review of the Federal Communications Commission's ("FCC") adoption of its 2015 Declaratory Ruling and Order (the "2015 Order") on the Telephone Consumer Protection Act ("TCPA"). The 2015 Order significantly changed the legal landscape of the TCPA, and had serious global consequences for numerous markets and businesses. In *ACA Int'l v. FCC*, (D.C. Cir. Mar. 16, 2018), the D.C. Circuit provided guidance on a number of issues, including the FCC's "unreasonably expansive interpretation" of what constitutes an "Automatic Telephone Dialing System" or "ATDS" under the TCPA.*

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#### BACKGROUND

Congress enacted the TCPA in 1991 to curb abusive telemarketing practices and encroachments on business and consumer privacy. The TCPA contains a private right of action permitting aggrieved parties to recover \$500 for each call made (or text message sent) in violation of the statute, and up to \$1,500 for each "willful or knowing" violation. See 47 U.S.C. § 227(b)(3). However, with the evolution of technology, statutory damages that may have seemed reasonable in 1991 have since morphed into a mammoth threat against any company employing automated dialing equipment. The FCC (the agency vested with the authority to promulgate regulations implementing the TCPA's requirements) has further compounded the issue by propounding a litany of rulemakings and declaratory rulings that have expanded the scope and reach of the TCPA.

The 2015 Order was one such ruling, and the subject of a challenge before the Court in *ACA Int'l*. Although the

impetus for the 2015 Order was the result of pleas to the FCC for clarification given the outdated language of the TCPA and competing court interpretations, what followed the 2015 Order was worse than what existed before—it was not only confusing, it was also onerous and overbroad. Because of this, a number of parties appealed the 2015 Order to the D.C. Circuit. There, the Court addressed four discrete aspects of the 2015 Order: (i) what types of automated dialing equipment are subject to the TCPA's restrictions on unconsented calls; (ii) when a caller obtains a party's consent, does a call nonetheless violate the TCPA if, unbeknownst to the caller, the consenting party's wireless number has been reassigned to a different person who has not given consent; (iii) how may a consenting party revoke her consent; and (iv) did the Commission too narrowly fashion an exemption from the TCPA's consent requirement for certain healthcare-related calls?

## THE D.C. CIRCUIT'S DECISION

In *ACA Int'l v. FCC*, (D.C. Cir. Mar. 16, 2018), the Court set aside the FCC's "unreasonably expansive interpretation" of what constitutes an ATDS—rejecting that it can include any device which had the "potential capacity" to make auto-dialed calls. It also vacated the FCC's approach to calls made to a phone number previously assigned to a person who had given consent, but which was since reassigned to another person who had not given consent. The Court also upheld the FCC's ruling that a consumer can revoke consent through any reasonable means and upheld the scope of the FCC's exemption for time-sensitive healthcare calls.

As part of its analysis, the Court assessed whether the FCC's challenged actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This inquiry includes ensuring that the FCC "engaged in reasoned decision-making."

### i. Potential Capacity of an ATDS

The TCPA prohibits calls using an ATDS without consent. It 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." See 47 U.S.C § 227(a)(1).

The Court rejected the 2015 Order's determination that "capacity" includes an ATDS's "potential functionalities" or "future possibility" (as opposed to present ability). The Court's decision turned on the "eye-popping" result that, under the 2015 Order, all smartphones, regardless of whether the appropriate application or software had been installed, ostensibly met the FCC's expansive ATDS definition. The Court explained that, under the FCC's interpretation, an individual could violate the TCPA by sending a text message to a new friend from her smartphone to invite her to a social gathering. The Court held this was an "unreasonable and impermissible" interpretation of the statute's reach, whereby the Commission's expansive application of "capacity" was incompatible with a statute which arose out of concerns about "solicitors" making "telemarketing" calls on behalf of tens of thousands of businesses—not hundreds of millions of "everyday callers."

The Court also admonished the FCC for not providing

guidance on what "functions" make a dialing platform an autodialer. For example, must a device itself have the ability to generate random or sequential numbers to be dialed, or is it enough if a device can call from a database of telephone numbers generated elsewhere? To that point, the Court held "[t]he Commission's most recent effort falls short of reasoned decisionmaking" in "offer[ing] no meaningful guidance" to affected parties in material respects on whether their equipment is subject to the statute's autodialer restrictions."

### ii. Re-assigned Numbers

Among other complaints, critics took issue with the 2015 Order's creation of a "one call" safe harbor for calls to reassigned numbers. Essentially, the safe harbor afforded callers one chance, without any penalty, to contact a telephone number to determine whether it was re-assigned to a party other than the one that had provided consent to be contacted by an ATDS. The problem with the safe harbor was that it was not always possible to ascertain whether a number had been reassigned with just one call, and unfair to punish a bona fide caller who had no way of otherwise knowing that the number was reassigned. In some cases, consumers were coached not to answer the phone to reveal that their number was reassigned in order to maximize TCPA damages. For this reason, the Court found that the safe harbor was arbitrary and capricious. In essence, the Court held that "reasonable reliance" on consent, given by a wireless number's customary user (the individual who had provided the initial consent to be called), could extend to more than a single call. The Court explained that, "[h]aving instead embraced an interpretation of the statutory phrase 'prior express consent' grounded in conceptions of reasonable reliance, the Commission needed to give some reasoned (and reasonable) explanation of why its safe harbor stopped at the seemingly arbitrary point of a single call or message." Because the 2015 Order failed to justify why a caller's "reasonable reliance" in express consent would cease after a first call, precedent required it to also set aside the FCC's interpretation that the called party refers to a new subscriber, rather than the intended recipient.

### iii. Revocation of Consent

The Court upheld the FCC’s broad application of the manner in which a consumer can revoke consent “at any time and through any reasonable means”—orally or in writing—“that clearly expresses a desire not to receive further messages.” The Court agreed, however, that the 2015 Order does not preclude contracting parties from selecting a particular revocation procedure by mutual agreement.

### iv. Healthcare Call Exemptions

Lastly, the Court held that the FCC did not restrict communications that the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) required be permitted to flow freely. Thus, the exemption from the TCPA’s consent requirement for certain healthcare-related calls was not disturbed.

### CONCLUSION

Although companies were hoping for more guidance from the D.C. Circuit, the outcome is unquestionably positive. Companies can rest assured knowing that reason has been reintroduced into the range of automatic dialers that may be regulated by the TCPA. Reason will likely also play a role in shaping the law on reassigned numbers. Although a bright line rule has not yet been established, to mitigate exposure, companies should use their best efforts to track and capture contacts with consumers that did not provide express consent to be contacted. To start, companies could identify unexpected names revealed on voicemail messages, conduct further investigation into suspicious activities, and perform regular directory scrubs to confirm the identity of the phone number’s current subscriber.

FCC Chairman Ajit Pai, who was among the dissenting Commissioners to the 2015 Order, has already spoken positively about the FCC’s future agenda. Among other things, the FCC is already working on the reassigned number issue, and is considering a proposal to establish a database of reassigned numbers.

Until the FCC issues further guidance, or the Supreme Court speaks on the topic, Courts will remain split about what constitutes an ATDS, as well as who the “called party” is *i.e.*, the intended recipient versus the current subscriber. Companies should consult with counsel about best practices regarding the use (and model) of its dialers—or any equipment used by third-party vendors—as well as the creation and/or modification of appropriate policies and procedures.

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