

DC Circuit Vacates Key Aspects of FCC's 2015 Order Interpreting the Telephone Consumer Protection Act

On March 16, 2018, in a long-awaited and much-anticipated decision, a unanimous panel of the US Court of Appeals for the District of Columbia Circuit vacated two important rulings from the Federal Communication Commission's 2015 declaratory ruling and order (FCC Order) concerning the Telephone Consumer Protection Act (TCPA): (1) the Commission's "clarification" of the types of calling equipment that fall within the TCPA's definition of "automatic telephone dialing system" (ATDS); and (2) the Commission's treatment of reassigned wireless numbers for purposes of TCPA liability. On two other rulings, the Commission's approach to revocation of consent and the scope of its exemption for time-sensitive healthcare calls, the Court upheld the FCC.

We represented one of the petitioners challenging the FCC Order; all petitions challenging the order were consolidated in front of the DC Circuit in *ACA Int'l v. FCC*, Case No. 15-1211. The DC Circuit's 51-page opinion can be found [here](#).

What's Next?

The DC Circuit's decision is a victory for companies that have been seeking clarity from the FCC as to how to comply with the TCPA. While the Court did not remand the matter back to the Commission, given the current makeup of the Commission, it is likely that the FCC will take up the rulings vacated by the decision (either through another declaratory ruling or rulemaking proceeding) and (hopefully) provide the certainty and guidance that companies have been seeking from the agency regarding TCPA compliance. Notably, with the change of administration, the Republican-led Commission looks different today from it did when a Democratic majority issued the FCC Order in 2015. One of the dissenters from the FCC Order – Ajit Pai – is now the chairman. In a statement released on March 16, Chairman Pai foreshadows a different approach: "Today's unanimous DC Circuit decision addresses yet another example of the prior FCC's disregard for the law and regulatory overreach. As the court explains, the agency's 2015 ruling placed every American consumer with a smartphone at substantial risk of violating federal law. That's why I dissented from the FCC's misguided decision and am pleased that the DC Circuit too has rejected it."

In fact, the FCC has already started to address some of the problems with reassigned numbers that remained after the FCC Order. In vacating the Commission's treatment of reassigned numbers, the DC Circuit recognized that "the Commission is already on its way to designing a regime to avoid the problems of the 2015 ruling's one-call safe harbor. The Commission recently sought comment on potential methods for 'requir[ing] service providers to report information about number reassignments for the purposes of reducing unwanted robocalls.'

Advanced Methods to Target and Eliminate Unlawful Robocalls, Second Notice of Inquiry, 32 FCC Rcd. 6007, 6010 ¶¶ 9 (2017). Most of its proposals envision creating a comprehensive repository of information about reassigned wireless numbers. *See id.* at 6012-13 ¶¶ 15-19." Indeed, on March 22, 2018, the FCC is expected to adopt proposed rules to establish at least one such database and seek comments on a potential safe harbor for those who tap into that information. Further, the FCC can now focus on a number of petitions that were tabled pending the DC Circuit's decision.

Impact on Pending Litigation

Many courts around the country have stayed TCPA litigation pending the DC Circuit's decision. If the Commission takes up the vacated rulings, some of those stays may continue, particularly those involving ATDS issues. Other courts, however, may not be willing to continue to stay their matters and will move forward with the litigation, using the DC Circuit's reasoning and other pre-FCC Order court decisions as guidance to resolving questions as to what type of equipment falls into the definition of ATDS and how to treat reassigned numbers.

The DC Circuit's Decision

The DC Circuit addressed each of the four challenges raised by petitioners:

The ATDS Issue: As the DC Circuit noted, the TCPA generally makes it unlawful to call a wireless phone using an ATDS. ATDS includes "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." 47 U.S.C. § 227(a)(1). The Court found that this definition raises two questions: (1) when does a device have the "capacity" to perform the enumerated functions?; and (2) what precisely are those functions? The DC Circuit found that the FCC's approach to both questions "cannot be sustained."

As to the first question, the DC Circuit found that the Commission adopted an "unreasonably, and impermissibly expansive" definition of "capacity" such that any smartphone would qualify. According to the Court, "[i]t is untenable to construe the term 'capacity' in the statutory definition of an ATDS in a manner that brings within the definition's fold the most ubiquitous type of phone equipment known, used countless times each day for routine communications by the vast majority of people in the country."

As to the second question, the DC Circuit found that the FCC Order did not clearly define the “requisite features” of an ATDS. The Court found that the Order provided conflicting guidance on whether a device must be able to *generate* and dial random or sequential numbers or whether it can be considered an ATDS even if it has no capability itself to generate random or sequential numbers (and instead can only dial from an externally supplied list of numbers). The DC Circuit found that the ruling was also unclear as to whether a device could be considered an ATDS if it required human intervention. “In short, the Commission’s ruling, in describing the functions a device must perform to qualify as an autodialer, fails to satisfy the requirement of reasoned decisionmaking.”

In an interesting aside, the DC Circuit raised questions about an issue not before it – the FCC’s understanding about what it means to make any call *using* any ATDS. The Court, seemingly indicating that this remained a relevant, unanswered question, noted that the Commission could choose to revisit that issue in the future.

The Reassigned Number Issue: The DC Circuit then addressed the Commission’s treatment of the circumstances in which a consenting party’s wireless number has been reassigned to another person. The Commission determined that a call in that situation violates the TCPA except it provided for a one-call, post-reassignment safe harbor. The Court found that this one-call safe harbor was arbitrary and capricious.

As an initial matter, the DC Circuit disagreed with petitioners and found that the “Commission was not *compelled* to interpret ‘called party’ in § 227(b)(1)(A) to mean the ‘intended recipient’ rather than the current subscriber.” However, the Court agreed with petitioners that the Commission’s one-call safe harbor was arbitrary. Noting that the Commission justified the safe harbor on the basis that it is reasonable for a caller to rely on a prior subscriber’s consent when the caller has no knowledge of the reassignment, the DC Circuit found that the Commission “gave no explanation of why reasonable-reliance considerations would support limiting the safe harbor to just one call or message. That is, why does a caller’s reasonable reliance on a previous subscriber’s consent necessarily cease to be reasonable once there has been a single, post-reassignment call?”

Because vacating the Commission’s one-call safe harbor while leaving in place its “called party” determination would leave a caller strictly liable for all reassigned calls, the DC Circuit vacated the Commission’s treatment of reassigned numbers generally. The Court found that it could not “say without any substantial doubt that the agency would have embraced the ‘severe’ implications of a pure, strict-liability regime even in the absence of a safe harbor.”

The Revocation of Consent Issue: Finding petitioners’ concerns “overstated,” the DC Circuit upheld the Commission’s determination that a called party may revoke consent at any time and through any reasonable means, including orally or in writing, that clearly expresses a desire not to receive further messages. Notably, however, as recognized by the Commission, the FCC Order only precludes a caller’s unilateral imposition of revocation rules; it does not address revocation rules mutually adopted by contracting parties.

The Healthcare-Related Exemption Issue: Finally, the DC Circuit rejected petitioner Rite Aid’s argument that the FCC exemption for selected healthcare-related calls had to dovetail with the terms of the Health Insurance Portability and Accountability Act. The Court also turned aside a challenge to the Commission’s decision to exempt from the TCPA’s consent requirements calls “for which there is exigency and that have a healthcare treatment purpose” but not those with “telemarketing, solicitation, or advertising content, or which include accounting, billing, debt-collection, or other financial content.”

We have seasoned and experienced regulatory, litigation and policy lawyers who can assist you with all aspects of the TCPA, including compliance, counseling, regulatory and litigation. We will continue to monitor the impacts of the DC Circuit’s decision, both in litigation pending around the country and future regulatory developments at the FCC.

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