

PUBLICATION

D.C. Circuit Sets Aside 2015 FCC Order on ATDS Definition, Upholds Revocation Expansion

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In its long-awaited ruling addressing the FCC's 2015 Declaratory Ruling and Order, the U.S. Court of Appeals for the D.C. Circuit partially upheld and partially set aside challenges to four specific provisions that had been intended to offer clarity on the TCPA. In *ACA International v. FCC*, the D.C. Circuit 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 the uptick of TCPA litigation will not likely subside.

With respect to the expanded autodialer definition, the Court took issue with the 2015 Order's 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 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 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 opinion is a setback for the plaintiff's bar. The rollback of the rules concerning the definition of an autodialer are significant and may ultimately result in plaintiff's counsel only pursuing suits involving a clear use of an autodialer. The ruling thus will also hopefully limit discovery into the issue of what is an autodialer. Conversely, the upholding of the rules regarding revocation of consent will adversely impact defendants in TCPA actions. However, as the Court expressly noted that "[n]othing in the Commission's order thus should be understood to speak to parties' ability to agree upon revocation procedures," the recent case law concerning contractual limitation on consent, outlined in *Reyes v. Lincoln Automotive Financial Services*, 861 F.3d 51 (2d Cir. 2017), remains good law.

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