ACA International, et al. v. FCC, et al., No. 15-1211 (D.C. Cir.)

Client Alert

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On March 16, 2018, the D.C. Circuit issued its long-awaited ruling in *ACA International, et al. v. FCC, et al.*, No. 15-1211, resolving a series of challenges to the July 10, 2015 Declaratory Ruling & Order of the Federal Communications Commission (FCC) implementing the Telephone Consumer Protection Act (TCPA), *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling & Order, 30 FCC Rcd. 7961 (2015) ("Order").

Petitioners challenged various aspects of the Order under the Administrative Procedure Act (APA) as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). The Court agreed that the Order's "effort to clarify the types of calling equipment that fall within the TCPA's restrictions" and "approach to calls made to a phone number previously assigned to a person who had given consent but since reassigned to another (nonconsenting) person" are arbitrary and capricious and accordingly vacated those portions of the Order. Op. 5. The Court upheld, however, the Order's approach to revocation of consent and to the scope of the exemption for healthcare-related calls. *See id.*

While the Court's decision may provide companies temporary relief from some of the most punitive aspects of the TCPA, lower courts will now be left to fill the gap left by the D.C. Circuit's partial vacatur of the FCC's Order. Notwithstanding this victory, companies should be mindful of the ongoing litigation risks of communicating with prospective and current customers using telephones and other emerging technologies.

Statutory Framework

The TCPA was enacted in the 1990s to curtail undesired robocalls to consumers. To that end, Congress prohibited the use of certain automated dialing equipment to make calls to cellular telephones without the called party's consent. Specifically, except in limited circumstances, the TCPA restricts calls made using an "automatic telephone dialing system" (commonly referred to as an "ATDS" or "autodialer") to a "telephone number assigned to a … cellular telephone service" without "the prior express consent of the called party." 47 U.S.C § 227(b)(1)(A). The TCPA defines "automatic telephone dialing system" 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." *Id*. § 227(a)(1).

Violations of the TCPA are subject to statutory damages of $500 per call, and up to $1500 in damages for each "willful[] or knowing[]" call in violation of the Act. 47 U.S.C. § 227(b)(3). The TCPA vests the FCC with authority to promulgate regulations to implement the Act's requirements. 47 U.S.C. § 227(b)(2).

2015 Declaratory Ruling

On July 10, 2015, the FCC issued the Order in response to 21 petitions for rulemaking or requests for clarification regarding the meaning and scope of several provisions of the TCPA. The Order expanded the scope of the TCPA in several important and concerning ways.

First, the FCC concluded that any equipment with the "potential" or "capacity" to "dial randomly or sequentially" qualifies an autodialer within the meaning of the TCPA. Order ¶¶ 15, 16. The Order clarified that a device's "capacity" is not limited to its "present" abilities, but also encompasses the devices "potential functionalities," including with modifications to hardware and software. *Id.* ¶ 16. The Order also reaffirmed prior decisions of the FCC that "predictive dialers" qualify as autodialers, but declined to clarify whether a device must "dial numbers without human intervention" to constitute a predictive dialer. *Id.* ¶ 17.

Second, the Order defined "called party" for purposes of the Act's prior express consent provision to include the "subscriber" or "customary user of the phone," rather than the intended recipient of the call. Order ¶ 73. Under the FCC's interpretation, a caller faces liability if it calls a number provided by a customer who had provided consent, but inadvertently reaches someone else to whom that number has been reassigned. To address this "severe" result, *id.* ¶ 90 n.312, the Commission permitted callers unaware of reassignment to make one—and only one—liability-free, post-reassignment call. All subsequent calls, however, are subject to TCPA liability, even if the caller is not actually made aware of the reassignment on the first call.

Third, the Order clarified the ways in which a consenting party can revoke previously-given consent to receive autodialed calls. The Order states that customers may revoke consent "at any time and through any reasonable means" and prohibits callers from "limit[ing] the manner in which revocation may occur." Order ¶¶ 47, 63.

Fourth, the Order exempted from the consent requirement certain non-marketing healthcare-related calls to wireless numbers, subject to numerous limitations. Order ¶ 146.

D.C. Circuit Decision

In *ACA International*, the Court granted in part and denied in part the petitions for review.

With respect to the Order's explanation of the types of devices that qualify as an ATDS, the Court concluded that the FCC's expansive interpretation of the statutory term "capacity" could not be sustained. In reaching that conclusion, the Court was troubled that the FCC's interpretation had "the apparent effect of embracing any and all smartphones" given that "essentially any smartphone, with the addition of software, can gain the statutorily enumerated features of an autodialer and thus function as an ATDS." Op. 14. "If every smartphone qualifies as an ATDS," the Court observed, "the statute's restrictions on autodialer calls assume an eye-popping sweep," rendering unlawful and subjecting to $500-per-call statutory damages "an[y] uninvited call or message from a smartphone … even if autodialer features were not used to make the call or send the message." *Id.* at 16. The Court concluded that the TCPA "cannot reasonably be read" to permit such "anomalous outcomes." *Id.* at 16-17. The Court further explained that the Order "falls short of reasoned decisionmaking" in failing to offer clear guidance on "whether a device *itself* [must] have the ability to generate random or sequential

telephone numbers to be dialed" to qualify as an ATDS or whether it is "enough if the device can call from a database of telephone numbers generated elsewhere." *Id.* at 25. Indeed, the Court found, the Order "seems to give both answers." *Id.* at 27. Moreover, the Court concluded, "[t]he order's lack of clarity about which functions qualify a device as an autodialer compounds the unreasonableness of the Commission's expansive understanding of when a device has the 'capacity' to perform the necessary functions." *Id.* at 29. Accordingly, the Court vacated the Order's interpretation of the term autodialer.

The Court then turned to the Order's treatment of liability for calls to reassigned numbers. The Court explained that when "a consenting party's cell phone has been reassigned to another person[,] … the caller might initiate a phone call (or send a text message) based on a mistaken belief that the owner of the receiving number has given consent, when in fact the number has been reassigned to someone else from whom consent has been obtained." Op. 31. By adopting an interpretation of the term "called party" (from whom consent to be called must be obtained) to mean "current subscriber" rather than the intended recipient of the call, the Court explained, the Order exposes the caller to TCPA liability for mistakenly calling a party who has not given consent. *Id.* at 32. The Court concluded that, as a textual matter, the FCC was not "compelled" to interpret the term "called party" to mean the "intended recipient" rather than the "current subscriber." *Id.* at 35. However, the Court went on to conclude that the Order's one-call safe harbor for calls to reassigned numbers is arbitrary and capricious. The Court explained that the FCC had rejected strict liability for calls to reassigned numbers on the ground that callers could reasonably rely on the consent given by the previous subscriber but "gave no explanation of why reasonable-reliance considerations would support limiting the safe harbor to just one call or message" when "[t]he first call or text message … might give the caller no indication whatsoever of a possible reassignment." *Id.* at 36. Accordingly, the Court vacated the one-call safe harbor on the ground that it was not the product of reasoned decision-making. The Court then concluded that, having invalidated the one-call safe harbor, it was required to set aside the FCC's "treatment of reassigned numbers more generally" because the Court could not say with certainty that the FCC would have adopted the severed portion but for the one-call safe harbor. *See id.* at 39.

With respect to the revocation of consent issue, the Court upheld the FCC's approach, "under which a party may revoke her consent through any reasonable means clearly expressing a desire to receive no further messages from the caller." Op. 5. The Court explained that although the FCC did not endorse standardized revocation procedures, the Order "absolves callers of any responsibility to adopt systems that would entail 'undue burdens' or would be 'overly burdensome to implement.'" *Id.* at 41. And, in light of the "any reasonable means" standard endorsed by the FCC, "callers will have every incentive to avoid TCPA liability by making available clearly-defined and easy-to-use opt-out methods." *Id.* at 42. Further, the Court emphasized, "[i]f recipients are afforded such options, any … idiosyncratic or imaginative revocation requests might well be seen as unreasonable" and therefore not an acceptable means of revoking consent. *Id*. The Court also rejected the notion that the Order "preclude[s] callers and consumers from contractually agreeing to revocation mechanisms," explaining that "[t]he ruling precludes *unilateral* imposition of revocation rules by callers; it does not address revocation rules mutually adopted by contracting parties." *Id.* at 43 (emphasis added); *see also id.* ("Nothing in the Commission's order … should be understood to speak to parties' ability to *agree* upon revocation procedures." (emphasis added)).

Lastly, the Court rejected the challenge by petitioner Rite Aid to the scope of the Order's exemption from the prior-consent requirement for certain healthcare-related calls to wireless numbers. The Court concluded that the FCC's restriction of the exemption "to calls for which there is exigency and that have a healthcare treatment purpose" was not arbitrary and capricious.

Conclusion

The Court's ruling invalidates two of the most concerning aspects of the Order for covered parties—the definition of ATDS and liability for calls to reassigned numbers. Going forward, it remains to be seen how courts will treat these issues in the absence of the FCC's guidance. Absent future action by the FCC in a rule making or in response to a petition, courts will be left to determine on a case-by-case basis whether a particular piece of dialing equipment is an autodialer within the meaning of the statute and whether calls to reassigned numbers subjects a caller to TCPA liability when the caller had the intended recipient's (but not the current subscriber's) prior express consent to be called. And although the Court upheld the Order's treatment of revocation of consent, the Court emphasized that reasonableness is the benchmark, suggesting that courts should be wary of unreasonable attempts to revoke consent in order to manufacture TCPA liability, and clarified that the Order in no way restricts parties' ability to mutually agree upon standardized revocation methods (even if it restricts callers' ability to impose those methods unilaterally).

Interestingly, the Court questioned whether "in the case of a device having the 'capacity' both to perform the autodialer functions set out in the statutory definition and to perform as a traditional phone, … the bar against 'making any call using' an ATDS apply only to calls made using the equipment's ATDS functionality," or whether "the bar appl[ies] to all calls made with a device having that 'capacity,' even ones made without any use of the equipment's autodialer capabilities?" Op. 30. The Court ultimately declined to address that question given that the parties had not raised it, but suggested that the FCC "could choose to revisit the issue in a future rulemaking or declaratory order, and a party might then raise the issue on judicial review." *Id.* at 31.