

[The Telephone Consumer Protection Act at 25: Gaps, Apps and Traps](#)

The Telephone Consumer Protection Act turned 25 years old this year, and although the statute is relatively young, most defense practitioners agree that it is showing its age—and not in a good way. Author Petrina Hall McDaniel of Dentons LLP says practitioners point to numerous gaps in the statute that have failed to keep up with the modern advances of smartphones and calling technologies. She offers several tips on avoiding liability.

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TCPA—the Telephone Consumer Protection Act. Most companies are acutely aware of this federal statute, especially those engaged in the business of reaching consumers by phone or text message. The TCPA restricts calls and text messages to cellphones and residential landlines by generally prohibiting communication using automated systems, artificial callers, or prerecorded voices unless the consumer gives “prior express consent.” The statute turned 25 years old this year, and though it is relatively young, most defense practitioners agree that the statute is showing its age—and not in a good way. As evidenced by the recent oral argument on Oct. 19, 2016, in the consolidated appeal of *ACA International, et al. v. FCC* in the U.S. Court of Appeals for the District of Columbia Circuit, petitioners point to numerous gaps in the statute that have failed to keep up with the modern advances of smartphones and calling technologies. *ACA Int'l, et al. v. Federal Commc'ns Comm'n and United States of America*, Case No. 15-1211 (D.C. Cir.). This in turn has resulted in the Federal Communications Commission (FCC) interpreting these voids with arguably sweeping and ambiguous orders.

The FCC Fills the 'Gaps'

Congress vested the FCC with authority to prescribe regulations implementing the TCPA. Most recently, the FCC issued an omnibus order in June 2015 that addressed 21 outstanding petitions and requests for clarification. See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) (2015 FCC Order). The 2015 FCC Order is perhaps the most controversial order from the FCC to date and is currently on appeal in *ACA International*. Issues that the FCC sought to clarify in the 2015 Order include the definition of an “automatic telephone dialing system” (commonly referred to as an autodialer), reassigned numbers and revocation of consent.

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The FCC's interpretation of an autodialer is probably the most contentious ruling from the 2015 Order. Based on the FCC's interpretation, autodialers now include technologies with a potential capacity to dial random or sequential numbers, “even with some modification.” Besides providing the lone example of what *does not* constitute an autodialer—the now-defunct rotary phone—the FCC offered no other guidance

regarding the expanded definition. It remains a question whether smartphones are somehow encompassed by the FCC's autodialer definition, as they arguably have the "potential" to be used as autodialers even if they do not presently have such capacity. Regarding the issue of reassignment of wireless numbers, the 2015 Order states that a caller must obtain the consent of the current subscriber (or customary user), not the intended recipient. This means that if a company has a good-faith belief that it has obtained consent to call or text a consumer, but that consumer's number has been reassigned, the company faces liability after the first call. The obvious problem with the "one-call safe harbor exception" is that it is virtually impossible to know with any certainty if a number has been reassigned if the recipient does not inform the company. Think of the scenarios where there is no identifying information on a voicemail or there is no voicemail at all, and the recipient does not respond to a text message.

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Another gap-filling interpretation in the 2015 Order concerns revocation of consent. Finding that "nothing in the language of the TCPA or its legislative history supports the notion that Congress intended to override a consumer's common law right to revoke consent," the FCC ruled that a caller can revoke consent in any "reasonable manner." What the FCC defines as "reasonable" remains to be seen. For example, is it reasonable to relay to a flight attendant when checking in for your flight that you do not wish to receive informational calls on your cell phone about your flight? Is it reasonable to opt-out of text messages by informing your pizza deliverer? Reconciling the thorny issue of oral revocation with whether a company can designate a reasonable method of opt-out will likely be a central issue in the DC Circuit's forthcoming order.

Yes, There's An 'App' for That

To say that plaintiff attorneys have become creative in exploiting the gold mine that has become the TCPA is an understatement. Class actions are much more common than individual actions, and the class action vehicle is largely used to extract million-dollar settlements from businesses. The plaintiff's bar has seized on this opportunity and some lawyers have even developed an Android or iPhone application to find potential putative plaintiffs.

Case in point: the apps "[Block Calls Get Cash](#)," "[Legal Call Blocker](#)" and "[Stop Calls Get Cash](#)" are available for download on smartphones, and serve one common purpose—to create legal documentation of unwanted telemarketing and debt collection calls. "Block Calls Get Cash" and "Legal Call Blocker" are offered by the Connecticut-based firm Lemberg Law, which describes itself as "the most active consumer firm in the country." The description of "Legal Call Blocker" touts: "If you receive a robocall, a telemarketing call, or a debt collection call, the app is ready. When you respond to a few quick Legal Call Blocker prompts, the app creates legal documentation of the call ... The team evaluates the documentation for violations of the Telephone Consumer Protection Act. If there is a violation of law, you take the caller to court for up to \$1,500 per call." Chicago-based [Agruss Law Firm LLC](#), which offers "Stop Calls Get Cash," similarly advertises that the app logs incoming calls and text messages, which will "help us stop

the harassment and get you money.”

These apps are more than just a nod to the plaintiff's bar ingenuity—it underscores the perverse incentives that the TCPA has created. As the FCC ruled in its 2015 Order, callers are subject to strict liability after a single attempted call to a number that's been reassigned to a new subscriber. As noted by Commissioner Ajit Pai, this type of “gotcha” loophole under the TCPA “creates a trap for law-abiding companies by giving litigious individuals a reason not to inform callers about a wrong number. This will certainly help trial lawyers update their business model for the digital age.” (2015 FCC Order, FCC 15-72, p. 120). These apps arguably do just that.

Don't Fall into the TCPA 'Trap'

Because the TCPA is essentially a strict liability statute, any innocent mistake or misstep can result in significant liability. For example, Rubio's Restaurant Inc. was sued under the TCPA for more than \$500,000 (exclusive of treble damages) arising from informational text messages the company sent to an employee's old phone number. In an effort to keep its staff informed about food safety issues, the restaurant's quality assurance team sent text alerts about issues affecting the health and safety of Rubio's customers. Rubio's sent messages to a phone number that it thought belonged to an employee. The employee, however, had previously lost his cell phone and the wireless carrier reassigned the employee's number to someone else—unbeknownst to Rubio's. The new subscriber never asked Rubio's to stop sending the text messages. Indeed, the subscriber waited until he received approximately 876 alerts before suing Rubio's under the TCPA. Rubio's Restaurant, Inc., Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, filed Aug. 15, 2014.

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Rubio's petitioned the FCC for clarification and argued that the FCC “should add an affirmative, bad-faith defense that vitiates liability upon a showing that the called party purposefully and unreasonably waited to notify the calling [] party of the reassignment in order [to] accrue statutory penalties.” 30 FCC Rcd. at 8011. In the 2015 Order, the FCC rejected Rubio's request, explaining that “uninvolved new users of reassigned numbers are not obligated under the TCPA or our rules to answer every call, nor are they required to contact each caller to opt out in order to stop further calls.” *Id.* Based on the FCC's assessment, the plaintiff had no affirmative obligation to notify Rubio's that the employee's number had been reassigned, and instead, the plaintiff had every right to sit back and amass hundreds of calls as a predicate for a TCPA lawsuit.

Until the DC Circuit rules in *ACA International*, scenarios like this may continue to form the basis of TCPA class actions. Understanding how to navigate FCC regulations and developing case law is therefore critical to avoiding litigation and ensuring compliance under the statute. Here are some tips:

- ensure that the business is capturing the appropriate consent required for the type of call or text message it delivers (i.e., oral or written consent for non-telemarketing calls and “prior express written consent” for telemarketing calls);
- understand the elements of “prior express written consent” for telemarketing calls and text messages (FCC regulations require a prior, signed, written agreement that is

“clear and conspicuous” in which the consumer specifically agrees to receive telemarketing calls or text messages via autodialer and/or prerecorded voice on a cellphone or residential line and such consent may not be a condition of purchase);

- confirm the accuracy of numbers in the database and verify that numbers have not been reassigned (while no national registry exists of reassigned numbers, consider using market solutions that can assist in scrubbing numbers and identifying current subscribers);
- good recordkeeping is key (the burden is on the caller to retain evidence of revocation of consent and the company should maintain records for at least four years); and
- perform independent and annual assessments of vendors that provide TCPA services (negotiate indemnification and joint and several liability if possible).