

D.C. CIRCUIT REJECTS FCC'S INTERPRETATION OF AUTOMATIC TELEPHONE DIALING SYSTEM UNDER TCPA

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As retailers continue to be sued for alleged violation of the Telephone Consumer Protection Act (“TCPA”), a long-awaited ruling by the D.C. Circuit on the FCC’s 2015 Declaratory Ruling and Order (“2015 Order”) may provide some relief.

The TCPA restricts telemarketing and the use of SMS text messages, automatic dialing systems, artificial or prerecorded voice messages, and fax machines. Importantly, for autodialers and voice messaging systems, it requires identification and contact information of the entity using the device to be contained in the message. For SMS text messages, it requires obtaining express consent from individuals before sending them text messages, and providing information on how they can stop receiving text messages.

In *ACA International v. Federal Communications Commission, et al.*, the D.C. Circuit issued its long-awaited opinion on the FCC’s 2015 Order interpreting various sections of the TCPA.

Of note, the Court specifically rejected and set aside the FCC’s interpretation of what constitutes an Automatic Telephone Dialing System (“ATDS”). The Court also rejected the FCC’s one-call “safe harbor” for re-assigned phone numbers. At first glance, this may seem like a win for those defending TCPA lawsuits; however, the opinion may create more questions than answers.

The Court addressed (i) what types of automatic dialing equipment fall under the TCPA’s definition of ATDS; (ii) whether a dialer violates the TCPA if a number is reassigned to another person who has not given consent to be called; (iii) how a consenting party may revoke consent; and (iv) whether the consent exemption for healthcare-related calls was too narrow. The Court’s scope was limited to whether these aspects of the FCC’s 2015 Order were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). The Court upheld the FCC’s “approach to revocation of consent, under which a party may revoke her consent through any reasonable means” and rejected the one-call “safe harbor” for re-assigned phone numbers as “arbitrary and capricious.”

Finally, the Court addressed the FCC’s broad definition of what constitutes an ATDS. The TCPA 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.” 47 U.S.C. § 227(a)(1). The Court ultimately rejected the FCC’s explanation of which devices qualify as an ATDS as “an unreasonably expansive interpretation of the statute.” The FCC interpreted “capacity” to encompass a device’s ‘potential functionalities’ with modification such as software changes.”

The FCC also made a troubling assumption that “a call made with a device having the capacity to function as an autodialer can violate the statute *even if autodialer features are not used to make the call.*” (emphasis added) The Court noted that under the current FCC interpretation, “essentially any smartphone, with the addition of software, can gain the statutorily enumerated features of an autodialer and thus function as an ATDS.” The Court further explained that “[t]he [FCC’s] interpretation would extend a law originally aimed to deal with hundreds of thousands of telemarketers into one constraining hundreds of millions of everyday callers.” Additionally, “[t]he agency’s prior rulings left significant uncertainty about the precise functions an autodialer must have the capacity to perform.”

The Court concluded that the FCC’s 2015 Order, “in describing the functions a device must perform to qualify as an autodialer, fails to satisfy the requirement of reasoned decision-making.” However, as the Court’s opinion was limited to whether the FCC’s order was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” it fails to provide an alternative interpretation of what devices *do* constitute an ATDS.

In sum, although the opinion sheds some light on what an ATDS is and has the capacity to do, the Court fails to provide an alternate interpretation of what devices may fall under the purview of the TCPA. The Court’s rejection of the FCC’s interpretation of what an ATDS is will likely result in, at least in the short term, increased litigation in fleshing out whether a defendant’s call system in fact has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers.

RELATED PRACTICE AREAS

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- Telephone Consumer Protection Act (TCPA)

MEET THE TEAM



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