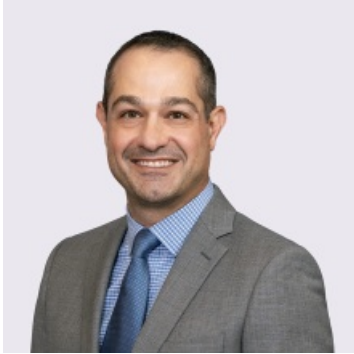


Federal Communications Commission Order on Telephone Calls Went Too Far, D.C. Circuit Court Rules

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The U.S. Court of Appeals for the District of Columbia has issued a highly anticipated ruling reviewing the Federal Communications Commission's July 2015 Declaratory Ruling and Order interpreting the Telephone Consumer Protection Act (TCPA). *ACA Int'l, et al. v. FCC, et al.*, No. 15-1211 (D.C. Cir. Mar. 16, 2018).

The TCPA generally prohibits the use of certain kinds of automated dialing equipment or automated telephone dialing system (ATDS) to place calls, send text messages, or to send facsimiles. It also vests the FCC with authority to implement those restrictions.

More than a dozen organizations sought review of the FCC's 2015 Order and the D.C. Circuit considered the following four issues in the Order:

1. The sorts of automated telephone dialing system equipment that are subject to the TCPA's restrictions;
2. If a party consents to a call, whether the caller is still in violation if the consenting party's wireless number is, unbeknownst to the caller, reassigned to a different party;
3. How may a consenting party revoke consent; and
4. Whether the FCC too narrowly interpreted an exemption for certain healthcare-related calls.

In examining the FCC's 2015 Order, the unanimous three-judge appellate panel set aside the FCC's expansive interpretation of what constitutes an ATDS and its approach to consent of reassigned wireless numbers. The Court, however, upheld the FCC's approach to revocation of consent by "reasonable means" to express a desire to receive no further messages from the caller as well as the scope of the FCC's exemption for certain healthcare calls.

ATDS Equipment

The appellate panel ruled the FCC's expansive interpretation of what constitutes an ATDS under the TCPA as all equipment with the theoretical "capacity" for autodialing is too broad.

While the 2015 Order stated that "there must be more than a theoretical *potential* that the equipment could be modified to satisfy the 'autodialer' definition," the Court held this "ostensible limitation affords no ground for distinguishing between a smartphone and a Firefox browser." It then determined the FCC's interpretation of ATDS was "an unreasonably expansive interpretation of the statute."

Wireless Number Reassignment

The Court rejected the FCC's approach to calls made to a person who previously had consented, but whose number has since been reassigned to another, nonconsenting,

person.

The FCC provided that calls in that situation violated the TCPA. However, it allowed a “one-call safe harbor,” which exempted one call post-reassignment, regardless of whether the caller is aware of the reassignment.

The Court set aside this interpretation as a whole because the FCC’s “one-call safe harbor” was “arbitrary and capricious.”

Revoking Consent

The Court upheld the FCC’s guidance allowing consumers to revoke consent by any “reasonable means clearly expressing a desire to receive no further messages from the caller.”

The FCC was petitioned originally to clarify whether callers unilaterally could prescribe exclusive means for consumers to revoke consent. It expressly declined this request because, it maintained, allowing “callers to designate exclusive means of revocation” could “materially impair” the “right to revocation.”

The Court agreed with the FCC’s conclusion. It stated, “The Commission’s ruling absolves callers of any responsibility to adopt systems that would entail ‘undue burdens’ or would be ‘overly burdensome to implement.’” The Court also pointed out that “callers will have every incentive to avoid TCPA liability by making available clearly-defined and easy-to-use opt-out methods.”

Apparently addressing lawsuits based on alleged unreasonable revocation attempts by call or text message recipients, the Court continued, “If recipients are afforded [clearly-defined and easy-to-use opt-out methods], any effort to sidestep the available methods in favor of idiosyncratic or imaginative revocation requests might well be seen as unreasonable. The selection of an unconventional method of seeking revocation might also betray the absence of any ‘reasonable expectation’ by the consumer that she could ‘effectively communicate’ a revocation request in the chosen fashion.”

Healthcare Exemption

The FCC was petitioned originally to exempt from the TCPA consent requirement “certain non-telemarketing, healthcare calls” purported to “provide vital, time-sensitive information patients welcome, expect, and often rely on to make informed decisions.” Although it acknowledged the “exigency and public interest” in certain healthcare-related calls, it was concerned that this policy argument failed with other types of healthcare calls, such as “account communications and payment notifications” that potentially could qualify as “vital, time-sensitive.”

The FCC’s 2015 Order limited the healthcare exemption to calls for which there is “exigency and that have a healthcare treatment purpose, specifically: appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, and home healthcare instructions.” The exemption would not cover calls “that include telemarketing, solicitation, or advertising content, or which include accounting, billing, debt-collection, or other financial content.”

The Court concluded the FCC was “empowered to draw the distinction it did, and it adequately explained its reason for doing so.” Accordingly, it was not “arbitrary and

capricious,” as petitioners argued.

FCC Response

In statements issued following the Court’s decision, FCC Chairman Ajit Pai and Commissioners Brendan Carr and Michael O’Rielly all viewed the decision favorably.

Commissioner Jessica Rosenworcel’s statement reflected her view that the Court’s decision would allow robocalls to continue unless the FCC does something to address them.

Further, an appeal of the Court’s decision appears unlikely as Chairman Pai stated, “I’m pleased today’s ruling does not impact ... the current FCC’s efforts to combat illegal robocalls and spoofing. We will continue to pursue consumer-friendly policies And we’ll maintain our strong approach to enforcement”

Takeaway

The D.C. Court’s ruling both clarifies key parts of the FCC’s 2015 Order and provides the FCC direction on addressing future rulemaking in this area. However, other troubling issues on the TCPA’s breadth and scope remain. Organizations should consider the D.C. Court ruling, together with Chairman Pai’s position on the TCPA, when implementing and updating telemarketing or automatic dialing practices.

Please contact a Jackson Lewis attorney if you have any questions or need assistance with this and other legal developments.

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