D.C. Circuit Court Decision May Help Level the Playing Field for TCPA Defendants

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In recent years, the Telephone Consumer Protection Act ("TCPA") has imposed significant burdens on companies in the financial services, collections, and retail industries that use automated dialing equipment (commonly known as "autodialers") to reach large volumes of consumers or account holders. The TCPA, a 1991 statute, prohibits using an Automated Telephone Dialing System ("ATDS") to call or send text messages to a cellular telephone number without prior express consent. Before 2010, there were at most a few hundred TCPA suits filed each year. Since 2011, that number has mushroomed to thousands of lawsuits filed annually.

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Defending against the TCPA is particularly challenging because the TCPA is a strict liability statute: If a company has autodialed someone who has not provided prior express consent, there are few, if any, available defenses. Moreover, each autodialed call or text message sent to a cellular telephone number can result in a fine of up to $1,500. There are many instances in which courts have been willing to certify TCPA class actions consisting of thousands or more of call recipients who were allegedly called without prior express consent. Companies who are defendants in such cases may face potential litigation exposure of hundreds of millions—or even billions—of dollars. As a result, TCPA settlements in excess of $10 million are not uncommon, and there have been TCPA settlements as high as $76 million. In one TCPA case that went to trial, the defendant—an entity that autodialed a list of telephone numbers that it had purchased—faced a $1.2 billion verdict (although the judge subsequently reduced it to $32 million).

In 2015, the Federal Communications Commission ("FCC"), which is responsible for implementing the TCPA, exacerbated the proliferation of TCPA litigation by issuing a Declaratory Ruling and Order (the "2015 Order") which was very friendly to the plaintiffs' bar. Among other things, this Order included a very expansive definition of what qualifies as an ATDS and provided almost no protection from liability for companies who were attempting to reach consenting consumers whose numbers had, unbeknownst to the companies, subsequently been reassigned to third parties.

The FCC's order had a dramatic effect on TCPA litigation. According to a 2017 study by the U.S. Chamber of Commerce, in the 17 months before the 2015 Order was issued, there were 2,127 TCPA lawsuits filed; after the Order was issued, there were 3,121 lawsuits filed during the same period of time—an increase of nearly 50 percent.

However, a recent decision by the Court of Appeals for the D.C. Circuit in *ACA International v. FCC* (No. 15-1211) may provide much-needed relief for defendants. The decision invalidated the most plaintiff-friendly portions of the 2015 Order and is likely to make it more challenging for plaintiffs to bring TCPA cases, particularly against companies that make concerted efforts to autodial only consenting consumers. Furthermore, the decision gives the FCC an opportunity to clarify its rulemaking at a time when the Commission's leadership is much more favorably disposed to business interests.

The court's decision has potential impact concerning four key issues:

The Definition of "Automated Telephone Dialing System"

One inherent problem with the TCPA lies in the difficulty of categorizing modern dialing equipment according to a statutory definition that is more than 25 years old. The TCPA applies only to calls made to cellular telephones using an ATDS, which is defined 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." This definition was originally written to apply to autodialers that dialed randomly generated numbers. Today, however, many companies use far more sophisticated predictive dialers that dial lists of numbers assembled by a company, typically from its consumer records. Predictive dialers use strategies that are designed to make calls at times when agents are anticipated to be available.

In its 2015 Order, the FCC chose to interpret the definition of ATDS broadly, stating that a dialing device falls within the definition of an ATDS merely if it has the "potential functionalit[y]" to carry out the tasks specified by statute, regardless of whether the functionalities are actually installed on the device or the functionalities are actually used during the call at issue. The D.C. Circuit struck down this definition for two reasons:

First, defining "capacity" in terms of "potential functionalit[y]" was unreasonable because it was so broad that it would include personal smart phones, given that there are apps which can dial random or sequentially generated telephone numbers. The court concluded that Congress never intended the TCPA to apply to calls placed by widely used devices.

Second, the court criticized the FCC for being "of two minds" when interpreting the key statutory phrase, "using a random or sequential number generator." In some places, the court explained, the FCC's prior statements have suggested that it believes that an ATDS must be able to generate random or sequential numbers and then dial those numbers. Yet in other places, the FCC has stated that dialing equipment such as predictive dialers count as ATDS even though predictive dialers do not generate random or sequential telephone numbers. The court found that the 2015 Order's "lack of clarity about which functions qualify" a device as an ATDS was a further reason to invalidate the FCC's ATDS definition.

Potential Impact

It is too early to assess the significance of this portion of the court's decision because the FCC has not issued a new definition of what counts as an ATDS. There are at least three approaches the FCC could take:

- The FCC could issue a broad ATDS definition that encompasses automated calls to lists of telephone numbers assembled by a company but that excludes smartphones. Since businesses typically do not use smartphones to contact consumers, such a decision would essentially maintain the status quo.

- The FCC could issue a very narrow ATDS definition that consists only of a device that currently has the capacity both to (i) generate random or sequential numbers *and* (ii) autodial such numbers. Such a ruling could exclude from the TCPA's scope predictive dialers or similar equipment that are configured only to call pre-existing consumer lists. This definition would likely curtail TCPA litigation.

- The FCC could adopt a middle-ground approach. In 2015, FCC Commissioner Ajit Pai—who is now Chairman of the FCC—objected to the 2015 Order in part on the grounds that the TCPA was never meant to interfere in communications between businesses and their customers. Based on that logic, the FCC could take the position that the ATDS definition does not include calls made by businesses to their customers but does include calls made from businesses to lists of individuals that were purchased from third parties.

Consequences of Cellular Telephone Number Reassignment

Each year, millions of cellular telephone numbers are reassigned. This can happen for a number of reasons, including because consumers change cellular telephone service providers or because consumers use pre-paid cellular telephones for a short period of time. Both of these phenomena occur frequently among low-income individuals—a

population that frequently receives automated calls from collections agencies and credit card companies. If a company calls what it believes to be the cellular telephone number of a consenting consumer, but the consumer's telephone number has been reassigned since the consent was provided, the company is likely to reach an unknown individual who has not consented to being autodialed by the company. Because the TCPA is a strict liability statute, the caller may be liable in that circumstance. "Wrong number" TCPA class actions thus have become an increasingly common claim against businesses that engage in direct contact with consumers or account holders.

Because the TCPA holds callers strictly liable, the very first call to a cellular telephone number following reassignment arguably violates the TCPA. In its 2015 Order, the FCC recognized that this interpretation was overly "severe." In response, the FCC clarified that the TCPA allowed for "reasonable reliance" on the prior express consent provided by the telephone number's original holder. The FCC created a "safe harbor" that allowed one call to a telephone number after reassignment without incurring a TCPA violation. Any subsequent telephone calls, however, would violate the statute—regardless of the outcome of the first call. In other words, if the first call went unanswered, the caller would be liable for all subsequent calls, even though the caller might still be unaware that the number was reassigned.

In its decision, the court upheld the application of "reasonable reliance" in this scenario, but invalidated as arbitrary the FCC's limitation of the "safe harbor" provision to just one call. The court criticized the FCC for assuming that a caller could engage in "reasonable reliance" for only one call after reassignment, as even the FCC acknowledged that the first call might not provide any indication that the number had been reassigned. As a result, it might well be reasonable to rely on the previously-obtained consent for more than one call.

Potential Impact

This ruling is a significant victory for companies that autodial consumers because it bolsters their defenses against "wrong number" TCPA cases in two substantial ways.

First, the decision may facilitate companies' ability to prevail on the merits of individual TCPA claims if they can argue that the court's decision strongly suggests that multiple calls to a reassigned number should not result in a violation if the company acted reasonably. A defendant would likely be in a strong position to argue that it acted reasonably if it could establish, for example, both that (i) it had recently verified that the telephone number at issue belonged to the consumer (either because of recent contact with the consumer or because a vendor confirmed that the consumer's name was likely associated with the telephone number) and (ii) the company stopped calling the telephone number after it was first informed that the telephone number was reassigned.

Second, the decision is likely to be even more significant for defeating class certification. Doing so is essential for TCPA defendants because if a large class is certified, a defendant faces a potentially enormous verdict based on statutory per-violation damages. A class cannot be certified, however, where resolution of the class members' claims would require individual inquiries. While the plaintiffs' bar argued that evaluation of the uniform "one call" safe harbor rule can be managed on a class-wide basis, the D.C. Circuit's decision suggests that "reasonable reliance" will become more tailored to the specific facts of interactions with individual call recipients. Such "reasonableness" inquiries cannot be conducted on a class-wide basis.

Despite this potential implication, however, companies should not think that they now have license to relax controls to ensure TCPA compliance. The argument that individualized inquiries are required for each alleged "wrong number" call is likely to be strongest when the company can convince the court that it has procedures in place to ensure that it is calling only numbers of individuals who have provided prior express consent and that "wrong number" calls are the exception, not the norm. To that end, companies that autodial consumers should maintain for at least four years—the TCPA's statute of limitations—evidence both of consumer consent and of the disposition of its calls with consumers. Companies should also avoid calling lists obtained from unrelated third parties, as it is likely to be difficult to argue that those call recipients provided prior express consent.

Revocation of Consent

The 2015 Order provided that a called party may revoke consent to receiving autodialed calls "through any reasonable means," whether orally or in writing. Although the court agreed with this position as a default rule, it specifically noted that the 2015 Order does not preclude a company from entering into a contract with the called party which specifies the means by which consent may be revoked.

Potential Impact

This portion of the court's decision highlights that companies may be able to include clauses in agreements with their consumers which provide that consent can only be revoked in writing. This is an option that companies may wish to explore. If a company requires revocation of consent in writing, it may be easier for the company to later defend itself against a TCPA lawsuit. A case will quickly collapse if the plaintiff cannot substantiate that she followed the procedures to which she agreed for revocation of consent.

Exemption for Certain Healthcare-Related Calls

The 2015 Order provided that calls with a healthcare treatment purpose—including appointment and exam confirmations and reminders, wellness checkups, lab results, home healthcare instructions and information related to hospitalizations—are exempt from the requirement to obtain prior express consent. The court rejected the argument that the exemption should also have covered communications relating to accounting, billing and debt collection. The court explained that communications about financial issues, as opposed to issues relating to treatment, did not warrant an exemption from the TCPA.

Potential impact

This portion of the opinion simply codifies the status quo. However, the FCC provisions governing when the "healthcare exemption" applies are quite detailed and companies that rely on these provisions should ensure that they are complying with all of the applicable requirements. Healthcare companies should, wherever practical, seek prior express consent from all consumers and thus eliminate need to rely on this TCPA exemption.

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In the aftermath of the court's decision, the FCC now has the opportunity to engage in new TCPA rulemaking. Since the 2015 Order was issued, there has been a significant change in the FCC's leadership, which is concerned about the proliferation of TCPA litigation. The court's decision gives that leadership the opportunity to issue new rules that will curtail litigation against companies that are making good-faith efforts to call only consumers or account-holders who have consented to being autodialed. Affected businesses should carefully monitor the FCC's rulemaking and where appropriate, consider offering comments on proposed new rules.

Please do not hesitate to let us know if you have questions.

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