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D.C. Circuit Partially Vacates FCC's 2015 Telephone Consumer Protection Act Order

The United States Court of Appeals for the District of Columbia Circuit recently issued a long-awaited decision on an appeal challenging certain aspects of a July 2015 Federal Communications Commission Order that clarified and expanded the reach of the Telephone Consumer Protection Act (TCPA) (47 U.S.C. § 227) and the FCC's rules governing autodialed, prerecorded or artificial voice calls or SMS text messages, commonly known as robocalls (47 C.F.R. § 64.1200). As explained below, the court struck down the FCC's definition of automatic dialing equipment subject to the TCPA and the FCC's restrictions on calling wireless numbers that have been reassigned to new subscribers. In addition, the court affirmed the FCC's decision that a party may revoke consent to receive robocalls through any reasonable means and the scope of the FCC's exemption from the prior consent requirement for calls by healthcare providers to wireless numbers when several conditions are met.

The TCPA and the FCC's implementing regulations generally provide that an entity may not use autodialers to place calls (which include text messages) to telephone numbers unless the caller has received prior express consent of the called party. Prior express **written** consent is required for all telemarketing calls to wireless numbers that use an autodialer or contain a prerecorded or artificial voice, but only prior express consent is required for such calls to residential numbers if the calls use an artificial or prerecorded voice. Prior express (not written) consent is required for informational (non-telemarketing) calls to wireless numbers, but not for informational calls to residential lines. The FCC's July 10, 2015 Order resolved numerous requests for clarification about the types of calls that require prior express consent, what constitutes consent, and categories of calls that are exempt from the prior consent requirements. In general, the FCC's rulings expanded the scope of the TCPA's limits on autodialed calls

and gave called parties greater protection against autodialed calls. Entities that initiate autodialed calls or that represent such entities appealed four issues addressed by the FCC and received mixed results from the court.

Automatic Telephone Dialing Systems

The TCPA prohibits making any call (except for emergency purposes or with prior express consent of the called party) using an automatic telephone dialing system (ATDS or autodialer) to a wireless telephone number unless the call is to collect a debt owed to or guaranteed by the U.S. government. (47 U.S.C. § 227(b)(1)(A)(iii)). The TCPA defines 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.” In the 2015 TCPA Order, the FCC clarified that an equipment’s capacity includes “potential functionalities” that could be activated or added through software changes or updates. The FCC also acknowledged that autodialing functions are available via smartphone apps. The effect of the FCC’s 2015 ruling was to render virtually any smartphone an ATDS which could subject any smartphone user to TCPA liability. In rejecting the FCC’s expansive definition of ATDS, the court explained that it is unreasonable to interpret the reach of the TCPA in a way that results in every smartphone meeting the definition of an autodialer and every smartphone user risking a violation of the TCPA whenever a call is made or text is sent without prior express consent of the receiving party.

Reassigned Numbers

As noted above, the TCPA permits calls to a wireless number using an autodialer or prerecorded voice if the caller has the prior express consent of the called party. In the context of reassigned numbers, the FCC found in the TCPA Order that “called party” refers to the person actually reached, not the person the caller expected to reach and from whom the caller had obtained prior express consent. The FCC further held that a caller without knowledge of the reassignment of the wireless number would not be liable under the TCPA for the first call made to the number. Any call to a reassigned number after that first call would subject the caller to TCPA liability. The court stated that the FCC’s conclusion that the called party means the person subscribing to the called number when the call is placed, rather than intended recipient of the call, was supportable. However, because the FCC failed to provide any reasoned explanation for adopting a one-call safe harbor, the court set aside the FCC’s treatment of reassigned numbers in its entirety. The court noted that the FCC had issued a notice of inquiry to seek proposals for methods to deal with unwanted robocalls to reassigned numbers. Indeed, the FCC is expected to issue a notice of proposed rulemaking in the near future seeking comment on a proposal to provide callers with access to databases regarding reassigned numbers prior to making calls.

Revocation of Consent

Consumers who have consented to receive robocalls to their wireless numbers are entitled to revoke their consent. The FCC declined to grant a petition that asked the FCC to clarify that callers can unilaterally determine the means for consumers to revoke their consent. Rather, the FCC stated that a called party may use “any reasonable means” to revoke consent so long as that means “clearly expresses a desire not to receive further messages.” The court affirmed the FCC’s ruling and further noted that callers can avoid TCPA liability by offering “clearly-defined and easy-to-use opt-out methods.” As observed by the court, a recipient’s use of an unconventional method to revoke consent when a straightforward method is clearly available may be seen as an unreasonable means to effectuate revocation of consent.

Healthcare Exemption

The final issue addressed by the court is the FCC's establishment of a new exemption from the prior express consent requirement for robocalls placed by healthcare providers (*i.e.*, "covered entities" and their "business associates" as defined in the Health Insurance Portability and Accountability Act (HIPAA)) to wireless numbers if several conditions are met. A detailed description of the healthcare exemption is found in a previous Alert issued in October 2015. ([See A Recent FCC Order May Require Financial Institutions and Healthcare Providers to Put Robocalls to Wireless Numbers on Hold](#)). One of the exemption's conditions is that the calls must have a healthcare treatment purpose, such as appointment confirmations, preoperative instructions, or lab results. The healthcare exemption does not cover calls that include telemarketing, billing, or debt collection content. A national pharmacy retailer challenged the exemption as being too narrow because HIPAA permits calls regarding accounts and billing, as well for calls related to healthcare treatment, and those calls should be treated in the same manner as those subject to the FCC's exemption. The court affirmed the scope of the healthcare exemption as defined by the FCC. The court explained that the FCC's decision to permit certain types of wireless communications to be exempt from the TCPA's prior express consent requirement does not diminish healthcare providers' ability to make any calls allowed under HIPAA.

The FCC could move fairly quickly to adopt new rules governing TCPA liability for calling wireless numbers for which consent to robocalling had been obtained, but have been reassigned to new subscribers. A draft FCC rulemaking notice indicates the FCC's expectation that a reassigned numbers database will reduce unwanted calls to consumers and protect callers from the costs associated with calling the wrong person. The FCC does not necessarily need to take any action regarding the definition of autodialers. The statutory definition refers to equipment that "has the capacity" to perform certain functions. While the court did not prohibit an interpretation that encompasses potential capacity, the FCC could reasonably rely on the statutory definition to limit the term to current capacity. Two of the current FCC commissioners dissented from that portion of the 2015 ruling which adopted an expansive definition of automated telephone dialing system. Those two commissioners are now part of a three member Republican majority on the FCC, including the current FCC chairman. Thus, it is probable that the FCC will again try to adopt and justify an expansive definition of ATDS.

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