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CONSUMER**CERTIFICATION**

Defendants in suits under the Telephone Consumer Protection Act can use the Federal Communication Commission's July 2015 Declaratory Ruling and Order to their advantage, attorneys Ian C. Ballon, Lori Chang, Nina D. Boyajian and Justin A. Barton say. The authors say the rule offer defendants a "playbook" for defeating a putative TCPA class action lawsuit by showing that individualized inquiries preclude class certification.

A 'Silver Linings Playbook' for Defending TCPA Class Actions

BY IAN C. BALLON, LORI CHANG, NINA D. BOYAJIAN
AND JUSTIN A. BARTON

Defendants in class actions arising under the Telephone Consumer Protection Act ("TCPA") can find silver linings in the FCC's July 2015 Declaratory Ruling and Order ("FCC Ruling").¹

Despite that plaintiffs' lawyers have argued that the FCC Ruling strengthened consumer protections by, among other things, placing constraints on calls made to reassigned numbers,² TCPA defendants can in certain circumstances use the FCC Ruling to their advantage.

¹ *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961 (July 10, 2015).

² These provisions, among others, are being challenged in the D.C. Circuit Court of Appeals. *ACA Int'l. v. FCC*, No. 15-1211 (D.C. Cir.).

The FCC Ruling laid out important protections for defendants by (1) affirming that the FCC did not change the statutory definition of "automatic telephone dialing system" ("ATDS") in the TCPA;³ (2) leaving it to courts to determine whether a platform operates "without human intervention" and therefore meets the FCC's alternative formulation of an ATDS; and (3) validating that consent can be obtained through an intermediary and can also be revoked, which potentially make it more difficult for plaintiffs to obtain class certification where consent is at issue.

The TCPA was enacted in 1991 to curtail, among other things, abusive telemarketing practices where unsolicited calls were made in bulk to random or sequential telephone numbers. These calls had become a private and public nuisance, because telemarketers in-

³ See 47 U.S.C. § 227(a)(1).

creasingly made calls during the “dinner hour” of most families, and used systems that dialed sequential blocks of telephone numbers that included those of emergency and public service organizations, whose phone lines were then occupied by autodialed calls. Accordingly, the TCPA makes it unlawful to use an ATDS, which Congress defined in the statute 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,”⁴ to place calls to cellular telephones, hospitals, or emergency telephone lines, unless the call is made for an emergency purpose or made with the prior express consent of the called party.⁵ The FCC and some courts have expanded the TCPA’s protections to include text messages.⁶ Recipients can recover statutory damages of \$500 (trebled to \$1,500 for willful violations) per violation, and there is theoretically no cap on the damages recoverable in class actions.⁷

In July 2015, the FCC issued a 138 page omnibus declaratory ruling and order addressing nineteen petitions that sought FCC guidance on the provisions of the TCPA and prior FCC rulings interpreting the TCPA.⁸ While many commentators have focused on the FCC Ruling’s protections for consumers,⁹ viewing these aspects of the ruling as impractical given the way businesses operate in a modern digital economy, the potential advantages for defendants are significant, and, in some circumstances, set forth a “playbook” for defeating a putative TCPA class action lawsuit.

Three Reasons FCC Ruling Helps Defendants

First, the FCC Ruling confirmed that the FCC has not purported to read out the statutory requirement that an ATDS use a “random or sequential number generator.” Both the FCC Ruling and the FCC’s corresponding Rule track the full statutory definition of ATDS.¹⁰ Indeed, in October 2015, the Third Circuit ruled that the FCC’s orders “hold that an autodialer must be able to store or produce numbers that *themselves* are randomly or sequentially generated.”¹¹ The Third Circuit confirmed that the FCC did not purport to change the statutory definition of ATDS because it lacked the authority to do so under the statute.¹²

Second, the FCC left it to the courts to determine whether a platform operates “without human intervention” and is therefore an ATDS under the FCC’s alternative formulation. In its 2003 Report and Order, the FCC interpreted the definition of an ATDS to include “predictive dialers” on the basis that they operated “without human intervention,” even if they were not presently using random or sequential number generation capability.¹³ In the FCC Ruling, the FCC declined to articulate precisely what level of human involvement was required, instead leaving it to the courts to determine on a “case-by-case basis.”¹⁴ Since July, several courts have exercised that authority and granted dispositive motions for defendants finding the dialing platforms at issue met neither the statutory definition nor the FCC’s alternative “human intervention” formulation of an ATDS.¹⁵

Third, and perhaps most significantly, the FCC Ruling has made it more difficult for plaintiffs to obtain class certification where the question of “prior express consent” is at issue. To be actionable under the TCPA, a call must be placed without the “prior express consent” of the called party.¹⁶ Following the FCC Ruling, consent can be obtained through an intermediary as long as the intermediary has actually obtained consent.¹⁷ The FCC Ruling also confirmed that “[c]onsumers have a right to revoke consent, using any reasonable method, including orally or in writing.”¹⁸ The FCC further introduced the possibility that these (and other) consent provisions apply equally to both the user and subscriber of a phone number.¹⁹ Because there is no one way that consent can be given through a third party or revoked and there may be multiple instances of consent (or revocation) for a single number, individualized factual inquiries will have to be made of each putative class member.²⁰ These possibilities offer defendants a strong basis to argue that individualized inquiries preclude class certification.

While the 2015 FCC Ruling creates new business and litigation challenges for businesses that seek to communicate with customers by SMS message, the Ruling also creates clear opportunities for defendants in many cases to defeat frivolous TCPA suits.

⁴ *Id.*

⁵ 47 U.S.C. § 227(b)(1)(A).

⁶ See, e.g., *Satterfield v. Simon & Schuster*, 569 F.3d 946, 951-52 (9th Cir. 2009); *Gager v. Dell Finan. Servs., LLC*, 727 F.3d 265, 269 n.2 (3d Cir. 2013).

⁷ 47 U.S.C. § 227(b)(3)(B).

⁸ FCC Ruling ¶ 3.

⁹ See, e.g., *FCC Strengthens Consumer Protections Against Unwanted Calls and Texts*, <https://www.fcc.gov/document/fcc-strengthens-consumer-protections-against-unwanted-calls-and-texts> (June 18, 2015).

¹⁰ See FCC Ruling ¶ 12; see also 47 C.F.R. § 64.1200(f)(2).

¹¹ *Dominguez v. Yahoo, Inc.*, 629 Fed. Appx. 369 (3d Cir. Oct. 23, 2015).

¹² See *Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1291 (S.D. Cal. 2014) (“the [FCC] does not have the

statutory authority to change the TCPA’s definition of an ATDS . . . it is therefore undeniable that any FCC attempt to modify the statutory language of § 227(a) is impermissible”).

¹³ See *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14092 (2003), ¶ 132.

¹⁴ FCC Ruling ¶ 17.

¹⁵ See, e.g., *Luna v. SHAC, LLC*, 122 F. Supp. 3d 936 (N.D. Cal. Aug 19, 2015); *Derby v. AOL, Inc.*, 2015 BL 294897, No. 5:15-cv-00452-RMW (N.D. Cal. Sept. 11, 2015).

¹⁶ 47 U.S.C. § 227(b)(1)(A).

¹⁷ See FCC Ruling ¶ 49.

¹⁸ *Id.* ¶ 64.

¹⁹ *Id.* ¶ 74.

²⁰ See *Sherman v. Yahoo! Inc.*, 2015 BL 308447, No. 13cv0041-GPC-WVG (S.D. Cal. Sept. 23, 2015).

