

March 19, 2018

D.C. CIRCUIT VACATES PART OF FCC'S 2015 TCPA ORDER IN *ACA INTERNATIONAL, ET AL. V. FCC, ET AL.*

To Our Clients and Friends:

On March 16, 2018, the D.C. Circuit unanimously vacated part of the FCC's July 2015 Declaratory Ruling and Order, which vastly expanded the scope of the Telephone Consumer Protection Act of 1991 ("TCPA").^[1] The Court of Appeals rejected the FCC's effort to expose legitimate companies of all sizes and types to liability for simply attempting in good faith to communicate with customers who previously provided valid consent to be contacted.

The TCPA prohibits calls to cellular phones by an "automatic telephone dialing system" ("ATDS") without the "prior express consent of the called party."^[2] The statute 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."^[3]

The FCC's 2015 order expanded the definition of an ATDS to include equipment that is not currently able to store or dial telephone numbers in a random or sequential fashion. The order also permitted callers only one call before imposing strict liability for future calls when a number, without the caller's knowledge, has been reassigned from a person who previously consented to be contacted.

The D.C. Circuit ruled for the petitioners—including the U.S. Chamber of Commerce, represented by Gibson Dunn—on two significant issues in the case. First, the Court set aside the FCC's "utterly unreasonable" interpretation of the types of calling equipment that qualify as an ATDS.^[4] The Court struck down that aspect of the FCC's order because it "fail[ed] to satisfy the requirement of reasoned decisionmaking" and "[t]he order's lack of clarity about which functions qualify a device as an autodialer compound[ed] the unreasonableness of the Commission's expansive understanding of when a device has the 'capacity' to perform the necessary functions."^[5] In particular, the court described the potential reach of the FCC's order to include all smartphones as "eye-popping."^[6]

Second, the Court set aside the FCC's one-call safe harbor as arbitrary.^[7] The Court concluded that the FCC "gave no explanation of why reasonable-reliance considerations would support limiting the safe harbor to just one call or message."^[8] Because the Court had "substantial doubt" that the FCC would have adopted its "treatment of reassigned numbers as a whole," it vacated that entire portion of the order.^[9]

The D.C. Circuit did uphold two other challenged portions of the order—the rule for revocation of consent and an exemption for healthcare-related calls.^[10] Nonetheless, the decision substantially

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reduces the increasing burden of class-action liability under the TCPA and helps to restore the open lines of communication necessary to consumers and businesses in our modern economy.

Because the D.C. Circuit did not remand the matter to the FCC, the agency could commence a new proceeding to address the definition of an autodialer, and in the meantime courts may also seek to address that issue. The FCC is currently slated to consider a request for further public comment on the creation of a database for reassigned numbers.[11] As part of that process, the FCC is considering whether to afford protection against liability to callers who take advantage of such a resource.[12] The FCC also has adopted "rules allowing providers to block calls from phone numbers on a Do-Not-Originate (DNO) list and those that purport to be from invalid, unallocated, or unused numbers." [13]

[1] *ACA Int'l, et al. v. FCC, et al.*, No. 15-1211 (D.C. Cir. Mar. 16, 2018).

[2] 47 U.S.C. § 227(b)(1)(A).

[3] *Id.* § 227(a)(1).

[4] *ACA Int'l*, No. 15-1211, slip op. at 19 (quoting *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1174 (D.C. Cir. 2003)).

[5] *Id.* at 29.

[6] *Id.* at 16.

[7] *Id.* at 35.

[8] *Id.* at 36.

[9] *Id.* at 39–40 (quoting *Am. Petroleum Inst. v. EPA*, 862 F.3d 50, 71 (D.C. Cir. 2017)).

[10] *Id.* at 5.

[11] *In re Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Further Notice of Proposed Rulemaking, CG Dkt. No. 17-59 at ¶ 2 (circulated for tentative consideration at March 2018 open meeting), available at https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0301/DOC-349522A1.pdf; see also *In re Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Notice of Inquiry, 32 FCC Rcd 6007, 6013 ¶¶ 16, 18 (2017) (discussing database proposal).

[12] *In re Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Further Notice of Proposed Rulemaking, CG Dkt. No. 17-59 at ¶ 30.

[13] *In re Advanced Methods to Target and Eliminate Unlawful Robocalls*, Report and Order and Further Notice of Proposed Rulemaking, CG Dkt. No. 17-59 (Nov. 16, 2017), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-151A1_Rcd.pdf.

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