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NEWSLETTER

D.C. Circuit Releases Its Long-Awaited TCPA Decision — Could Affect Political Robocalls

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After nearly eighteen months, the United States Court of Appeals for the District of Columbia Circuit released its opinion in *ACA International v. Federal Communications Commission*, a petition for review of the Federal Communication Commission's (FCC or Commission) *2015 Telephone Consumer Protection Act Order* (2015 TCPA Order or Order). Among other matters, that Order (1) clarified what constitutes an automatic telephone dialing system (ATDS), (2) imposed liability, with some exception, for calling a wireless number that has been reassigned from a consenting party to another person without the caller's knowledge, (3) clarified how a consenting party can revoke consent to receive autodialed calls, and (4) exempted from the prior express consent requirement calls to wireless numbers for time-sensitive healthcare purposes. Using the two-step Chevron framework, the Court, in a unanimous opinion by Judge Sri Srinivasan, reversed the Commission's explanation of what constitutes an ATDS and its clarification on calling reassigned numbers, but upheld the Commission's ruling on revoking consent and the consent exemption for exigent healthcare calls.

The Court first considered the Commission's ATDS definition. Under the TCPA, an ATDS is "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." 47 U.S.C § 227(a)(1). The FCC interpreted the phrase "capacity" to include "potential functionalities" or "future possibility," rather than just "present ability." The Court found this interpretation to be expansive and therefore unreasonable, fearing that it could sweep in smartphones as ATDS. It reasoned that the TCPA cannot be read to include "the most ubiquitous type of phone equipment known, used

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countless times each day for routine communications by the vast majority of people in the country," and that the *Order* cannot be read to exclude smartphones without failing arbitrary and capricious review.[1]

The Court also considered the Commission's description of the functions of an ATDS, specifically the FCC's interpretation of "using a random or sequential number generator." The Court found that the *Order* offered two competing descriptions of what devices satisfy the definition: encompassing both devices that have the capability to generate random or sequential numbers to be dialed, and those that cannot. The Court held that this inconsistent interpretation fails to provide clarity and therefore fails the requirement of reasoned decision making.

The Court next considered the FCC's decision to impose liability for calling a wireless number that has been reassigned from a consenting party to another person without the caller's knowledge. The TCPA prohibits making "any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing equipment or prerecorded voice." 47 U.S.C. § 227(b)(1)(A). In the *2015 TCPA Order,* the Commission interpreted "called party" to refer to the person actually reached, which, in the reassigned number context, the subscriber to a number after reassignment. The Commission did, however, include a safe harbor provision, exempting a caller's first call to a reassigned number from liability.

Although the Court agreed that the Commission could interpret "called party" to refer to the current, post-reassignment subscriber, it held that the one-call safe harbor was arbitrary and capricious. The Court found that the Commission adopted this safe harbor because it interpreted "prior express consent" to mean "reasonable reliance," but that the FCC acted arbitrarily by providing no justification for why reasonable reliance is limited to just one call or message. After all, there is no guarantee that one call will alert the caller that the phone number dialed has been reassigned and reasonable reliance would carry over to the next call. The Court also noted that the desire to give a caller the opportunity to learn of a reassigned number, and the desire to have callers bear the risk for calls made to reassigned numbers could not justify the one-call safe harbor.

In setting aside the safe harbor, the Court also decided to overturn the FCC's entire interpretation of calls to reassigned numbers. Without a safe harbor, the FCC's interpretation would create strict liability for when a caller calls a reassigned number, even if the caller has no knowledge of the reassignment. The Court did not believe that the FCC would have adopted such a severe rule, therefore vacated the entire rule. It also noted the current FCC proceeding on establishing a reassigned numbers database could address the issues raised by the safe harbor. The proposals to create a reassigned number database and a safe harbor for callers that inadvertently reach reassigned numbers after consulting the most recently updated information could "bear on the reasonableness of calling numbers that have in fact been reassigned, and have greater potential to give full effect to the Commission's principle of reasonable reliance."

Next, the Court reviewed and upheld the Commission's ruling that a called party may revoke consent at any time and through any reasonable means (orally or in writing) that clearly expresses a desire not to receive further messages. It found that the ruling would not require carriers to implement burdensome systems or

processes, and a standardized opt-out procedure, such as the specific opt-out mechanisms required for banking or healthcare-related calls, are only necessary for those calls because of their importance and should not apply to all calls. The Court further noted that the FCC's ruling does not affect parties' ability to select a particular revocation procedure by agreement.

Finally, the Court considered the FCC's decision to exempt urgent healthcare calls to wireless numbers from the prior-express consent requirement. The TCPA permits the Commission to exempt from the consent requirement "calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect." 47 U.S.C. § 227(b)(2)(C). The Commission found that some, but not all, healthcare-related calls justify an exemption because of their urgency. Rite Aid Pharmacy challenged this decision. As a threshold matter, the Court first considered whether Rite Aid could even mount its challenge. Rite Aid did not file its own petition in the FCC's proceeding, although it did file comments in support of another's. The Court held that those comments granted Rite Aid "party aggrieved" status to challenge the FCC's Order, because the comments provided the FCC an opportunity to consider Rite Aid's position.

On the merits of the challenge, the Court upheld the FCC's exemption. First, it found that the exemption did not conflict with HIPAA-permitted communications. Next, the Court found that the Commission's decision to adopt a narrower exemption for healthcare-related calls to wireless numbers than what the Commission's rules provide for such calls to landline numbers was not arbitrary and capricious. The TCPA, it reasoned, presupposes that landline and wireless numbers warrant different treatment. Finally, the Court held that the FCC did not act arbitrarily by exempting only certain healthcare-related calls. Rite Aid could not identify any emergency healthcare calls that were not included in the exemption.

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[1] The Court also noted that the FCC's interpretation of "make any call using any" ATDS was broad and that the term could be read more narrowly, as Commissioner Michael O'Rielly suggested in the Order. A narrower reading could assuage the concerns raised by the expansive interpretation of "capacity," but that challenge was not raised so the Court took no position.