Bloomberg Law®

Telecommunications Law Resource Center

TCPA

Long-Awaited *ACA International* Opinion Will Inform FCC's Work on Related Rulemakings

By Angela E. Giancarlo

A panel of judges from the U.S. Court of Appeals for the District of Columbia Circuit ruled unanimously March 16 to partially uphold and partially vacate a 2015 Federal Communications Commission order regarding Telephone Consumer Protection Act (TCPA) restrictions on calls and text messages to wireless numbers. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd 3961 (2015).

In *ACA International v. FCC*, No. 15-1211, slip op. (D.C. Cir. Mar. 16, 2018), the court vacated the FCC's:

- effort to clarify the type of dialing equipment that the TCPA restricts, concluding that the FCC's interpretation of what constitutes an automatic telephone dialing system, or autodialer, was so broad that it impermissibly captured smartphones used by 80 percent of American consumers; and
- one-call safe harbor for calls or texts to reassigned numbers, holding that the rule ''is arbitrary and capricious.''

The court upheld the FCC's:

Angela E. Giancarlo, partner, Mayer Brown LLP, handles a multitude of complex matters within the technology, media, and telecommunications field. Ms. Giancarlo counsels on the legal, business, and policy implications of proposed transactions, enforcement actions, proposed legislation and regulation, spectrum allocations for new and existing technologies and services, and issues related to market convergence and competition, at the FCC and globally. She is available at agiancarlo@mayerbrown.com. Ms. Giancarlo gratefully acknowledges the assistance given by her partner, Howard Waltzman, and associate attorney Sasha L. Keck.

- interpretation that called parties may revoke consent ''through any reasonable means clearly expressing desire to receive no further messages from the caller''; and
- limitation on time-sensitive communications pertaining to health-care matters.

Case Summary

The FCC issued an order in July 2015 clarifying TCPA provisions pertaining to calls and text messages to wireless numbers. In this case, appellants sought review of four aspects of the FCC's ruling:

- the types of devices that qualify as an autodialer;
- the consequences of calling numbers reassigned to a party who does not consent to calls when the previous subscriber did consent;
- methods for a consenting party to revoke consent; and
- the exemption from the consent requirement for health care-related calls.

First, regarding what equipment constitutes an autodialer, the court found that the FCC's interpretation was both beyond the FCC's authority under *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) and arbitrary and capricious under the Administrative Procedure Act.

The TCPA describes covered devices as ''equipment that 'has the capacity' to 'store or produce telephone numbers to be called, using a random or sequential number generator,' and 'to dial such numbers.' '' The FCC interpreted ''capacity'' to encompass *any* device that could make automated calls with the addition of software or updates. After noting that this broad construction would encompass ordinary smartphones, the court concluded that the FCC's interpretation ''lie[d] considerably beyond the agency's zone of delegated authority for the purposes of the *Chevron* framework.'' ''Nothing in the TCPA countenances concluding that Congress could have contemplated the applicability of

the statute's restrictions to the most commonplace phone device used every day by the overwhelming majority of Americans.''

The court also concluded that the FCC's interpretation of the phrase ''using a random or sequential number generator'' was arbitrary and capricious. The FCC offered contradictory answers to the question of whether the equipment must be able to generate numbers randomly or sequentially to qualify as an autodialer under the TCPA. The court reasoned, ''The Commission cannot, consistent with reasoned decision making, espouse both competing interpretations in the same order'' and added, ''affected parties are left in a significant fog of uncertainty about how to determine if a device is an [autodialer] so as to bring into play the restrictions on unconsented calls.'' Given this uncertainty, the court ruled that this aspect of the FCC's order did not satisfy the APA requirements.

Second, regarding the one-call safe harbor for calls and text messages to numbers reassigned to nonconsenting parties, while accepting the FCC's interpretation of ''called party'' as referring to the current subscriber at the time a call is placed, the court nonetheless rejected the one-call safe harbor rule as arbitrary and capricious.

The FCC adopted the one-call policy in 2015 as an alternative to applying strict liability for a call to a nonconsenting party in instances in which the caller did not know the number was reassigned. The FCC acknowledged that callers may ''reasonably rely'' upon consent to call a wireless number without knowledge that the number has been reassigned, and hence created the one-call safe harbor. Yet, the FCC could not and did not articulate why, after one call, a caller could no longer rely on the prior consent, especially given that the caller had no guarantee of learning of the reassignment after only one call.

The court also questioned the FCC's action to provide ''an unlimited period of time'' within which to rely on the one-call safe harbor rather than for ''a given period of time.'' The court explained that ''the FCC's one-call-only approach'' runs counter to its reasonable reliance-based interpretation of prior express consent and therefore requires ''some reasoned and reasonable explanation of why its safe harbor stopped at the seemingly arbitrary point of a single call or message.'' The court therefore vacated the FCC's entire treatment of reassigned numbers, citing its ''substantial doubt'' that the FCC would have adopted its interpretation of ''called party'' creating a severe strict-liability regime in the absence of a safe harbor.

The court next upheld the two remaining issues on appeal. First, the court upheld the FCC's rule that called parties can revoke prior consent through ''any reasonable means.'' Appellants challenged the FCC's standards for revocation of consent as indeterminate and unduly burdensome; however, the court determined that even when callers provide ''clearly-defined and easy-to-use opt-out methods . . . any effort to sidestep the available methods in favor of idiosyncratic or imaginative revocation requests might well be seen as unreasonable.'' Thus, petitioners' concerns about their burden were ''overstated'' and the court upheld the FCC's rule.

Second, the court rejected Rite Aid's appeal of the FCC's decision not to expand its exemption from the TCPA's prior consent requirement for certain health care-related calls to wireless numbers. Citing a conflict between the Health Insurance Portability and Accountability Act (HIPAA) and the FCC's interpretation of the TCPA, Rite Aid petitioned the FCC to expand the scope of permissible health care-related calls to wireless numbers to include those that pertain to account communications and payment notifications. The court clarified that the TCPA and HIPAA ''provide separate protections'' and found the FCC's rule did not inhibit Rite Aid from fulfilling its requirements under HIPAA because Rite Aid could undertake methods other than automated calls to fulfill its HIPAA notification duties. Moreover, the FCC may apply different rules to wireless and landline numbers because ''the TCPA itself presupposes . . . that calls to residential and wireless numbers warrant differential treatment.'' Given that the FCC ''was empowered to draw the distinction it did, and it adequately explained its reasons for doing so,'' the court rejected Rite Aid's claim.

Next Steps

The FCC must now revise its interpretation of what constitutes an autodialer and its rules regarding reassigned numbers. The FCC will vote March 22 on a second notice of proposed rulemaking seeking to address calls to reassigned numbers. The notice proposes to ensure that one or more databases are available to provide callers with the means to obtain timely, relevant information to avoid reaching reassigned numbers; and seeks comment on the type of information that ought to be included in the database; the best way for service providers to supply and for callers to access the information; and whether the FCC should adopt a safe harbor from liability under the TCPA for those callers that choose to use a reassigned numbers database.

Furthermore, as the court noted, in the context of identifying ways by which telecommunications carriers can help block fraudulent calls, the FCC is examining whether there are objective standards that would indicate to a reasonably high degree of certainty that a call is illegal. The FCC has asked about whether to adopt a safe harbor to give carriers certainty that they will not be found in violation of the commission's rules when they block these calls. *See Advanced Methods to Target and Eliminate Unlawful Robocalls*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 2306, 2316 ¶ 34 et al. (2017).

Thus, the FCC will address several key TCPA-related issues through rulemaking. We expect the agency to consider taking up other aspects of the agency's TCPA rules, which the current commissioners do not believe properly reflect the statute and congressional intent. For example, in response to the ruling, Commissioner Michael O'Rielly said, ''While I disagree with the court's decision on the revocation issue, I believe there is an opportunity here for further review in order to square it with the Second Circuit's more appropriate approach.''

  ISSN