

The Telephone Consumer Protection Act (“TCPA”)

Recent Developments and Takeaways from the Oral Argument in the Appeal Challenging the FCC’s Interpretations of the Act

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OVERVIEW

- TCPA background
- The FCC's 2015 Declaratory Ruling and the *ACA International* challenge
- Next steps after the D.C. Circuit rules
- Other issues from the FCC's 2015 Declaratory Ruling
- A TCPA legislative update
- Best practices for TCPA compliance

What's so bad about the TCPA?

More calls ... and texts
+
More cell phones
x
\$500 to \$1,500 per call
=
**Massive potential
liability**



TCPA lawsuit filings

- Between 2007 and 2015, the number of TCPA actions filed in federal court increased 26,400% — from 14 to 3,710
- As of September 2016, TCPA filings are up 41.2% as compared to same period in 2015

— WebRecon



What do the courts have to say?

- “The conclusion is inescapable that these class actions exist for the benefit of the attorneys who are bringing them and not for the benefit of individuals who are truly aggrieved....”

West Concord 5-10-1.00 Store, Inc. v. Interstate Mat Corp., 2013 WL 988621, at *6 (Mass. Super. Ct. Mar. 5, 2013)

- “These penalties are an irresistible lure for the class-action lawsuit....”

Sawyer v. W. Bend Mut. Ins. Co., 821 N.W.2d 250, 260 (Wis. Ct. App. 2012)

- “Anyway, the statute, with its draconian penalties for multiple faxes, is what it is.”

Creative Montessori Learning Ctrs. v. Ashford Gear LLC, 662 F.3d 913, 915 (7th Cir. 2011)

Overview of the TCPA



TCPA: The basic restrictions

- No calls or texts to a **cellular phone** “using any **automatic telephone dialing system** or an **artificial or prerecorded voice**,” unless the call is made:
 - “For emergency purposes,”
 - With the “**prior express consent** of the called party,” or
 - To a just-ported (within 15 days) number
- No calls to a **residential telephone subscriber** “using an **artificial or prerecorded voice**” without the “**prior express consent of the called party**,” unless the call is exempted by the FCC (*e.g.*, non-telemarketing calls)
- No calls to “residential telephone subscribers” on national or company-specific **Do Not Call** registries

[47 U.S.C. § 227 & 47 C.F.R. § 64.1200]

Key questions for determining TCPA risk

- What type of phone was called?
 - Business landline
 - Residential landline
 - Cell phone
- How was the call made?
 - Autodialer versus manual dialing
 - Artificial/prerecorded voice versus live person
- Why was the call made?
 - Telemarketing
 - Informational
- If consent is required, did the called party consent?

Key questions for determining TCPA risk

	Residential Landline		Cell Phones	
	Marketing	Non-Marketing	Marketing	Non-Marketing
Calls or Texts Using An Autodialer	Do Not Call List		Prior express <u>written</u> consent	Prior express consent
Prerecorded Voice	Prior express <u>written</u> consent		Prior express <u>written</u> consent	Prior express consent
Calls or Texts when Dialing By Hand	Do Not Call List		Do Not Call List	
Faxes	Prior express permission or established business relationship			

What counts as consent?

Prior express consent

- “Persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.”

Prior express written consent (current standard for marketing)

- “[W]ritten” agreement
- Contains physical or electronic “signature”
- “[C]learly authorizes” business to send “advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice”
- Identifies “telephone number”
- “Clear and conspicuous disclosure[s]”:
 - Agreeing to autodialed telemarketing calls
 - Consent isn’t required (directly or indirectly), and consent isn’t a condition of “purchasing any property, goods, or services”

The FCC's 2015 Declaratory Ruling and Order

FCC



The FCC's 2015 Declaratory Ruling and Order

- Substantial confusion regarding the FCC's prior TCPA orders and disagreements among courts about key issues spurred filing of 21 petitions before FCC
- FCC issued omnibus order in July 2015
- Consolidated challenge to order now pending before D.C. Circuit



ACA International v. FCC: Key Issues



What's an autodialer?



Liability for calls to reassigned numbers



Exemption for HIPAA-regulated calls and texts



Revocation of consent

ACA International: ATDS or autodialer



47 U.S. C. § 227(a)(1)

(a) DEFINITIONS As used in this section—

(1) The term “automatic telephone dialing system” means 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(b)(A)(iii)

(b) Restrictions on use of automated telephone equipment

(1) **PROHIBITIONS** It shall be unlawful for any person . . . (A) to make any call . . . other than a call . . . made with the prior express consent of the called party [] using any automatic telephone dialing system or an artificial or prerecorded voice . . . (iii) to any telephone number assigned to a . . . cellular telephone service. . . .

ACA International: ATDS or autodialer

Question before the FCC: Does the term “capacity” in the definition of an ATDS refer not only to a device’s “present capacity” or “current configuration” but also its “potential functionalities”?

- The FCC said “yes”
 - “We reaffirm our previous statements that dialing equipment generally has the capacity to store or produce, and dial random or sequential numbers (and thus meets the TCPA’s definition of “autodialer”) even if it is not presently used for that purpose . . .”
 - Reiterated that, in 2003 and 2008, it interpreted the TCPA to cover dialing equipment that dials numbers randomly or sequentially from a “set list,” but does not have the capacity to generate the numbers
 - *E.g.*, predictive dialer

ACA International: ATDS or autodialer

Chevron

- The Supreme Court set forth a two-test test for judicial review of administrative agency interpretations of federal law
 - (1) the court determines “i[f] the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress
 - (2) if a statute is silent or ambiguous with respect to the issue at hand, “a court must defer to the federal agency’s interpretation of the statute, as long as such interpretation is reasonable” (*i.e.*, based on a permissible construction of the statute)
 - An agency’s interpretation of the statute is permissible, unless it is “arbitrary, capricious, or manifestly contrary to the statute.”
- If the *Chevron* test is met, the agency’s interpretation has the force of law

ACA International: ATDS or autodialer

1. Whether “capacity” means “present ability” or “potential functionalities”
2. Whether dialing equipment can be considered an ATDS if it automatically dials numbers in sequence from a “set list” as opposed to dialing numbers produced by a random or sequential number generator
3. Whether using dialing equipment falls within the prohibition of the TCPA if a person does not use the automatic dialing capability to make a call

ACA International: ATDS or autodialer

CAPACITY



Is a smartphone an autodialer?

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ACA International: ATDS or autodialer

FUNCTIONALITY



What does it mean to “store” or “produce” phone numbers “to be called, using a random or sequential number generator”?

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ACA International: ATDS or autodialer

USE



If equipment has the capacity to serve as an autodialer, but the caller doesn't employ that capability, has the caller used an autodialer?

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ACA International: Calls to reassigned numbers

Question before the FCC: Does “called party” for the purposes of express consent mean the intended recipient of the call or the person who answered the call?

- “The FCC found that ‘called party’ is the subscriber, i.e., the consumer assigned to the telephone number dialed and billed for the call, or the non-subscriber customary use of a telephone number included in a family or business calling plan.”
- Thus, “calls to reassigned wireless numbers violate the TCPA when a previous subscriber, not the current subscriber or customary user, provides the prior express consent on which the call is based.”

ACA International: Calls to reassigned numbers

One-Call Safe Harbor

- “[C]allers who make calls without knowledge of reassignment and with a reasonable basis to believe that they have valid consent to make the call should be able to initiate one call after reassignment as an additional opportunity to gain actual or constructive knowledge of the reassignment and cease future calls to the new subscriber.”
- “If this one additional call does not yield actual knowledge of reassignment, we deem the caller to have constructive knowledge of such.”

ACA International: Calls to reassigned numbers



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- Discussion among Judge Pillard, Judge Srinivasan, and Petitioners' counsel
- Discussion among Judge Srinivasan, Judge Edwards, and FCC's counsel

ACA International: Revocation of consent

- In the 2015 Order, the FCC concluded that “Consumers have a right to revoke consent, through any reasonable means including orally or in writing.”
- The Commission explicitly rejected a request that a company be able to determine an exclusive method or methods through which a called party could opt out of receiving automated calls or texts
- Examples include a call from the consumer to the company or visiting an in-store payment location

ACA International: HIPAA exemption

- FCC was asked to “clarify and confirm that “the provision of a telephone number by an individual to a healthcare provider constitutes ‘prior express consent’ for non-telemarketing, healthcare calls to that telephone number by or on behalf of the healthcare provider” as well as “by or on behalf of the ‘covered entity’ as well as its ‘business associates.’”
- FCC concluded that only such calls that are “within the scope of the consent given, and absent instructions to the contrary” are permissible

ACA International: What happens after the ruling?

- Several Alternatives Are Possible

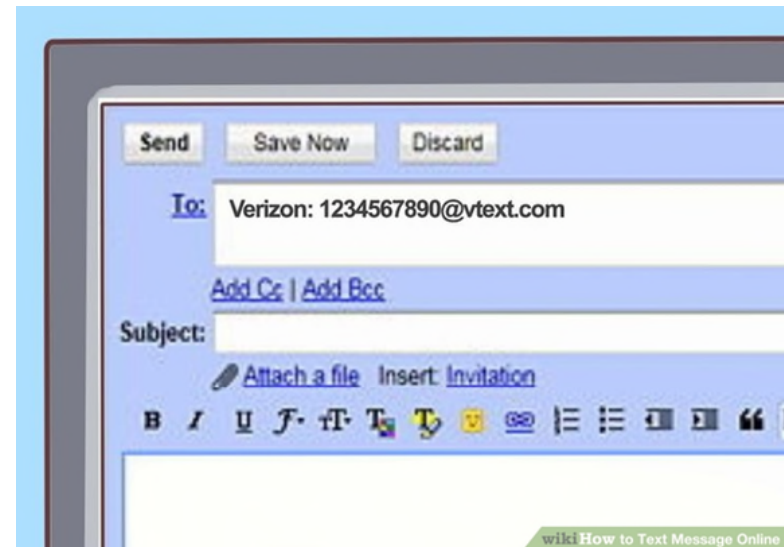
- Court could apply Chevron test and determine that the FCC’s interpretation of the autodialer definition is reasonable, and that the FCC also had the authority to make the other adjustments to the Commission’s TCPA rules regarding reassigned numbers, revocation of consent and HIPAA-related calls
- Court could conclude that the FCC’s interpretation of the TCPA in the July 2015 Order was unreasonable and remand the Order back to the FCC for further consideration
 - This could prompt the FCC to simply attempt to better explain its rationale underlying the July 2015 Order, or the FCC could evaluate whether to make substantive changes to the Order

Other issues covered by the FCC's 2015 Order: Reliance on pre-October 2015 consents

- In its 2012 TCPA Order, the FCC changed the requirement for obtaining prior express written consent from called parties and eliminated oral consent as an option for telemarketing calls
 - The 2012 Order created ambiguity regarding whether the new written consent requirements were prospective or applied retroactively
- In the 2015 Order, the FCC provided retroactive waivers to certain parties to allow them time to comply with the 2012 Order's written consent requirements on a prospective basis because of the ambiguity in the 2012 Order
 - On October 14, the FCC granted similar relief to seven additional parties

Other issues covered by the FCC's 2015 Order: Internet-to-phone messages

- Internet-to-phone messages—often originate as emails or instant messages to address including the recipient's phone number
- Because these messages are already regulated by CAN-SPAM Act, petition sought their exemption from TCPA
- FCC: No. These are the functional equivalent of text messages, and computers sending them are autodialers



Other issues covered by the FCC's 2015 Order: Calling and texting platforms

Who is the “calling party” if an app is used to text a third party?

- Fact-specific analysis:
 - User involvement on making calls/texts
 - Caller-ID blocking or number-spoofing functionality
 - App maker’s “know[ledge]” of users’ “unlawful purposes”?
- Company **not** the caller “when an individual merely uses its service to set up auto-replies to incoming voicemails” or if user chooses to send invitational text messages to third parties
- Company **is** the caller if app “automatically sends” texts/calls “of its own choosing,” with “little or no obvious control by the user.”
- Collect-call services not the caller even if they inject prerecorded voice into user’s call

Other issues covered by the FCC's 2015 Order: Exemption for texts responding to questions

Example: “Text ‘discount’ to xxx-xxxx to receive coupon.”

FCC adopted safe harbor from TCPA liability if:

- The consumer sent an “initiating text”
- Company responds with a “**one-time** only message[] sent **immediately** in response to a specific consumer request”
- Company’s text provides the requested information “with no other marketing or advertising information.”

Other issues covered by the FCC's 2015 Order: Call-blocking technology

- FCC clarified that nothing in Communications Act or FCC rules “prohibits carriers or VoIP providers from implementing call-blocking technology.”
- With consumer’s consent, carriers may:
 - Block calls from a “source identified by consumer.”
 - Block calls from numbers on “carrier-provided” or “crowd-sourced black list.”
 - Block “individual calls or categories of incoming calls that may be part of a mass unsolicited calling event.”
 - Block all calls, calls not on approved list, or calls without caller ID
- Carriers can use over-inclusive call-blocking technologies so long as risk disclosed to consumers

Other legislative developments

- Congress has conducted several hearings on the TCPA
 - Concerns raised by Members of Congress have focused on two primary areas:
 - The TCPA, and the FCC’s implementation of the law, continue to result in a multitude of frivolous litigation, especially with respect to so-called “wrong number calls”
 - Robocalls continue to be a primary nuisance to consumers and wireless carriers should have the statutory tools necessary to block unsolicited calls and texts
- Congress is likely to consider legislation in 2017 to address these concerns

Enhancing Your TCPA Compliance Practices

- Maintain clear policies and procedures outlining your TCPA compliance (including compliance with Do Not Call requirements)
- Train key consumer-facing employees on the TCPA
 - Consider using scripts for employees who must obtain prior express consent or who may receive revocation of consents from called parties
- Ensure consumer contact information is kept up-to-date in your system of record
 - Record wrong party contacts
- Provide called parties with easy methods to revoke consent
 - Consider using a dedicated email address or interactive opt-out mechanisms
 - Share revocation of consent with affiliates and subsidiaries

Enhancing Your TCPA Compliance Practices (cont.)

- Ensure appropriate vendor oversight of TCPA compliance practices.
 - You may be vicariously liable for the activities of certain third party telemarketers placing calls on your behalf.
 - Review the consent practices of your third party lead generators.
- Strong recordkeeping practices are key.
 - Records should be retrievable and defensible.
- Use technology.
 - Scrub calling lists for wireless telephone numbers.
 - Consider scrubbing calling lists for certain VoIP numbers as well.
 - Scrubs should be regular to capture recently reassigned numbers.
 - Place system flags on numbers where consent has not been obtained or where consent has been revoked.

Compliance and autodialers



Non-autodialer equipment: Can it avoid TCPA liability?

- In March 2016, the Southern District of Florida found that a “**manual clicker**” invented by a company called CBE group was not a ATDS under the FCC’s expansive standard
 - From a stored list of records (including phone numbers), a human clicks each record, and another device connects the call
 - The plaintiff failed to rebut the contention that the clicker “cannot dial predictively, does not use a random or sequential number generator, and does not have the capacity to store, produce, or dial numbers using a random or sequential number generator.”
- **Ringless voicemail drop:** allows users to drop a voicemail message directly into a subscriber's voice mailbox without ever making a call or ringing their phone line
 - FCC generally interprets the language of the TCPA to cover advances in technology
 - *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953-54 (9th Cir. 2009) (“Webster's defines ‘call’ in this context as ‘to communicate with or try to get into communication with a person by a telephone” **** “a **voice message** or a text message are not distinguishable” from a voice call “in terms of being an invasion of privacy”)

Questions?

- Please call or e-mail

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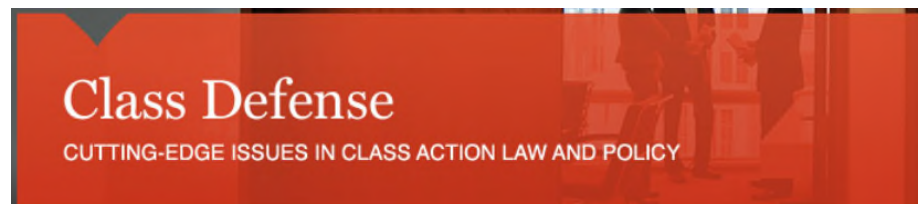
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