April 5, 2018

D.C. Circuit Rolls Back the FCC's Expansive Order Targeting Telephone Marketing

On March 16, 2018, the D.C. Circuit handed down a unanimous decision rejecting two core components of a 2015 Declaratory Ruling and Order (the "FCC Order") issued by the Federal Communications Commission (the "FCC") that would have significantly expanded the reach of the Telephone Consumer Protection Act (the "TCPA"). See *ACA Int'l v. FCC*, No. 15-1211. Most notably, the D.C. Circuit rejected what it considered the FCC's "unreasonably expansive" interpretation of the TCPA that would have had "eye-popping sweep": expanding the definition of "autodialer" to include not only telephones with the present capacity to automatically call phone numbers using a random or sequential number generator, but also devices that could be modified to do so. That interpretation, the court reasoned, would reach nearly all telephone equipment, even conventional smartphones, making "nearly every American [a] TCPA-violator-in-waiting, if not a violator-in-fact."

As the D.C. Circuit recognized, the draconian remedies available under the TCPA underscored the importance of not extending the TCPA's prohibitions beyond their intended reach. In addition to facing potential regulatory penalties, entities that violate the TCPA can be liable to private plaintiffs for $500 per call or text, which can be trebled to $1500 per call or text for willful or knowing violations, and with no cap on the amount of cumulative damages. 47 U.S.C. § 227(b)(3).

The D.C. Circuit also struck down the FCC's ruling that caller intent is irrelevant for purposes of imposing liability in the case of calls to reassigned phone numbers, reaching a holding that will help protect telephone marketers from unintentional violations of the statute.

The court did side with the FCC on two remaining issues, agreeing with the FCC that called parties may revoke consent to robocalls by any reasonable means and confirming that the FCC may exempt certain time-sensitive healthcare-related calls, but not others, from the TCPA's prior express consent requirements.

While the D.C. Circuit's decision is expected to significantly reduce potential liability under the TCPA, it does not eliminate the risk. Indeed, in the wake of the *ACA International* decision, the FCC has confirmed that telephone solicitations remain its top consumer protection enforcement priority. With the D.C. Circuit's decision leaving untouched the TCPA's private right of action and statutory damages provisions, moreover, businesses should not expect that the plaintiffs' bar, which began litigating TCPA cases long before the FCC's controversial Order and filed more than 4,000 such complaints in 2017, will quit filing TCPA cases any time soon. TCPA compliance should, therefore, remain a priority.

Potential Capacity Not Sufficient for Autodialer Liability

The highlight of the D.C. Circuit's decision is its reversal of the FCC's expansive autodialer interpretation, which would have expanded the scope of the TCPA's prohibition on certain calls made with autodialers to include calls made with ordinary smartphones. Specifically, the TCPA prohibits use of an "automatic telephone dialing system," or autodialer, to call or message wireless numbers without prior express consent. 47 U.S.C. § 227(b)(1)(A). An autodialer, in turn, is defined by statute as equipment with the "capacity" "to store or produce telephone numbers to be called, using a random or sequential number generator; and . . . to dial such numbers." § 227(a)(1).

In the Order, the FCC determined that the "capacity" of dialing equipment "includes its potential functionalities" or "future possibility," not just its "present" or "current" ability. According to the FCC, therefore, "a piece of equipment

can possess the requisite 'capacity' to satisfy the statutory definition of 'autodialer' even if, for example, it requires the addition of software to actually perform the functions described in the definition." In arguing before the D.C. Circuit, the FCC did not dispute that this interpretation would sweep in the average smartphone. Indeed, in providing guidance on its Order, the only type of dialing equipment that the FCC confirmed would not be in scope was a rotary telephone.

The D.C. Circuit rejected the FCC's expansive interpretation. At the end of 2016, nearly 80% of American adults owned smartphones, a number expected to increase. If every smartphone qualifies as an autodialer, and if an uninvited call or message from a smartphone violates the statute even if autodialer features were not used to make the call or send the message, then "the statute's restrictions on autodialer calls assume an eye-popping sweep." The court's rejection of the FCC's interpretation, then, precludes a regulatory regime where "every uninvited communication from a smartphone infringes federal law."

Intent Relevant to Calls Made to Reassigned Phone Numbers

The D.C. Circuit also rejected the FCC's approach to permitting a limited one-call safe harbor for calls to reassigned numbers and, as a result, additionally invalidated the FCC's interpretation of "called party." Under the TCPA, "prior express consent of the called party" precludes liability against the caller for calls made with an autodialer. 47 U.S.C. § 227(b)(1)(A). The issue of whether the "called party" consented, however, becomes complicated where the person who gave the consent is no longer the person who received the call, particularly where the phone number was reassigned. Liability for calls to reassigned numbers poses a considerable concern since, as the FCC has observed, approximately 35 million numbers are disconnected and made available for reassignment to new consumers each year.

Although the D.C. Circuit determined that the FCC's statutory interpretation of "called party" to mean a phone number's present-day subscriber and customary users was a reasonable one, the court nevertheless set aside that interpretation on the basis of the FCC's flawed single-call safe harbor. According to the court, such a safe harbor amounted to arbitrary rulemaking since callers may learn of reassigned numbers prior to the first call and even a single call may fail to provide adequate notice of reassignment.

For immediate practical purposes, the court's decision undoes the FCC's "called party" interpretation and invites businesses to argue, in a fashion that the Order had rejected, that mistaken, good faith calls to parties with reassigned numbers could fall within the consent exception.

Looking ahead further, the precise interpretation of "called party" may lose significance. As the D.C. Circuit observed, the FCC is considering the creation of a "comprehensive repository of information about reassigned wireless numbers," which could eliminate much of the confusion surrounding reassigned numbers. Shortly after the appellate decision, on March 22, 2018 the FCC adopted its latest proposal, soliciting comments regarding the implementation of one or more databases to provide callers with comprehensive and timely potential number reassignment information. The FCC has made clear that it will not mandate that callers use such databases in order to comply with the TCPA. Instead, the FCC's proposal would incentivize use by adopting a safe harbor for callers that consult the reassigned number databases.

While the FCC's proposal for the reassigned number database undergoes consideration, businesses are encouraged to employ tools and best practices to facilitate detection of number reassignment before making good faith calls. For instance, the FCC has recommended that callers include an interactive opt-out mechanism for recipients to report a reassigned or wrong number and implement procedures for customer service representatives placing outbound calls to record wrong number reports and for allowing customer service agents to record new phone numbers when receiving calls from customers.

Called Parties May Revoke Consent at Any Time and Through Any Reasonable Means

In other aspects, the D.C. Circuit agreed with the FCC, keeping in place some of the FCC's pro-consumer rules. The D.C. Circuit, like the agency, emphasized that called parties may revoke consent through "any reasonable means

clearly expressing a desire to receive no further messages from the caller." Callers, therefore, may not limit the manner or designate the exclusive means by which revocation may occur. Consequently, the D.C. Circuit observed that "callers will have every incentive to avoid TCPA liability by making available clearly-defined and easy-to-use opt-out methods," which regulated entities are encouraged to implement.

Moreover, regulated entities may consider contracting with called parties on particular revocation procedures. Whereas the FCC did not address parties' contractual rights regarding revocation, the D.C. Circuit clarified that parties retain the ability to agree to mutually adopted rules.

Certain Time-Sensitive Financial and Healthcare Messages Are Exempt from Liability

Finally, the D.C. Circuit confirmed that the Health Insurance Portability and Accountability Act ("HIPAA") does not supersede the FCC's authority to craft exemptions from the TCPA's consumer consent requirements for some, but not all, healthcare-related calls. Consequently, absent consumer consent, callers such as pharmacies and healthcare providers may still face TCPA liability for billing and accounting calls to wireless numbers, whose timely delivery is not critical to a called party's healthcare. As the *ACA International* decision counsels, regulated entities should seek to comply with both the TCPA and HIPAA rules and regulations governing the disclosure of protected health information.

For more information regarding the TCPA or to discuss privacy or cybersecurity practices generally, please feel free to contact a member of Ropes & Gray's leading privacy & cybersecurity team.