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The TCPA: After an Eventful 2018, Further Hope for 2019

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The year 2018 was a year of hope and continued questions for businesses impacted by the Telephone Consumer Protection Act (TCPA). As in prior years, the plaintiffs' bar continued to aggressively pursue TCPA claims; although new claims have plateaued and slightly decreased over the last two years, thousands of new claims were filed in 2018, including more than 74 new class actions.

But 2018 was unquestionably a unique year thanks to the D.C. Circuit finally weighing in on questions about the Federal Communications Commission's (FCC) prior guidance that had potentially foreclosed many defenses to TCPA liability. Through its decision in *ACA International*, the D.C. Circuit struck down prior FCC guidance, and with a new lineup of FCC commissioners and the influence of a Republican Administration, TCPA critics were hopeful that 2018 would bring clarity that could control the rising costs of TCPA compliance and litigation. The FCC did conduct a notice and comment rulemaking process that indicated it is taking a hard look at the scope and breadth of the TCPA. However, 2018 closed with little rulemaking action. The only rule that resulted from that process was the creation of a new reassigned number database, with an accompanying limited safe harbor.

So the year closed with many questions remaining and TCPA followers looking to 2019 for continued legal developments, including additional anticipated rulemaking and direction from the Supreme Court, which has a TCPA case on its docket in 2019.

Highly Anticipated and Long Awaited: The D.C. Circuit Decided *ACA International*

On July 10, 2015, the FCC entered a long-awaited order on 21 petitions seeking clarification on a number of issues concerning the TCPA. Although the FCC stated that the order would "benefit consumers and good-faith callers alike by clarifying whether conduct violates the TCPA and by detailing simple guidance intended to assist callers in avoiding violations and consequent litigation," it was clear from the outset that the newly confirmed interpretations would, in many circumstances, create more confusion than clarity. What was also clear from the outset was that the FCC's new requirements would be a burden on businesses

that placed autodialed calls or calls that use an artificial or prerecorded voice.

In response to the 2015 order, a number of entities, led by the Association of Credit and Collection Professionals ("ACA International") appealed the order to the D.C. Circuit Court of Appeals, which finally issued a ruling on March 16, 2018. The most hotly contested part of the FCC's 2015 order concerned its interpretation of the definition of an automatic telephone dialing system (ATDS). Finding several errors in the FCC's ruling, the D.C. Circuit set aside the commission's 2015 treatment of those matters. The court's major concern with the FCC's definition was its breadth. As the court understood the FCC's interpretation, "as long as equipment has the 'capacity' to function as an autodialer—as is true of every smartphone under the agency's view—*any* uninvited call or message from the device is a statutory violation." The need for a statutory definition of an ATDS had more or less disappeared: every electronic phone system falls within the FCC's interpretation. Such an interpretation, according to the court, is "unreasonable" and "impermissible," and it was found to be arbitrary and capricious because it was "utterly unreasonable in the breadth of its regulatory [in]clusion," "indiscriminate," and "offer[ed] no meaningful guidance to affected parties." The court also took issue with the FCC's inconsistent treatment of the phrase: "using a random or sequential number generator." Specifically, the FCC's guidance provided no clarity on whether an ATDS had to have the actual ability to generate random or sequential numbers. This lack of clarity combined with the FCC's expansive understanding of the term "capacity" compelled the court to set aside the ruling concerning the ATDS definition.

The D.C. Circuit also invalidated the FCC's rule on reassigned wireless numbers and consent. Under established FCC rules, a "called party" is the actual recipient of the call (who may not have consented) rather than the intended recipient (who did consent). Consent therefore extinguished automatically when a number was reassigned, triggering liability even though the caller likely had no idea the number had been transferred. To partially mitigate the effect of the rule, the FCC had created a one-call safe harbor after reassignment before liability kicked in. The D.C. Circuit first held that the one-call safe harbor was arbitrary and capricious and therefore invalid. The court found that the one-call safe harbor was inconsistent with other FCC rules allowing reasonable reliance on another party's (not the called party's) prior consent. By "embrac[ing] an interpretation of the statutory phrase 'prior express consent' grounded in conceptions of reasonable reliance, the [FCC] needed to give some reasoned (and reasonable) explanation of why its safe harbor stopped at the seemingly arbitrary point of a single call or message." It did not, and the D.C. Circuit struck the new safe harbor rule.

The D.C. Circuit's rejection of the FCC's positions on the ATDS definition and reassigned numbers marked a big change in the TCPA landscape. Following the court decision, the FCC asked for comments on rulemaking on both issues. The pending FCC rulings will be a big focus for 2019.

Courts Provide Mixed Results Following the *ACA International* Decision

Following the *ACA International* decision, courts across the country wrestled with the applicable definition of an ATDS and came to contradictory results. Two courts of appeals focused on the TCPA's literal definition of an ATDS in delivering defendant-friendly decisions. In *King v. Time Warner Cable Inc.*, the Second Circuit "conclude[d] that the term 'capacity' in the TCPA's definition of a qualifying autodialer should be interpreted to refer to a device's current functions, absent any modifications to the device's hardware or software."

The court of appeals remanded the case to the trial court to determine "whether Time Warner's system had the ability to perform the functions of an ATDS when it made the calls to" the plaintiff and "what kinds of modifications might be required to permit it to do so." In *Dominguez v. Yahoo Inc.*, the Third Circuit noted that the plaintiff failed to "point to any evidence that creates a genuine dispute of fact as to whether [Yahoo's] Email SMS Service had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers." Rather, "the record indicate[d] that the Email SMS Service sent messages only to numbers that had been individually and manually inputted into its system by a user," thereby removing the system from the purview of the TCPA's ATDS definition.

But the Ninth Circuit took a completely different direction in a decision that followed the *King* and *Dominguez* opinions. In *Marks v. Crunch San Diego LLC*, the court of appeals determined that the statutory definition is ambiguous on its face as to whether a device must be able to generate random or sequential numbers to be an ATDS or if a device could be an ATDS if it only dialed numbers from a stored list. Accordingly, the Ninth Circuit was required to conduct its own construction of the statutory text. In determining that the ATDS definition extended to Crunch's dialing system, the court pointed to other language in the TCPA indicating that equipment that makes calls from a stored list could qualify as an ATDS. The court also rejected the defendant's argument that an ATDS must operate with no human involvement whatsoever, observing that "common sense indicates that human intervention of some sort is required before an autodialer can begin making calls, whether turning on the machine or initiating its functions." The defendant has petitioned the Supreme Court for certiorari in this case, but until there is further guidance from the FCC, businesses seeking to place calls or texts en masse to its customers do so with uncertainty on whether they are using an ATDS to do so.

The FCC Responds to *ACA International* with Rulemaking

Following the *ACA International* decision, the FCC requested comments on the appropriate definition of an ATDS and liability for calling reassigned numbers. On December 12, 2018, the FCC adopted a new rule addressing only reassigned numbers: it established a single reassigned-numbers database to supplement existing commercial solutions. The new rule also provides a safe harbor from TCPA liability for calls to reassigned numbers caused by database error.

Under the new rule, reporting carriers are required to report the most recent date on which each number the carrier is allocated becomes permanently disconnected. This information will populate a database, which will be administered by an independent third-party administrator. The database is limited to the date of the most recent permanent disconnection of a number. When queried by number and a date, the database will provide a limited response of "yes," "no," or "no data" to answer whether a number has been disconnected or reassigned. To access the database, callers must agree that they will use the database solely for the limited purpose of determining whether a number has been reassigned for the purpose of making lawful calls. Callers will pay a usage charge to access the database.

To support the functionality of the database, the new rule establishes a minimum aging period of 45 days before numbers can be reassigned. The FCC envisions that this will create the possibility that callers will learn that a number is reassigned through an intercept message, while adding uniformity to the

reassignment process. Because of the aging period, the FCC anticipates that callers will only have to check the list periodically, instead of requiring real-time updates and checks.

The rule also provides a safe harbor from TCPA liability for callers that use the database and reasonably rely on its information. To qualify for the safe harbor, the caller must demonstrate that it had prior express consent of the called party and demonstrate that it queried the most recent numbering information in the database and received a "no" response when seeking to verify that the number was not reassigned. The safe harbor is limited to the FCC's database only and does not include commercial databases.

The rulemaking process continues to other matters opened by the *ACA International* decision. The question of the ATDS definition drew significant attention from a variety of business interests, from the U.S. Chamber of Commerce and Institute for Legal Reform to trade associations like the American Financial Services Association and Consumer Bankers Association to individual businesses like Sirius XM Radio Inc. and Allstate Insurance Company. The business interests were largely consistent in their comments. Underscoring their positions was the belief that the FCC should not deviate from the straightforward language of the TCPA statute. They argued that the FCC should issue a declaratory ruling that (1) equipment constitutes an ATDS if it uses a random or sequential number generator to store or produce numbers and dial those numbers without human intervention; and (2) only calls made using actual ATDS capabilities are subject to the TCPA's restrictions. The FCC asked for additional comments following the Ninth Circuit's *Marks* decision. Those comments largely echoed previous ones, with the additional note that the *Marks* decision contradicted the *ACA International* holding.

Opposition came largely from plaintiffs' attorneys, with a few comments from consumer advocate groups. Their focus, unsurprisingly, was on the nature of the calls being made rather than the technical capabilities of the equipment. Like the plaintiff in *Marks*, these commenters urged a finding that a piece of equipment qualifies as an ATDS if it has the capacity to store telephone numbers and then dial them, whether or not the equipment actually used a random or sequential number generator.

The Supreme Court Grants Cert to Review the Impact of FCC TCPA Rules

Businesses and attorneys impacted by the TCPA will also be playing close attention to the Supreme Court in 2019 as it entertains an appeal in *Carlton & Harris Chiropractic Inc. v. PDR Network LLC*. The chiropractor plaintiff received a fax from PDR Network that invited the plaintiff to "Reserve [Its] Free 2014 Physicians' Desk Reference eBook" by visiting PDR Network's website. In response to the defendant's motion to dismiss, the plaintiff argued that sending a fax promoting a free product constituted an "unsolicited advertisement" under a 2006 FCC rule that states that "facsimile messages that promote goods or services even at no cost … are unsolicited advertisements under the TCPA's definition." The plaintiff further argued that the Hobbs Act, which grants exclusive jurisdiction to "[t]he court of appeals" to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of … all final orders of the [FCC]" required the district court to adhere to the 2006 FCC Rule.

The Supreme Court granted certiorari from the Fourth Circuit on the issue of "whether the Hobbs Act required the district court in this case to accept the FCC's legal interpretation of the Telephone Consumer Protection Act." While ostensibly limited to a single issue concerning junk faxes, the impact of the decision could be much broader. The FCC's TCPA positions have consistently been viewed as the definitive interpretation of

the statute. If the Supreme Court finds that FCC TCPA rules are merely advisory, courts will have a lot more discretion in interpreting and applying a draconian statute that is viewed very differently by different parties and different courts.

The FCC's Exemptions See Little Playing Time

The health care and financial services exemptions to the TCPA that the FCC created are one aspect of the FCC's 2015 order that remains unaffected by the *ACA International* decision. Under certain circumstances, the FCC deemed certain calls sufficiently important that autodialed, prerecorded, or artificial voice calls and text messages are allowed regardless of whether there is any prior express consent. In 2018, courts continued to enforce these exemptions but cautioned businesses in the health care and financial service industries about stretching the exemptions too far.

Under the health care exemption, calls to wireless numbers that have an "exigent … healthcare treatment purpose" are exempt from consent requirements if they are not charged to the called party. Such calls include those concerning appointment and exam confirmations and reminders, wellness checkups, and pre-operative instructions. In the Second Circuit, two defendants argued for extending the exemption to reminders that it is time for an annual flu shot. The court of appeals ultimately found that the plaintiffs had consented to the calls in *Latner v. Mount Sinai Health System Inc.* and *Zani v. Rite Aid Corp*. but declined to apply the health care exemption, noting that the FCC declared that "the call must be closely related to the purpose for which the telephone number was originally provided."

The financial services emergency exemption, on the other hand, did not get much play in 2018 litigation. One defendant did find protection from the TCPA pursuant to the exemption for debt collection calls placed to collect a debt owed to the government. In *Schneider v. Navient Solutions LLC*, the Western District of New York held that Navient's calls to the plaintiff were exempt from the TCPA because Navient was calling on behalf of the U.S. Department of Education in connection with servicing the student loan debt that the plaintiff owed to the DOE. Such calls are exempted from the TCPA by the Bipartisan Budget Act of 2015.

Conclusion

As 2018 brought promise, 2019 hopes to bring clarity. All will be watching with anticipation for the FCC to propose a rule defining ATDS. Yet the Supreme Court could complicate the value of such clarity depending on its ruling on the persuasive value of FCC guidance. Until additional changes in the TCPA legal landscape occur, practitioners can anticipate continued TCPA action.

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