

## Critical Takeaways From the D.C. Circuit's Long-Awaited Robocall Ruling

Last Friday, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued its long-awaited decision in [ACA International v. Federal Communications Commission](#), No. 15-1211 (D.C. Cir. Mar. 16, 2018). The court unanimously vacated in part and affirmed in part portions of the Federal Communication Commission's July 10, 2015 omnibus Declaratory Ruling and Order (Omnibus Order) interpreting the Telephone Consumer Protection Act (TCPA).

Specifically, the D.C. Circuit **vacated** the Commission's:

- expansive definition of the statutory term "automatic telephone dialing system" (ATDS or autodialer), to eliminate the agency's construction that any device that has the "potential capacity" to dial numbers without human intervention, such as any smart phone, constitutes an autodialer. This definitional change is important because making calls from an autodialer to wireless subscribers without their prior consent potentially exposes the caller to claims of significant financial penalties under the FCC's rules implementing the TCPA; and
- one-time safe harbor approach for reassigned numbers as overly constrained and definition of called party.

The panel **affirmed** the Commission's:

- reasonableness standard for revocation of consent; and
- interpretation of the scope of healthcare exceptions to the prior express consent standard under the TCPA.

While the D.C. Circuit did not define what an autodialer is, it clarified what it could not be: an autodialer cannot be defined as a device that merely has the potential capacity to call or text to wireless subscribers without human intervention. Because all smart phones effectively have the potential capacity to automatically place calls to wireless subscribers, the Commission's rule effectively made practices as innocent as texting friends from a smart phone a violation of federal law. It remains to be seen, however, how the FCC may further clarify the definition of autodialer following this decision, and how courts will interpret it. Nevertheless, the ruling should help provide clearer guidance to companies seeking to remain compliant with the TCPA.

### Background

On July 10, 2015, the Commission adopted the Omnibus Order to address numerous requests for clarification and other actions regarding the Commission's rules and orders implementing the TCPA. *See* Omnibus Order ¶ 2. Among other things, the Omnibus Order adopted a new, broader definition of autodialer and "called party," as well as the means by which an individual who previously consented to receive calls can revoke that consent.

Regarding the autodialer definition, the FCC interpreted the term as expanding beyond equipment that has the capacity to store or produce telephone numbers to be called using a random or sequential number generator, and to call such number, and is actually used to call or text wireless subscribers without human intervention, to encompass any equipment with the "potential" ability or capacity to dial numbers randomly or sequentially. *See* Omnibus Order ¶ 19. The FCC's interpretation had raised questions over whether it encompasses *all* modern dialing technology, including effectively all smart phones currently in the hands of millions of American

consumers. *See id.* ¶ 21; [Recording of Oral Argument](#).

The FCC also determined that the "called party" under the TCPA is not necessarily the party the caller was trying to reach, but the subscriber or regular user of the telephone. Omnibus Order ¶¶ 73, 78. Further, if an intended recipient's phone number was reassigned to a new subscriber, the FCC ruled that, save for a one-call safe harbor, the caller could be liable for subsequent calls even if the caller had no notice of the reassignment. *Id.* ¶¶ 83-84.

Finally, the FCC crafted a new rule that a called party who gave prior express consent to receive calls may revoke that consent using "any reasonable manner that clearly expresses his or her desire not to receive further calls," and "is not limited to using only a revocation method that the caller has established as one that it will accept." Omnibus Order ¶ 70.

Immediately after the FCC issued the Omnibus Order, a flurry of petitions sought review and were consolidated in the D.C. Circuit. They challenged the FCC's interpretations of "ATDS," "called party" and revocation of consent as arbitrary and capricious, an abuse of discretion, exceeding the FCC's statutory authority, and contrary to the TCPA's plain text. The appeal attracted significant amicus interest: 18 amici filed briefs on behalf of petitioner and four filed briefs on behalf of respondent.

#### D.C. Circuit's *ACA International* Opinion

**Autodialer Definition Vacated.** As to the definition of autodialer, the court set aside the Commission's order on two bases, but notably did not offer its own definition.

First, it found the Commission's interpretation arbitrary and capricious because of its "eye-popping sweep." The court held that "[t]he TCPA cannot reasonably be read to render every smartphone an ATDS subject to the Act's restrictions, such that every smartphone user violates federal law whenever she makes a call or sends a text message without advance consent." Slip Op. at 17. And it concluded that, "[n]othing 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." *Id.* at 19.

Second, in dicta, the court appeared to tip its hat to FCC Commissioner Michael O'Rielly's dissent in the Omnibus Order, where he had argued the statute's phrase "make any call using any" autodialer could be reasonably interpreted to only prohibit the use of an autodialer when relying on its functionality as an autodialer. The court declined to address or resolve this statutory interpretation point because the petitioners failed to raise the argument themselves. However, the court appeared to provide the Commission a legal roadmap for narrowing and clarifying the definition of autodialer in a future rulemaking.

#### One-Call Safe Harbor for Reassigned Numbers Set Aside in Favor of Unlimited "Reasonable Reliance" Standard

The court found the Commission's one-call safe harbor for reassigned numbers to be arbitrary and capricious and set aside the Commission's treatment of reassigned numbers as a whole. *Id.* at 39-40.

As an initial matter the court found persuasive the analysis by the U.S. Court of Appeals for the Seventh Circuit of "called party" as referring to the "current subscriber" to a phone number, rather than the intended recipient, but only insofar as it supported concluding that the Commission was not *compelled* to interpret "called party" in § 227(b)(1)(A) to mean the "intended recipient" rather than the current subscriber. *Id.* at 35; *see Soppet v. Enhanced Recovery Co.*, 679 F.3d 637 (7th Cir. 2012).

The court then observed that, having adopted that interpretation of "called party," the Commission had already expressly rejected a strict liability standard, instead consistently adopting a "reasonable reliance" approach when

interpreting the TCPA's approval of calls based on "prior express consent." For example, the court observed that this standard motivated the Commission's determination that a "customary user" of a wireless number who is not the subscriber can provide consent to receive autodialed calls. *Id.* at 36. The Commission also cited to the "reasonable reliance" standard for allowing a one-call safe harbor when a consenting party's number is reassigned, but the court found this arbitrary and capricious. "Why does a caller's reasonable reliance on a previous subscriber's consent necessarily cease to be reasonable once there has been a single, post-reassignment call?" the court asked. *Id.* The court set aside the safe harbor on the basis that the Commission "gave no explanation of why reasonable-reliance considerations would support limiting the safe harbor to just one call or message." *Id.* at 36.

The court also determined that it could not say without substantial doubt that the Commission would have adopted the "'severe' implications of a pure, strict-liability regime even in the absence of any safe harbor." *Id.* It thus set aside not only the one-call safe harbor, but also the FCC's treatment of reassigned numbers more generally, including the definition of called party. *Id.* at 39-40.

**Revocation of Consent Standard Sustained.** The court sustained the Commission's conclusion 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." *Id.* at 41 (citing 2015 Order at 7989-90 ¶ 47; *id.* at 7996 ¶ 63). The court found petitioners' concerns about the unwieldy nature of the standard "overstated," observing that the "Commission's ruling absolves callers of any responsibility to adopt systems that would entail 'undue burdens' or would be 'overly burdensome to implement.'" *Id.* (citing 2015 Order at 30 FCC Rcd. at 7996 ¶ 64 & n.233).

The court also found that "callers would have no need to train every retail employee on the finer points of revocation." *Id.* It observed that if recipients are afforded "clearly-defined and easy-to-use opt-out methods," then "any effort to sidestep the available methods in favor of idiosyncratic or imaginative revocation requests might well be seen as unreasonable." *Id.* at 41-42. Finally, it found that while "[t]he ruling precludes unilateral imposition of revocation rules by callers[,] it does not address revocation rules mutually adopted by contracting parties" and that "[n]othing in the Commission's order thus should be understood to speak to parties' ability to agree upon revocation procedures." *Id.* at 43.

**Scope of Healthcare Exceptions Sustained.** The court sustained the Commission's interpretation of the scope of healthcare exceptions to the prior express consent standard under the TCPA, which allowed calls to wireless numbers "for which there is exigency and that have a healthcare treatment purpose." Rejecting Rite-Aid's contrary position, the court determined there is no obstacle to complying with both the TCPA and HIPAA because "[t]he two statutes provide separate protections." *Id.* at 46.

#### Significance of *ACA International* Decision

- **The broad definition of autodialer espoused in the Omnibus Order is no longer good law.** The court has not offered a substitute definition but noted several limiting factors on such definition including: the statutory language restricting autodialer to 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;" the fact that the Commission has defined the "basic function" of an autodialer as the ability to "dial numbers without human intervention;" and the fact that the statutory language "making any call using" an autodialer may only apply to calls made using the equipment's autodialer functionality rather than calls made not using such functionality but made on equipment with the capacity to autodial.
- **The Commission will commence a new rulemaking to clarify what constitutes an autodialer, in all likelihood, further limiting the scope of the Omnibus Order.** The two dissenting commissioners in the Omnibus Order are now a part of the FCC's majority, Republican members Chairman Ajit Pai and

Commissioner O'Rielly. In light of their past criticism of the Omnibus Order's expansive scope, a new rulemaking will provide the Pai FCC an opportunity to refashion the Commission's TCPA rules in a manner that will be less onerous to the business community.

- **The Commission's treatment of reassigned numbers as a whole is no longer good law.** Again, while the court did not suggest new ways of handling reassigned numbers, it did note the Commission's acknowledgment of the unfairness of a strict liability regime and also noted the Commission's efforts to develop procedures through which companies can "reasonably" rely on the prior express consent of the previous subscriber when placing calls to numbers that are ultimately discovered to have been reassigned.
- **The Commission's rule relating to revocation of consent remains good law.** However, the court gave guidance about these rules indicating that where there are clear means to opt out, and a recipient sidesteps those methods, the recipient's attempted revocation may be considered unreasonable.
- **The scope of the TCPA's healthcare exception remains unchanged.**

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## Authors



### James G. Snell

Partner

[JSnell@perkinscoie.com](mailto:JSnell@perkinscoie.com)    [650.838.4367](tel:650.838.4367)



### Debra R. Bernard

Of Counsel

[DBernard@perkinscoie.com](mailto:DBernard@perkinscoie.com) [312.324.8559](tel:312.324.8559)



## **Marc S. Martin**

Partner

[MMartin@perkinscoie.com](mailto:MMartin@perkinscoie.com) [202.654.6351](tel:202.654.6351)



## **Nicola Menaldo**

Partner

[NMenaldo@perkinscoie.com](mailto:NMenaldo@perkinscoie.com) [206.359.8000](tel:206.359.8000)



## **Erin K. Earl**

Partner

[EEarl@perkinscoie.com](mailto:EEarl@perkinscoie.com) [206.359.8510](tel:206.359.8510)

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