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TCPA Trends: Impact On Future Litigation And Compliance

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The number of Telephone Consumer Protection Act lawsuits has grown exponentially in recent years, affecting companies in almost all consumer-facing industries. With this wave of TCPA litigation, these companies and their lawyers have had to grapple with an evolving TCPA landscape and uncertainty surrounding the scope of the TCPA. As described below, courts have issued several significant decisions in recent months that may impact future TCPA litigation and compliance efforts, the details of which are essential for those seeking to avoid TCPA lawsuits and potential future liability.

An Overview of TCPA Litigation

Congress enacted the TCPA in 1991 to address aggressive telemarketing practices by placing certain restrictions on commercial solicitation calls, faxes and other outgoing communications. Specifically, the TCPA prohibits using an automated telephone dialing system (ATDS), or a prerecorded message to make telephone solicitations unless the recipient has granted prior express consent or in case of an emergency. In addition, the TCPA mandates the creation of a federal "do not call" registry, requires companies to keep internal "do not call" lists and imposes regulations on telemarketing faxes. The Federal Communications Commission, which is tasked with implementing the TCPA, has in past years interpreted these regulations to apply to cell phones and text messages.

Plaintiffs rarely pursued TCPA claims in the early years after its enactment. However, the ubiquity of cell phone use ushered in new ways for companies to communicate with consumers. As a result, consumer-facing companies found themselves increasingly vulnerable to potential TCPA claims based on their phone call or text message marketing practices. Further, the significant statutory damages for TCPA violations and the broad scale of most marketing campaigns made the law ripe for plaintiffs seeking class action treatment. In particular, the TCPA authorizes minimum damages of $500 per call (or text) for negligent violations, and $1,500 per call (or text) for knowing or willful violations. With no cap on damages for TCPA class actions, the number of TCPA lawsuits has surged. This proliferation in TCPA litigation has targeted a wide variety of industries and led companies to implement compliance measures to avoid potentially disastrous liability.

Key Developments in TCPA Litigation

1. D.C. Circuit Overturns FCC's Expansive Interpretation of TCPA Regulations Governing Calls and Texts to Consumers

This year, the biggest development in TCPA litigation was the D.C. Circuit's long-awaited decision in the consolidated appeal of the FCC's July 10, 2015, declaratory ruling and order. On March 16, 2018, the D.C. Circuit issued its landmark decision in ACA International v. Federal Communications Commission,[1] which the petitioner ACA International deemed a "major victory" for "businesses and organizations from a wide variety of industries."[2] In a unanimous decision, the D.C. Circuit ruled on several key issues raised in the FCC order, including the statutory definition of "autodialer," the one-call exception for reassigned telephone numbers, the revocation of consent requirements, and the exemption for time-sensitive health care calls.

The Court Narrows the FCC's Statutory Interpretation of "Autodialer"

The first significant aspect of the D.C. Circuit's decision centers on the FCC's broad interpretation of the TCPA's "automated telephone dialing system" definition. The TCPA defines an ATDS as "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."[3] In the FCC order, the agency interpreted this provision to cover a broad array of technological devices, including those with the "potential capacity" to make autodialed calls.[4] According to the FCC's definition, because a smartphone can be configured to function as an "autodialer" with easy modifications or application downloads, essentially any smartphone can be considered an autodialer and function as an ATDS under the TCPA thanks to its "potential capacity."[5]

On appeal, the D.C. Circuit took issue with the FCC's "unreasonabl[e], and impermissibly, expansive" definition of "autodialer."[6] The court expressed its concern with the FCC's overbroad interpretation of the term "capacity" because any smartphone could meet the FCC's definition.[7] The court emphasized the statutory definition of an ATDS as "equipment with the 'capacity' to perform each of two enumerated functions: (i) storing or producing telephone numbers 'using a random or sequential number generator, and (ii) dialing those numbers,"[8] and concluded that unclear language in the FCC order left "affected parties ... in a significant fog of uncertainty about how to determine if a device is an ATDS so as to bring into play the restrictions on unconsented calls,"[9]. The court therefore overruled the FCC's definition of autodialer, requiring the FCC to issue a new ruling consistent with the court's decision.

The Court Vacates the FCC's "One-Call Safe Harbor"

The D.C. Circuit also addressed the FCC's one-call safe harbor for calls made to "reassigned" telephone numbers. The TCPA prohibits "mak[ing] any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing equipment or prerecorded voice."[10] In the FCC order, the agency determined that this prohibition meant that a new subscriber of a reassigned number who received a call that otherwise violated the TCPA would have a cause of action under the act.[11] With millions of wireless numbers reassigned every year,[12] the FCC ruling created compliance headaches for businesses dealing with the prospect of frequent mistaken calls to new persons. The FCC recognized this potential nightmare scenario and adopted a one-call exemption from liability for the first call made to previous subscribers who had given prior consent when inadvertently calling new subscribers.[13] However, the FCC determined that after the first call, the caller would be charged with constructive notice of the reassignment and potentially

liable for any subsequent calls made to reassigned numbers.[14]

The D.C. Circuit concluded that the FCC's "one-call safe harbor" was arbitrary.[15] The court reasoned that it could find no reason to conclude that reasonable reliance should stop at "a single, post-reassignment call."[16] The court criticized the inconsistency in the FCC's reasoning where the FCC had found "reasonable reliance" on the caller's consent received for the first call after reassignment, but not for any subsequent calls absent actual notice of the reassignment.[17] The court therefore overruled the FCC's "one-call safe harbor" approach for reassigned numbers and directed the FCC to issue a more reasoned explanation in a later ruling.[18]

The Court Upholds the FCC's Revocation of Consent Requirements

The third significant aspect of the D.C. Circuit's decision addressed the FCC's ruling that consumers can revoke consent to telemarketing by "any reasonable means."[19] The challengers of the FCC order argued that callers, rather than consumers, should be able to determine the methods of revocation of consent.[20]

On this issue, the D.C. Circuit disagreed with the appellants. The court held that callers cannot unilaterally establish standardized methods for consumers to revoke consent.[21] The court reasoned that the FCC's ruling already "absolves callers of any responsibility to adopt systems that would entail 'undue burdens'" to implement.[22] Further, the court found that the current system incented callers "to avoid TCPA liability by making available clearly defined and easy-to-use opt-out methods."[23] However, the court clarified that while the FCC order precludes callers from unilaterally imposing revocation procedures, the ruling "'did not address whether contracting parties can select a particular revocation procedure by mutual agreement.'"[24] Accordingly, the court noted that the FCC order left open the possibility of the parties adopting bilateral contractual revocation rules.[25]

The Court Affirms the FCC's Health Care-Related Call Exemption

Finally, the D.C. Circuit addressed the FCC's exemption for time-sensitive health care calls. The FCC order exempted from the TCPA's consent requirement certain such calls to wireless numbers, including calls about "appointment and exam confirmations and reminders, wellness checkups, hospital preregistration instructions, preoperative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, and home health care instructions."[26] The appellant challenged this exemption as conflicting with the Health Insurance Portability and Accountability Act and as arbitrary and capricious because it excluded billing, debt collection and other account-related communications.[27]

The D.C. Circuit upheld the scope of the health care-related call exemption. The court reasoned that "[t]here is no obstacle to complying with both the TCPA and HIPPA" because "'[t]he two statutes provide separate protections.'"[28] The court rejected the appellant's argument that the FCC's line-drawing on this exemption was arbitrary and capricious, concluding that the FCC "was empowered to draw the distinction it did" and had "adequately explained its reasons for doing so."[29]

2. Second Circuit Finds Broadly-Worded Consent Sufficient for Prior Express Consent

On Jan. 3, 2018, the Second Circuit in Latner v. Mount Sinai Health System[30] addressed whether a flu shot reminder text message sent by a hospital violated the prior consent requirement under the TCPA. In Latner, the Second Circuit helped clarify the FCC's "Telemarketing Rule," which requires prior written

consent for autodialed or prerecorded telemarketing calls unless the calls and texts to cell phone numbers deliver a "health care message."[31] The district court had dismissed the class action after finding that the lead plaintiff had consented to receiving flu shot reminder text messages when he provided consent for use of his "health information" for "treatment" purposes, as well as "to recommend possible treatment alternatives or health-related benefits and services" in his initial patient intake forms.[32]

On appeal, the Second Circuit affirmed the district court's dismissal of the claims but interpreted the health care exception more narrowly. The Second Circuit explained that the district court's "analysis was incomplete" because it did not determine whether the call was made with the "prior express consent" of the plaintiff, which is a factor of the health care message exemption.[33] However, the court affirmed the district court's holding, concluding that the "facts of the situation" showed that the text message was within the scope of the plaintiff's prior consent.[34]

3. Third Circuit Deals Blow to Standing Challenge

On July 10, 2017, the Third Circuit addressed whether a single prerecorded gym membership promotional voicemail is sufficient to cause a plaintiff a concrete injury to establish Article III standing — an inquiry that gained prominence after the Supreme Court's 2016 Spokeo Inc. v. Robins decision. In Sussino v. Work Out World,[35] the appellate court was asked to reverse a district court's order dismissing a TCPA class action for lack of standing. The district court had found that the lawsuit was not "the type of case that Congress was trying to protect people against" and that the single, unsolicited call to the plaintiff's cell phone and voicemail message did not cause her a concrete injury.[36]

On appeal, the Third Circuit reversed the district court's decision.[37] The court reasoned that the call constituted an invasion of the plaintiff's privacy and was "'the very harm that Congress sought to prevent.'"[38] The court explained that "Congress was not inventing a new theory of injury when it enacted the TCPA," and that the plaintiff had alleged a concrete, albeit intangible and nonmonetary, harm.[39] The court remanded to the district court for further proceedings consistent with its decision.[40]

4. Second Circuit Clarifies Revocation of Consent Requirements

On June 22, 2017, the Second Circuit issued one of the most business-friendly TCPA decisions in recent years. In Reyes v. Lincoln Automotive Financial Services[41] the court addressed whether a party to a contract can withdraw from a written lease agreement consenting to receive telephone calls.[42] The plaintiff in Reyes had leased a new luxury Lincoln sedan from a Ford dealership and provided his cellphone number in his lease application.[43] Lincoln financed the lease.[44] The application included a provision that he "expressly consent" to contact via "prerecorded or artificial voice messages, text messages, ... and/or automatic telephone dialing systems."[45] After the lease was finalized, he stopped making payments.[46] Lincoln called several times to cure his default.[47] The plaintiff claimed that he mailed Lincoln a letter demanding that Lincoln cease calling him, but the calls continued.[48] After the plaintiff filed a TCPA complaint against Lincoln for the allegedly unlawful calls, the district court granted summary judgment in Lincoln's favor.[49] The district court reasoned that the plaintiff had failed to prove that he revoked his consent and that the TCPA does not permit a party to a legally binding contract to unilaterally revoke bargained-for consent to be contacted.[50]

The Second Circuit disagreed that the plaintiff had failed to prove that he revoked consent but agreed with the district court that the TCPA does not permit consumers to revoke their consent "when that

consent is given, not gratuitously, but as bargained-for consideration in a bilateral contract."[51] The court reasoned that in tort law, consent is generally defined as a "gratuitous action," and is extinguished upon termination.[52] In contract law, however, consent can "'become irrevocable' when it is provided in a legally binding agreement."[53] Accordingly, the Second Circuit affirmed the district court's decision dismissing the lawsuit.[54]

5. D.C. Circuit Narrows "Opt Out" Requirements for Fax Advertisements

On March 31, 2017, the D.C. Circuit issued its decision in Bais Yaakov of Spring Valley v. FCC[55] addressing an FCC ruling that required businesses to include opt-out notices on solicited faxes.[56] The Junk Prevention Act of 2005 allows certain unsolicited fax advertisements so long as opt-out notices are included on the faxes.[57] In 2006, the FCC issued a ruling applying the act's opt-out notice requirements not only to unsolicited faxes but also to solicited faxes.[58] The FCC rule resulted in many companies, including the defendant generic drug selling company, facing significant damages for not strictly following these requirements, even when consumers admitted to previously consenting to receive the faxes.[59]

On appeal, the D.C. Circuit concluded that the FCC had exceeded its authority by requiring opt-out notices for solicited faxes.[60] The court held that the act's "requirement that businesses include opt-out notices on unsolicited fax advertisements" does not authorize the FCC to require opt-out notices on solicited fax advertisements.[61] The court held that "the act does not require a similar opt-out notice on solicited fax advertisements."[62] It concluded that "what the FCC may not do under the statute is require opt-out notices on solicited faxes[.]"[63] This February, the U.S. Supreme Court denied further review of the decision, leaving the D.C. Circuit's decision as final.[64]

Key Takeaways for Future TCPA Cases

In the ever-evolving TCPA litigation landscape, both consumer-facing companies and their counsel will benefit from heeding the lessons gleaned from these key cases. Although the decisions are binding precedent only in their particular jurisdictions, the following takeaways can assist all TCPA targets and defendants:

- The FCC's 2015 order on "autodialers" is no longer persuasive, let alone binding authority, after the D.C. Circuit set aside the FCC's definition of "autodialer" and vacated the one-call safe harbor for calls made to "reassigned" telephone numbers. However, parties should follow the FCC's approach to revocation of consent and exemption for time-sensitive health care calls, which were upheld by the court.

- Broad call, text and ATDS authorization language in new patient intake forms is likely to qualify as sufficient consent.

- TCPA defendants are unlikely to achieve routine dismissals by asserting Article III standing challenges, even for a one-time, intangible injury.

- Businesses should consider reviewing their contracts and including an unambiguous "consent to contact" provision, which would ensure that consent is properly obtained and allow them to continue collection efforts in an event of default.

- The TCPA's "opt out" requirements for fax advertisements arguably no longer apply to solicited faxes.

In addition to these key lessons drawn from recent TCPA cases, businesses engaging in marketing and communications to customers should take additional precautions to avoid costly TCPA lawsuits, including:

- Monitoring TCPA litigation developments and FCC rulings for new significant decisions because TCPA lawsuits remain pervasive, and courts will continue to grapple with TCPA regulations and exceptions;
- Creating clear policies and guidelines outlining TCPA compliance measures and training employees on those procedures;
- Reviewing all intake forms, call transcripts and other call data to ensure adequate disclosures and consent;
- Confirming that consumer contact information is current and documenting any out-of-date and inaccurate consumer contacts;
- Flagging any consumers who have revoked or denied consent and removing them from contact or marketing lists;
- Establishing strong record-keeping and record retention practices; and
- Ensuring appropriate oversight of third-party vendors' TCPA compliance through vendor agreements and compliance monitoring.

By heeding these key lessons and precautions, companies may protect themselves from unwanted TCPA lawsuits and potentially costly future liability.

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[1] ACA International et al. v. Federal Communications Commission, No. 15-1211, 2018 U.S. App. LEXIS 6535 (D.C. Cir. March 16, 2018).

[2] See ACA Wins Legal Challenge Against FCC's TCPA Declaratory Ruling and Order, ACA International, March 16, 2018, https://www.acainternational.org/press/press-release-aca-wins-legal-challenge-against-fccs-tcpa-declaratory-ruling-and-order.

[3] 47 U.S.C. § 227(a)(1).

[4] ACA Int'l, No. 15-1211, 2018 U.S. App. LEXIS 635, at *15.

[5] Id. at *15–18.

[6] Id. at *30.

[7] Id. at *21.

[8] Id. at *8, *32.

[9] Id. at *37.

[10] 47 U.S.C. § 227(b)(1)(A).

[11] ACA Int'l, No. 15-1211, 2018 U.S. App. LEXIS 635, at *42–43.

[12] Id. at *41.

[13] Id. at *46–47.

[14] Id. at *48.

[15] Id. at *46.

[16] Id. at *48.

[17] Id. at *49.

[18] Id. at *49, *51, *53.

[19] Id. at *54.

[20] Id. at *55.

[21] Id. at *55-56.

[22] Id. at *55.

[23] Id.

[24] Id. at *57.

[25] Id. at *43.

[26] Id. at *59.

[27] Id. at *61–62.

[28] Id. at *62.

[29] Id. at *68.

[30] Latner v. Mount Sinai Health System, Inc., 879 F.3d 52 (2d Cir. 2018).

[31] Id. at 54–55.

[32] Id. at 55.

[33] Id.

[34] Id.

[35] Sussino v. Work Out World Inc., 862 F.3d 346 (3d Cir. 2017).

[36] Id. at 348.

[37] See id. at 352.

[38] Id. at 351.

[39] Id. at 352.

[40] Id.

[41] Reyes v. Lincoln Automotive Financial Services, 861 F.3d 51 (2d Cir. 2017).

[42] Id. at 53.

[43] Id.

[44] Id.

[45] Id. at 54.

[46] Id.

[47] Id.

[48] Id.

[49] Id.

[50] Id.

[51] Id. at 55–56.

[52] Id. at 57.

[53] Id.

[54] Id. at 59.

[55] Bais Yaakov of Spring Valley v. FCC, 852 F.3d 1078 (D.C. Cir. 2017).

[56] Id. at 1079.

[57] 47 U.S.C. § 227(b).

[58] Bais Yaakov, 852 F.3d at 1079.

[59] Id. at 1080.

[60] Id. at 1083.

[61] Id. at 1079.

[62] Id. at 1082.

[63] Id.

[64] See Bais Yaakov of Spring Valley v. FCC, No. 17-351, 2018 U.S. LEXIS 1254 (U.S. Feb. 20, 2018).