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TCPA Shakeup: Analysis of the D.C. Circuit's Long-Awaited Decision in 'ACA International'

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Every company engaged in telephone or text message solicitation, advertising, and/or customer notification should be aware of the Telephone Consumer Protection Act (TCPA). Enacted in 1991, the TCPA was intended to address consumers' concerns with receiving undesired telemarketing calls. To that end, the TCPA generally bans the use of automated dialing equipment to call wireless telephone numbers without having the recipient's prior consent. In furtherance of this goal, Congress granted the Federal Communications Commission (FCC) the power to create regulations and orders interpreting the TCPA.

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SHUTTERSTOCK

In 2015, the FCC promulgated an order that broadly interpreted the TCPA's statutory language (the 2015 Order). Since the 2015 Order, the rate at which TCPA class actions have been filed has skyrocketed—and so too have the settlement amounts that companies have paid to resolve these cases.

In March, the U.S. Court of Appeals for the District of Columbia Circuit released its long-awaited, unanimous opinion in *ACA International*, which

reviewed the validity of the 2015 Order. Although it confirmed some aspects of the 2015 Order, *ACA International* set aside two key provisions of the 2015 Order that will have a wide-ranging impact on TCPA consumer class actions and will create uncertainty in this sphere until the FCC provides further guidance.

Key Aspects of 'ACA International'

ACA International reviewed four key aspects of the FCC's 2015 Order

interpreting the TCPA: (1) what kinds of automated dialing equipment are subject to the TCPA's restrictions on unconsented calls and text messages; (2) whether a call violates the TCPA if, unbeknownst to the caller, a previously consenting party's wireless number has been subsequently reassigned to a different person who has not given consent; (3) by what manner may a party revoke her consent to receive calls; and (4) whether the 2015 Order too narrowly fashioned an exemption for certain health care-related calls. The opinion's resolution of these issues has sweeping implications for companies subject to the TCPA's regulations.

The Definition of Automated Telephone Dialing System

It is well-settled that the TCPA prohibits the use of automatic telephone dialing systems (ATDS) to call or text cell phones without prior express consent. *But what equipment qualifies as an ATDS?* The TCPA defines an ATDS as any "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." However, the 2015 Order greatly expanded the definition of "capacity" to include not only devices with the *present* capacity to perform the specified functions, but also those devices where that functionality is a "future possibility." *ACA International* rejected the FCC's expansive definition, reasoning that this broad interpretation could

apply to even commonplace devices, such as personal smartphones. Such a reading, the court reasoned, would be "utterly unreasonable" and invalid.

The court found that the FCC's broad interpretation of an ATDS was further complicated by the agency's inadequate explanation of the fea-

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tures that a device must possess to qualify as an autodialer. As the court explained, the FCC seems to espouse two inconsistent theories on this point. On the one hand, the FCC states that a device can qualify as an ATDS only if it can generate random or sequential numbers to be dialed; but the FCC also states that some devices, like predictive dialers (i.e., dialing equipment that uses algorithms to connect telemarketing agents with live, answered calls)—which cannot be programmed to generate these numbers—can also qualify as an ATDS.

As a result, *ACA International* narrowed the scope of equipment that is regulated under the TCPA.

'One Call' Safe Harbor for Reassigned Numbers

"Recycled numbers" are often a source of significant concern to

businesses attempting to comply with the TCPA. Even where a company has fully complied with the TCPA and obtained prior express consent to contact a consumer, the consumer's phone number may be subsequently reassigned by the carrier to a new person who has not provided such consent. As a result, even the most scrupulous of companies may accidentally call someone who has not consented to be contacted.

The 2015 Order addressed this situation by creating a "one call" safe harbor under which a caller may contact the number *one time*—whether the recipient answers or not—without violating the TCPA. *ACA International* sets aside this rule, finding that it was arbitrary and capricious because the FCC could not explain the justification of a one-call limit, which may or may not even give the caller notice of reassignment. Although the FCC has proposed the establishment of a database of phone number reassignments and disconnects (as discussed in greater detail below), the situation is not yet resolved at the time of publication. As a result, companies must be diligent in auditing their call lists to ensure their callers have provided consent.

Revocation of Consent

The TCPA itself does not directly address the manner in which a consenting call or text recipient may revoke her consent. Instead, the 2015 Order created the rule 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.” *ACA International v. FCC*, 885 F.3d 687, 709 (D.C. Cir. 2018) (emphasis added). *ACA International* upheld this rule, dismissing the concerns that consumers would begin to use unconventional methods to opt out of phone calls (e.g., speaking to a retail employee of a business about no longer receiving calls) and finding that such methods likely would not satisfy the “reasonable means” requirement. As a result, it is critical that companies engaged in telephonic advertising establish “clearly-defined and easy to use opt-out methods” and/or agree in advance with the consenting caller to a particular revocation procedure. *Id.*

Health Care Exemption

The 2015 Order exempts from the TCPA’s general ban “certain non-tele-marketing, healthcare calls.” *Id.* at 710. *ACA International* upheld this exemption because such calls “provide vital, time-sensitive information patients welcome, expect, and often rely on to make informed decisions” but declined to further expand it.

Practical Implications of ‘ACA International’ on TCPA Class Actions

ACA International is sure to have wide-ranging implications for companies facing (or threatened with) TCPA consumer class actions.

On the one hand, *ACA International* clarifies the definition of an ATDS and the manner in which consumers may revoke their consent. Companies engaged in telephonic advertising should immediately audit their programs to ensure compliance with these clarified provisions.

On the other hand, *ACA International* has also muddied the waters with respect to the treatment of reassigned numbers. For example, by invalidating the 2015 Order’s interpretation of ATDS and its “one call” safe harbor provision, the court has left companies seeking to comply with the TCPA with little guidance. The good news is that the FCC is currently in the process of creating a “reassigned number database” that would allow callers to audit their call lists to determine whether a previously consenting recipient’s number has been reassigned or disconnected. Companies consulting the database would be provided a safe harbor from liability if they nonetheless accidentally reach a reassigned and nonconsenting number. At the time of this writing, the FCC is seeking public comment concerning: (1) how the database(s) should be created, serviced, and accessed; (2) how often the database(s) should be updated; (3) potential access fees; and (4) whether the database(s) should be managed by the FCC or commercial providers; among other things. Until these measures are implemented, however, companies should closely monitor their call lists and refrain

from dialing any numbers that they have reason to know or believe might have been reassigned.

In sum, *ACA International* has changed the current TCPA class action landscape. To minimize the risk of litigation, companies engaging in telephonic advertising must carefully review their advertising programs to ensure compliance with the decision—including: auditing the technology used to contact consumers; establishing a convenient and reliable opt-out method; and auditing their call list to identify and remove reassigned numbers. Companies already engaged in TCPA class action litigation should make certain that they have partnered with experienced counsel who may be able to deploy the *ACA International* decision to defeat the litigation at an early stage.