

ATDS, WTF? The DC Circuit Dismantles the FCC's 2015 TCPA Order

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Following the FCC's 2015 Telephone Consumer Protection Act Omnibus Order, following ten consolidated appeals of the Order filed shortly thereafter, and following an oral argument in 2016, on March 16, 2018 the DC Circuit issued its long-awaited opinion dismantling the Order. Unfortunately, the DC Circuit did not do much more than tell the FCC that many of its rulings were arbitrary and capricious—in other words, the Court did not itself provide definitive interpretations. Now, three years later, plaintiffs and defendants alike find themselves with infinitely more questions than answers, and with a long road to hoe back before the FCC.

Going back to the FCC, following an already years-long battle, is understandably cold comfort. So in the meantime, what exactly did the DC Circuit do? And what now?

What Did the DC Circuit Evaluate?

The FCC's Omnibus Order was so named because it evaluated 21 separate petitions for rulemaking and requests for clarification, resulting in an voluminous Order that was at times internally inconsistent and difficult to follow. In short, if one needed good late night reading after having trouble sleeping, the Omnibus Order would do the trick.

Fortunately for the DC Circuit, only four major issues ended up in the consolidated appeal:

- (i) The Court evaluated the FCC's interpretation of the definition of an automatic telephone dialing system, which the FCC decided encompassed any equipment with the *potential future capacity* to be used as such.
- (ii) The Court evaluated the FCC's interpretation of "called party," insofar as it applied to the actual recipient—not the *intended recipient*—of the call. Part and parcel of the Circuit's review was the FCC's one-call safe harbor to reassigned phone numbers.
- (iii) The Court evaluated the FCC's determination that consent under the TCPA can be revoked through any reasonable means.
- (iv) And finally, the Court evaluated the FCC's determination that certain healthcare calls—but not all—could be made without consent.

How did the DC Circuit Rule?

In short, the DC Circuit (i) set aside the FCC's interpretation of an autodialer, (ii) set aside the FCC's one-call safe harbor and reassigned number rulings, (iii) affirmed the FCC's revocation of consent ruling, and (iv) affirmed the FCC's treatment of healthcare calls. A more thorough analysis of each aspect of the ruling follows.

A. ATDS

i. What Does "Capacity" Mean?

An ATDS under the TCPA is not a particularly difficult concept-it is simply:

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.

47 U.S.C. § 227(a)(1). Leave it to lawyers and the FCC, however, to Bill-Clinton the definition and sustain years of litigation over the definition of "capacity."

The FCC determined that the term "capacity" simply meant that the equipment must have the *potential* capacity to function as an ATDS-in other words, not simply the *present* capacity or to have been *actually used* as an ATDS. This opened the door to significant potential liability as it could no longer reasonably be determined what was and was not an ATDS.

The DC Circuit cried foul. The Court found that the FCC's view of capacity was impermissibly overbroad, as it would "have the apparent effect of embracing any and all smartphones," which "with the addition of software, can gain the statutorily enumerated features of an autodialer and thus function as an ATDS." This would create liability, the Court found, for an average person sending out a group invitation to a social gathering via text, which person likely did not pre-inquire to obtain prior express written consent to do so.

The Court thus held that "[i]t is untenable to construe the term 'capacity' . . . in a manner that brings within the definition's fold the most ubiquitous type of phone equipment known," and sent the FCC back to the drawing board.

ii. What the Heck Is an ATDS Anyway?

The Court did not stop at the FCC's definition of "capacity," deciding next to take aim at what it perceived to be a largely arbitrary and unsettled interpretation the FCC had taken as the autodialers more generally that left parties without guidance to determine what technology met the ATDS definition. To put it lightly, the Court stated that "[t]he agency's prior rulings left significant uncertainty about the precise functions an autodialer must have the capacity to perform."

To reiterate, the statutorily required functions of an autodialer are "(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1).

The FCC had, however, created significant confusion as to what role the phrase "random or sequential number generator" actually played-namely, does the device itself have to be able to generate random or sequential numbers or can those numbers come from a list. The DC Circuit pointed out that the FCC, over the last fifteen years, had taken both views alternately, and in fact had taken both views simultaneously in the Omnibus Order. The latter interpretation is significant

insofar as it sweeps within the TCPA so-called predictive dialers, which do not generate numbers, but rather call from lists, and have long since overtaken number generators as preferred dialing equipment.

Again, the DC Circuit simply set aside the FCC's interpretation (to the extent it actually adopted a coherent view), sending it back to square one. The Court noted that the FCC *may* be able to take either interpretation, but it could not adopt both.

The Court also noted, for good measure, a handful of other FCC pronouncements that had created substantial confusion. For example, the Court pointed out that the FCC had simultaneously held that the absence of "human intervention" is *key* to an autodialer, but that a device might still be an autodialer if human intervention is required for use. Likewise, the FCC had held that a "basic function" of an ATDS is the ability to dial thousands of numbers in a short time period, but provided no guidance as to whether that condition is necessary, sufficient or none of the above. These aspects of the Court's ruling will receive, no doubt, additional attention from the FCC in the next go around as the FCC (ideally) cleans up its mess.

B. Reassigned Numbers

i. Who Is the "Called Party"?

The reassigned number conundrum is now perhaps the highest risk stemming from the TCPA—that is, calling a number for which consent was previously obtained, but which number has since changed hands (*i.e.*, as a result of failing to pay the phone bill) to a new consumer. This added layer of risk creates in essence an obligation of hyper-vigilance to determine whether a number has been reassigned since consent was first obtained, something that may not in all circumstances be readily or even possibly determinable.

The threshold issue in addressing reassigned numbers is whether it even matters—is it sufficient that consent was obtained *for the intended recipient*, or is the "called party" for purposes of the TCPA claim the one who actually received the call. The FCC answered this in the negative in its Omnibus Order, ruling that the pertinent consent must come from the party actually receiving the call, not the intended recipient.

Importantly, the DC Circuit appeared to bless this interpretation. Looking to a prior Seventh and Eleventh Circuit ruling as to the meaning of the term "called party," the Court found that the FCC "could permissibly interpret 'called party' . . . to refer to the current subscriber."

ii. One and Done

Part and parcel of the FCC's "called party" determination was its subsequent creation of a one-call safe harbor for callers. Recognizing that callers would largely be unaware that a number changed hands, the FCC in a seeming act of sympathy allowed in essence one call relying on the consent of the prior holder, but strict liability thereafter.

The Court found this one-call safe harbor completely without mooring: "The Commission . . . gave no explanation of why reasonable-reliance considerations would support limiting the safe harbor to just one call or message." The Court viewed this as particularly problematic given that the FCC itself

recognized that callers may still have no idea-and no way of finding out-that the number had been reassigned after just one call.

The setting aside of this arbitrary rule, however, had a much more significant overall impact. The Court held that setting aside the one-call safe harbor “requires setting aside . . . its treatment of reassigned numbers more generally.” The Court found that, while it tries to salvage related aspects of agency actions where a specific part is invalidated, it could not do so here because it could not be said that the FCC would adopt the same definition of “called party” without the one-call safe harbor. In other words, if the FCC had to choose between strict liability for reassigned numbers or some alternative, the Court found it was unclear what the FCC would do. The only outcome was thus to scrap the FCC’s entire treatment of reassigned numbers.

C. Revocation of Consent

The FCC in its Omnibus Order determined that consent to receive calls could be revoked by the consumer by any reasonable means, which likewise meant that callers could not specifically designate a sole means of revocation. Fearing that consumers would begin attempting to revoke consent through bizarre methods (*i.e.*, telling the janitor or an unsuspecting sales clerk), this ruling was appealed. The DC Circuit, though affirming the FCC’s interpretation, provided something of a middle ground.

The Court found the FCC’s interpretation reasonable. However, it made a point of assuring callers that “[i]f recipients are afforded [clearly-defined and easy-to-use opt-out methods], any effort to sidestep the available methods in favor of idiosyncratic or imaginative revocation requests might well be seen as unreasonable.”

The Court also threw callers another bone, holding that the FCC’s interpretation did not reach instances of “revocation rules mutually adopted by contracting parties.” As detailed below, this is particularly significant in light of the holding by a number of courts that consent obtained through contract cannot be unilaterally revoked.

D. Healthcare Calls

In its Omnibus Ruling, the FCC crafted a consent exemption for certain healthcare-related calls to cell phones that were deemed “exigent,” like prescription notifications and post-discharge follow-up. An appeal was subsequently filed on two bases-that the ruling conflicted with HIPAA and that the FCC created an arbitrary distinction between healthcare calls to cell phones and landlines.

The DC Circuit affirmed the FCC in all respects, finding that the exemption did not conflict with HIPAA and that it was permissible to treat healthcare-related calls to cell phones in a stricter manner than landlines, which calls had been entirely exempt from TCPA liability years earlier.

Like with the revocation ruling, however, the Court threw a bone to callers in the healthcare industry. The Court strongly indicated that the healthcare calls deemed “exigent” by the FCC also satisfied the emergency purposes exception to the TCPA. As detailed further below, this will have a significant practical effect because the “exigent call” consent exemption had numerous strings attached (*i.e.*, were not charged to the called party) that the emergency exception does not.

Now What?

The DC Circuit's decision is a significant win for TCPA defendants. The two most dangerous FCC rulings in the Omnibus Order-that everything under the sun is an ATDS and that reassigned numbers are defendants' collective problem-were set aside. The practical effect, though, is that we still do not know what is an ATDS and we still do not know what to do with reassigned numbers. That, the DC Circuit held, is still the FCC's problem (despite years of confusing, conflicting and now arbitrary rulings on the same).

Nevertheless, there are crucial takeaways. First, it is clear that the FCC's broad view of an ATDS is gone. This brings arguments like "human intervention" and actual use back on the table. As to the first, the DC Circuit strongly indicated that the absence of human intervention is in fact key to the ATDS definition, noting that the term "'auto' in autodialer . . . would seem to envision non-manual dialing of telephone numbers." The "human intervention" argument had been largely put on ice due to the Omnibus Order, but now should find its way back in favor.

As to actual use, the DC Circuit opined that-though no party raised this issue before the Court-it may very well be the case that dialing equipment must *actually be used* as an ATDS (capacity issues aside) in order to create liability. The Court did not issue a ruling one way or the other, but put the issue firmly on the table for litigants and the FCC to consider as it would significantly cabin whether and when any technology (including smartphones) create TCPA liability.

Second, as it concerns reassigned numbers, the DC Circuit's holding that "called party" could be reasonably interpreted to mean the *current subscriber* likely eats away at any immediate impact of the Court's setting aside of the reassigned number ruling. A handful of Circuits, like the Seventh and Eleventh, had already reached this conclusion, and it should be expected to carry the day at least until the FCC reevaluates its treatment of reassigned numbers. The one-call safe harbor-which provided limited practical benefit anyway-is gone. Whether the FCC now determined to provide a better safety net (*i.e.*, a more expansive reasonable reliance standard) for callers or strict liability is to be seen. In the meantime, callers should continue to take all efforts possible to scrub for reassigned numbers assuming that liability may now attach to the first call.

Third, the DC Circuit's view as to reasonable revocation significantly lessens the impact of the FCC's ruling. The Court specifically indicated that setting out "clearly-defined and easy-to-use opt-out methods"-even if callers cannot designate *sole* opt-out methods-will have the practical effect of delineating the reasonable from unreasonable. In effect, the Court put the burden on TCPA plaintiffs to establish why shunning a readily available opt-out method (*i.e.*, texting "stop") was reasonable.

Similarly, the Court left intact the ability for parties to contract over consent. An issue that has percolated throughout the country recently is whether consent to be called, provided as a material term in a contract, is incapable of being revoked unilaterally (or being revoked other than through contractually provided mechanisms). A number of courts (including the Second Circuit) thus far have affirmed the contract, and found such contractual provisions enforceable. The DC Circuit's decision leaves this rulings and contractual defenses intact.

And fourth, the Court's apparent finding that the healthcare calls deemed "exigent" by the FCC, like prescription reminders, likewise met the emergency purposes exception opens the door to significant defenses in the healthcare space. Prescription pick-up and refill reminders have been the focus of numerous TCPA class actions. By appearing to find that these calls satisfy the emergency purposes exception-and also noting that "[c]onsumers may find themselves wholly unable to stave

off calls satisfying the exception”-plaintiffs will have a tough road ahead of them in pursuing TCPA cases over prescription-related calls.

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The DC Circuit’s long-awaited ruling was, from the defense perspective, worth the wait. While there is much to be learned insofar as the FCC’s future interpretations of ATDS and reassigned numbers, there is much to be used in the short term in defending TCPA cases.

For more information on this topic, please contact a member of the firms Telephone Consumer Protection Act (TCPA) Practice Group.

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