The Telephone Consumer Protection Act Steamroller

Recent Trends in TCPA Regulations and Litigation

By Jennifer Bagg and Amy E. Richardson

In-house and outside counsel need to comprehend the act's legal foundations and regulatory framework, recent court decisions dealing with it, and the direction that litigation will probably take.

The Telephone Consumer Protection Act (TCPA) has been and continues to be a source of significant stress to businesses that seek to use new technologies to market to customers while navigating the law and its ambiguities.

Large class actions are often threatened for non-compliance—including by nefarious plaintiffs seeking to cash in—and businesses often look for a quick payout to avoid the expenses associated with defending cases and the statutory damages afforded under the TCPA. Companies also face enforcement actions from state attorneys general and the federal government for TCPA non-compliance. Given these risks, companies and their counsel need a strong grasp of the legal foundations of the TCPA, including an understanding of TCPA compliance requirements; the effect of a recent U.S. Court of Appeals for the District of Columbia Circuit decision vacating in part a TCPA ruling from the Federal Communications Commission; and the current strategies used by regulators, plaintiffs, and defendants.

Overview of the TCPA: Legislative History and Key Statutory Language

The TCPA was adopted by Congress in 1991 in response to the "increasing number of consumer complaints" regarding "telemarketing calls and communications." S. Rep. No. 102-178, at 1 (1991). At the time, members of Congress and the Federal Communications Commission (FCC)—the primary regulator of the communications industry—received voluminous consumer complaints about pre-recorded telemarketing calls that often interrupted family dinners. In response, Congress determined that "automated or pre-recorded telephone calls were a greater nuisance and invasion of privacy than live solicitation calls" and passed the TCPA. *Id.*

The TCPA restricts making calls using "automatic telephone dialing systems" or

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artificial or prerecorded voice messages (often referred to as "robocalls") and sending advertisements to fax machines. 47 U.S.C. §227. The statute defines an automatic telephone dialing system (or ATDS) as "equipment which has the capacity" (1) to "store or produce telephone numbers to be called, using a random or sequential number generator" and (2) to "dial such numbers." 47 U.S.C. §227(a)(1)(A), (B). The FCC—the agency charged with implementing the TCPA via rules—later determined that a text is the same as a call for purposes of applying TCPA regulations. As a result, the TCPA prohibits calls and texts sent to a cellular number using an ATDS unless the call or text is an emergency, or the calling party has the consent of the called party. 47 U.S.C. §227 (b)(1)(A).

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The TPCA also adopted a strict penalty system for violations—$500 per violation or $1,500 per violation in the case of a willful violation. There is no cap on the number of violations or the total remedy. While the TCPA covers numerous telemarketing issues such as fax advertisements and the Do Not Call list, this article focuses on the TCPA as applied to mobile marketing messages (*i.e.*, short message service, referred to as "SMS," or text messages), which have been the center of class actions around the country. Companies engaged in mobile marketing are now accustomed to the regular flurry of demand letters seeking a quick payout and claims that have proceeded to litigation have resulted in class action settlements that range from $6 million to upwards of $70 million. No industry has been left unscathed, with lawsuits affecting a wide variety of industries, such as banking, financial services, pharmacies, fitness services, retailers, medical device manufacturers, and communications providers. While the large class actions are the newsmakers, companies must also remember that the FCC and state attorneys general can, and do, enforce the TCPA.

Text Messages Covered by the TCPA

The TCPA was enacted to address voice calls, but courts and the FCC have found that it also applies to text messages. Text marketing messages are often sent via a short code. A short code, or short number, is a special shortened five or six digit telephone number that is used to send SMS (short message service, which are texts that include text only) and MMS (multimedia messaging service, which are texts that include pictures) messages to mobile phones.

CTIA, a trade association representing the wireless communications industry in the United States, is the short code administrator, which means they oversee the short code assignment and usage process. CTIA publishes the Short Code Compliance Handbook, and companies must comply with the rules and guidance in the handbook to enter into short code agreements with wireless carriers. Companies must also pay carriers to send the short codes over the carriers' networks. However, compliance with CTIA's Short Code Compliance Handbook does not equate to TCPA compliance or a complete defense in a TCPA lawsuit or enforcement action. Companies seeking to engage in mobile marketing via SMS or MMS often use a mobile marketing provider that acts as an intermediary and aggregator between the company and the carriers.

The FCC's Implementation of the TCPA

Under the TCPA "[t]he [Federal Communications C]ommission shall prescribe regulations to implement the requirements of this subject." 47 U.S.C. §227(b)(2). The FCC issued its first order implementing rules under the TCPA in 1992. 47 C.F.R. §64.1200, *et seq.* Since 1992, the FCC has issued multiple rules and decisions to implement the TCPA. In 2003, the FCC issued an order that determined that the TCPA applied to texts. *See* Rules and Regulations Implementing the Telephone Consumer Protection Act, 18 FCC Rcd. 14014, 14115 ¶ 16 (2003). In 2012, the FCC issued an order in which it required companies to obtain "prior express written consent" to make an autodialed or prerecorded telemarketing call (or text) to a cell phone. *See* Rules and Regulations Implementing the Telephone Consumer Protection Act, 27 FCC Rcd. 1830, 1837 ¶ 18 (2012) (2012 order). In detail, it found that to obtain "prior express written consent" the following must happen:

- The agreement must be in writing;
- The agreement must bear the signature of the person who will receive the advertisement or telemarketing calls or texts;
- The language of the agreement must clearly authorize the seller to deliver or cause to be delivered ads or telemarketing messages via autodialed calls or robocalls or robotexts;
- The written agreement must include the telephone number to which the person signing authorizes advertisements or telemarketing messages to be delivered; and
- The written agreement must include a clear and conspicuous disclosure informing the person signing that (1) by executing the agreement, the person signing authorizes the seller to deliver or cause to be delivered ads or telemarketing messages via autodialed calls or robocalls or robotexts; and (2) the person signing the agreement is not required to sign the agreement (directly or indirectly) or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

The FCC's 2012 order also eliminated the established business relationship exception for landline calls, which meant that a company could no longer rely on an existing relationship with a customer if it wanted to use an autodialer or a pre-recorded voice call to reach a customer.

After the 2012 order, lawsuits continued to flourish, and the FCC received more complaints of TCPA violations than any other complaint. At the same time, the

industry sought clarity from the FCC on TCPA compliance issues that were giving rise to frequent lawsuits. In response, the FCC issued a lengthy order in 2015 that sought to address many TCPA-related issues and concerns. *See* In re Rules & Regulations Implementing the TCPA, 30 FCC Rcd. 7961, 8089 (2015) (omnibus order). Of particular importance to mobile marketing, the omnibus order (1) established that consumers have the right to revoke express consent that was previously provided using any reasonable means; (2) provided a limited, one-call "safe-harbor" for contacting phone numbers that have been reassigned to new consumers; (3) provided exemptions from the "prior express written consent" requirement for certain types of urgent calls and text messages; and (4) the clarified what qualified as an ATDS under the statutory definition.

After the 2015 omnibus order was issued, TCPA litigation dramatically increased. The TCPA "blossomed into a national cash cow for plaintiff's attorneys specializing in [such] disputes." *Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 941 (7th Cir. 2016). In 2007, plaintiffs filed 14 TCPA cases. In the 17-month period before the 2015 omnibus order was issued, there were 2,127 TCPA cases filed. In the 17-month period after the 2015 FCC ruling, this number increased by 50 percent, to 3,121 cases. The overwhelming majority of the cases have included a claim for class action treatment.

Not surprisingly, the omnibus order proved controversial, and many companies and trade organizations appealed the decision. The U.S. Court of Appeals for the D.C. Circuit heard arguments in the case in October 2016 and considered three main issues: (1) the definition of autodialer; (2) consumer revocation of consent; and (3) reassigned numbers.

U.S. Court of Appeals for the D.C. Circuit Decision: *ACA Int'l v. FCC*

On March 16, 2018, the U.S. Court of Appeals for the District of Columbia Circuit issued its opinion. *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687 (D.C. Cir. 2018). The court's order struck down significant portions of the FCC's omnibus order rules regulating automatic telephone dialing systems. The court ultimately set aside the FCC's definition of automatic telephone dialing system and its "one free call" rule for reassigned numbers, while upholding the commission's decisions regarding revocation of consent and exemptions for certain health-care calls.

Definition of Automatic Telephone Dialing System

Under the TCPA, devices are autodialers if they "have the capacity" to "store or produce telephone numbers to be called, using a random or sequential number generator" and "to dial such numbers." 47 U.S.C. §227(a)(1). Dialing technology has changed since the TCPA was adopted in 1991, and the FCC has struggled to apply the statutory language defining terms to new calling systems. For example, most modern systems call numbers from preloaded lists, not randomly or sequentially generated numbers. In response to requests from the industry and a flood of TCPA lawsuits, the FCC attempted to clarify its definition of an autodialer in the 2015 omnibus order. The FCC determined that TCPA liability applies to any device that has the "potential functionality" or "future possibility" of performing autodialer functions—even if the device would have to be substantially modified to work that way, and even if the autodialer functions were not actually used. On appeal, the petitioners argued that the FCC's interpretation was at odds with the statutory language and so confusing and contradictory as to be no guidance at all.

The D.C. Circuit agreed, and focused its analysis on two questions: (1) when does a device have the "capacity" to perform the functions of an autodialer; and (2) what are those functions? First, the court concluded that the FCC's approach would transform virtually every ordinary smartphone into an autodialer, since they could be modified by an app, software, or new code to "store or produce telephone numbers to be called, using a random or sequential number generator." Such an "eye-popping sweep" was not, the court held, consistent with congressional intent.

Second, the court found that the FCC has been inconsistent—both in the 2015 omnibus order and previous decisions—about whether a device qualifies as an autodialer "only if it can generate random or sequential numbers to be dialed." Accordingly, the court also set aside the FCC's interpretation of what functions a dialing system must have to qualify as an autodialer.

Reassigned Numbers

The D.C. Circuit also struck down the FCC's approach to TCPA liability when a caller autodials or sends a prerecorded message to a number that has been reassigned. Specifically, it affects liability when a subscriber validly consented to receive calls from a given entity at a given number, the number was reassigned to someone different (because the former subscriber stopped using the number), and then the entity calls or texts the new subscriber without knowing of the reassignment. Under the TCPA, a caller may place an autodialed call to a phone number with "the prior express consent of the called party." 47 U.S.C. §227(b)(1)(A). In the 2015 omnibus order the FCC interpreted a "called party" to mean the person who actually receives a call, not the person who the caller intended to reach. This interpretation suggests that if a caller inadvertently autodials the incorrect person, the caller would violate the TCPA. In the case of mobile number reassignment, however, the FCC adopted a one-call safe harbor: a sender could place one autodialed or prerecorded voice call to the new subscriber without violating the TCPA. Any subsequent calls, however, would violate the TCPA, even if the caller did not know that the number had been reassigned.

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The D.C. Circuit held that the FCC had failed to provide a "reasoned (and reason-

able) explanation of why its safe harbor stopped at the seemingly arbitrary point of a single call or message." The FCC did not dispute that callers would not (and could not) learn of number reassignment during the course of a single call. According to the court, if callers should not be liable for inadvertently autodialing the wrong person, there is no logical reason to limit the safe harbor to a single call. Alternatively, if callers should be liable for inadvertently autodialing the wrong person, there is no logical reason to have a safe harbor at all. In the court's eyes, this was a contradiction that rendered the FCC's entire treatment of reassigned numbers (including the FCC's interpretation of "called party") arbitrary and capricious.

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Revocation of Consent

The D.C. Circuit upheld the FCC's conclusion that a called party may revoke his or her consent to receive autodialed or prerecorded voice calls and texts "at any time and through any reasonable means—orally or in writing—that clearly expresses a desire not to receive further messages." The court also upheld the FCC's ability to determine what was reasonable under "a totality of the circumstances."

Although the court ruled in favor of the FCC on this point, it provided guidance on how to apply the "totality of the circumstances" test in a way that will likely benefit callers. For example, the court explained that if callers make "available 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 held that "[n]othing in the Commission's order thus should be understood to speak to parties' ability to agree upon revocation procedures." In other words, under current FCC precedent, there is nothing to prevent a caller from binding a call recipient to a specific revocation procedure, as long as the procedure is included in a legally binding contract between the caller and call recipient.

Post-*ACA Int'l v. FCC*: What Now?

While the D.C. Circuit's decision significantly curtails the FCC's broad interpretation of the TCPA, it also creates uncertainty in the near term. The D.C. Circuit's decision likely will not curb the significant increase in TCPA litigation. Indeed, plaintiffs have continued to file cases since the March 2018 decision. Companies engaged in or preparing for TCPA litigation should immediately consider how this new authority changes their arguments, including the threshold question of whether an autodialer was used. Cases that were stayed pending the D.C. Circuit's decision are active again, and both district and circuit courts alike have started to issue decisions based on the D.C. Circuit's decision. Without binding FCC authority, courts currently hearing TCPA cases have more freedom to interpret the statute—and are reaching conflicting decisions on hotly contested issues, including the authority that should apply to determining whether a device qualifies as autodialer. *See, e.g., Ammons v. Ally Fin.*, No. 3:17-cv-00505, 2018 U.S. Dist. Lexis 108588 (M.D. Tenn. June 27, 2018) (finding that the defendants used an autodialer based on FCC the precedent existing before 2015); *Herrick v. GoDaddy.com*, 312 F.Supp.3d 792, 801 (D. Ariz. 2018) (finding that the plaintiff failed to allege sufficiently that the defendant used an autodialer); *Marshall v. CBE Grp., Inc.*, No. 216-CV-02406-GMN-NJK, 2018 WL 1567852, at *7 (D. Nev. Mar. 30, 2018) (finding that the plaintiff could not "rely on the FCC's definition of an ATDS to the extent [sic] it includes systems that cannot be programmed to dial random or sequential numbers, as is the case with some predictive dialers…." because "the D.C. Circuit explicitly rejected this 'expansive' interpretation of the TCPA, particularly as that definition pertained to systems that may not, in fact, have the capacity to dial randomly or sequentially").

The Third Circuit recently issued a decision applying the D.C. Circuit's decision in *ACA Int'l v. FCC*. The Third Circuit granted summary judgment in favor of the defendant, Yahoo. *Dominguez v. Yahoo, Inc.*, 894 f.3d 116 (3d Cir. 2018). The court found that that Yahoo's email SMS service was not an ATDS because it did not have the "present capacity to function as an autodialer." In the case, plaintiff Bill Dominguez filed suit against Yahoo alleging that it violated the TCPA by sending thousands of text messages to his cellular phone without his prior express consent. Specifically, Dominguez received a text message from Yahoo each time the previous owner of the number received an email sent to his Yahoo email account.

In light of the decision in *ACA Int'l*, the Third Circuit held that it would "interpret the statutory definition of an autodialer as [it] did prior to the issuance of 2015 Declaratory Ruling." The Third Circuit analyzed "whether [Dominguez] provided evidence to show that the Email SMS Service had the present capacity to function as an autodialer." The court, as part of its analysis, reviewed multiple expert reports on Yahoo's email SMS service and held that Dominguez could "not point to any evidence that create[d] a genuine dispute of fact as to whether the Email SMS Service had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers." The service only sent messages to numbers that were "individually and manually inputted into its system by a user." Therefore, the Third Circuit reasoned, the text system was not an ATDS.

The Second Circuit also recently overturned a district court decision because it applied the wrong standard for autodialer in a TCPA case, but unlike the Third Circuit, remanded the factual analysis of whether the equipment used in the case was an autodialer to the district court. *King v. Time Warner Cable Inc.*, 894 F.3d 473 (2d Cir. 2018). The Second Circuit in *King* wrote,

> we agree with [*ACA*] that the term 'capacity' [in §227(a)(1)] is best under-

> stood to refer to the functions a device is currently able to perform, whether or not those functions were actually in use for the offending call, rather than to devices that would have that ability only after modifications.

King, 894 F.3d at 479.

King does not address the necessary functions of an ATDS, or whether another statutory provision, §227(b)(1)(A), requires that a defendant actually use the equipment's autodialing functions. *Id*. at 480. The *King* court, however, focused on and discussed the steps necessary to allow a device to have the capacity to store or dial numbers and noted that a simple step, such as flipping a switch, might be significant. *Id*.

The D.C. Circuit's decision also brought TCPA issues back to the forefront at the FCC. The FCC opened a proceeding in response to the D.C. Circuit's decision. Public Notice, Comment Request, Telephone Consumer Protection Act in Light of *ACA International*, DA 18-493, CG Docket Nos. 18-152, 02-278 (FCC Consumer & Gov'tal Aff. Bur., May 14, 2018). Numerous parties have submitted comments in the proceeding. The majority of commenters have asked the FCC to (1) adopt a definition of automatic telephone dialing systems (commonly known as "autodialers" or "ATDS") that is consistent with the statute, (2) shield from liability callers who follow the best available methods to avoid calling reassigned numbers, and (3) confirm that companies who send text messages can rely on widely accepted, industry-standard methods for revocation without fear of liability.

In addition, the FCC has asked the industry to comment on the development of a reassigned numbers database to assist callers in identifying when numbers are moved from one customer to another and to protect called parties from unwanted communications. In re Advanced Methods to Target and Eliminate Unlawful Robocalls, Second Proposed Rulemaking, FCC 18-91 (FCC, Mar. 23, 2018). The FCC has questioned whether use of the database should shield callers from liability for calls inadvertently placed to reassigned numbers.

Some defendants facing complaints at the trial court level have asked for stays of their pending litigations in light of the FCC's proceeding, arguing that the FCC's decision should affect the courts' analysis of what an autodialer is under the TCPA. So far, defendants have not been successful in obtaining stays. *See, e.g.*, *Gould v. Farmers Insurance Exchange et al.*, 288 F. Supp. 3d 963 (E. D. Mo. 2018). In *Gould*, the court denied the request for a stay based on length and uncertainty of the outcome of the FCC proceeding and the court's authority to interpret statutory language. That said, this is a new trend that could change as more courts review stay requests, so companies facing litigation should evaluate this option as part of their strategy.

Overall, however, the uncertainty that companies face under the TCPA will continue for the foreseeable future. While the FCC has signaled that it is open to a more restrictive definition of ATDS than it had adopted in the 2015 omnibus order, some members of Congress have responded with proposed legislation that would amend the TCPA to include a broader definition of ATDS that would encompass essentially any text message from an automated system. Stopping Bad Robocalls Act, H.R. 6026,115th Cong. (June 7, 2018) (introduced by Rep. Pallone, with Sen. Markey introducing companion bill S. 3078, 115th Cong. (June 18, 2018)). Experience demonstrates that the only real change that would quell frivolous TCPA claims is eliminating the statutory damages. But such a change does not appear to be on the horizon, which means that the plaintiffs' bar will continue to seek out loopholes to target compliant companies.

Conclusion

The TCPA landscape continues to evolve. Companies subject to the TCPA and their counsel must have an understanding of the statute's legislative and regulatory history, pending regulatory and judicial proceedings, and the continuously developing litigation minefield to design compliance programs. That said, even the most compliance-focused companies face litigation, or the threat of litigation, and often to the tune of a multi-million dollar class action. Recent trends show that the best defense to the onslaught of litigation is a thoughtful and rapid, aggressive defense that leverages a company's compliance program and draws from an understanding of the complex web of regulatory, statutory, and appellate law. FD