

KIRKLAND ALERT

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D.C. Circuit Sets Aside FCC's 2015 Order Addressing Portions of the Telephone Consumer Protection Act

On March 16, 2018, in a closely watched case regarding a 2015 FCC Declaratory Ruling (“2015 Declaratory Ruling”) on the meaning and scope of certain provisions of the Telephone Consumer Protection Act (“TCPA”), the U.S. Court of Appeals for the District of Columbia Circuit partially granted consolidated petitions to review the 2015 Declaratory Ruling (“D.C. Opinion”).¹ While the D.C. Circuit upheld the FCC’s ruling regarding revocation of consent to receive calls and the scope of an exemption for specific healthcare calls, it set aside the FCC’s attempts to clarify the definition of an autodialer, or Automatic Telephone Dialing System (“ATDS”), and a one-call safe harbor for reassigned numbers.² This alert focuses on these two sub-parts of the D.C. Opinion.

The D.C. Circuit found the FCC’s interpretation of “capacity” for an ATDS to be “utterly unreasonable in the breadth of its regulatory inclusion.”

Background

The TCPA makes it “unlawful ... to make 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 system ... to any telephone number assigned to a ... cellular telephone service” subject to certain debt collection exemptions.³ 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.”⁴ The TCPA allows aggrieved parties to recover \$500 for each violation up to \$1,500 for each “willful[] or knowing[]” violation.⁵

The 2015 Declaratory Ruling attempted to clarify what devices qualify as an ATDS by construing the statutory term “capacity” to encompass “potential functionalities” including functionalities that could be added through changes in a device’s software.⁶ Further, with respect to violations where a caller unknowingly calls a reassigned number, the FCC determined that permitted calls “made with the prior express consent of the called party” required the consent of the “current subscriber” rather than the intended recipient of the call.⁷ The FCC’s interpretation of the TCPA allowed only one liability-free call for callers who lack “knowledge of [the] reassignment” and have “a reasonable basis to believe that they have valid consent.”⁸ The D.C. Circuit set aside both of these determinations.

The FCC’s ATDS Definition Was Shifting and Unreasonable

The D.C. Circuit framed its inquiry into the functionalities of an ATDS with two questions: “(i) when does a device have the “capacity” to perform the functions of

an autodialer enumerated by the statute?; and (ii) what precisely is the content of those functions?”⁹ As to the first question, a number of parties had argued to the FCC that a broad interpretation of “capacity” could cover calls made from smartphones and the FCC responded only that it was unclear such a ruling would be “likely” to give rise to “legal action.”¹⁰ But the D.C. Circuit found the FCC’s interpretation of “capacity” to be “utterly unreasonable in the breadth of its regulatory inclusion” of every smartphone in the country.¹¹

On the court’s second question, the 2015 Declaratory Ruling suggested a conflicting standard: that a device must be able to generate and dial random or sequential numbers to qualify as an ATDS but also it may lack such capacity.¹² The court did not consider this interpretation to be reasoned decision-making, and set aside the conflicting regulations.¹³

Interestingly, the court, *sua sponte*, noted a further statutory provision that affects the scope of the TCPA’s restrictions on calls to cellular numbers using an ATDS: it is unlawful to “make any call . . . using any automatic telephone dialing system.”¹⁴ The court tacitly endorsed the view “that the equipment must, in fact, be used *as an autodialer* to make the calls before a TCPA violation can be found.”¹⁵ Under such an interpretation, everyday calls made with a smartphone would not violate the TCPA; only if the relevant software were in fact loaded onto the phone and used to initiate calls could there be a violation.¹⁶

The D.C. Circuit’s opinion rejecting the FCC’s broad definition of “capacity” and contradictory views of what functions an ATDS must perform in order for potential liability to attach now requires the FCC to tailor rules on the scope of the TCPA to be consistent with the court’s opinion.

A One-Call Safe Harbor is Insufficient

On the issue of reassigned numbers, though the court agreed with the FCC that “called party” could permissibly be interpreted to mean the current subscriber, it ultimately “set aside the Commission’s interpretation on the ground that the one-call safe harbor is arbitrary and capricious.”¹⁷ The court reviewed the FCC’s reasoning behind the one-call restriction on the safe harbor and could not square the stated goal of the safe harbor — to give callers an additional “opportunity” to find out about a possible reassignment — with the one-call limitation.¹⁸ But if the court simply voided the one-call safe harbor, callers would be left only with the strict liability regime (i.e., no safe harbor at all) that the FCC itself labeled “severe.” The court thus “set aside the Commission’s treatment of reassigned numbers as a whole” including the interpretation of “called party” to mean “current subscriber.”¹⁹

The court also discussed the FCC’s current proposals on this issue, including a repository of information regarding reassigned wireless numbers and a safe harbor based on a caller consulting such a repository.²⁰ The D.C. Circuit indicated that these proposals “have greater potential to give full effect to the Commission’s principle of reasonable reliance” rather than the arbitrary and capricious one-call safe harbor regime.²¹

The D.C. Circuit set aside the FCC’s one-call safe harbor for reassigned wireless numbers because it is “arbitrary and capricious.”

Looking Forward

This long-awaited opinion took the FCC to task for its broad and conflicting definitions of an autodialer, but still leaves uncertainty as to the what devices qualify as an ATDS under the TCPA. In the coming months, the FCC must still determine what functions qualify a device as an ATDS and will hopefully provide clarity on the scope of functionalities that could trigger liability under the TCPA. Based on the D.C. Circuit’s suggestion, the FCC may approach this issue differently in the future and require autodialing capabilities be assessed on a call-by-call basis.

As for reassigned numbers, the FCC already appears on its way to creating a scheme to deal with reassigned numbers in a reasoned way, and gone is the arbitrary “one-call” safe harbor. That the D.C. Circuit endorsed the FCC’s current proposals likely means they would survive future judicial review. This is strong evidence that the FCC’s next order may include a safe harbor based on reasonable reliance on a centralized repository of reassigned wireless numbers.

The FCC must still determine what functions qualify a device as an ATDS under the TCPA.

¹ *ACA Int’l v. Fed. Commc’ns Comm’n*, No. 15-1211, (D.C. Cir. Mar. 16, 2018).

² *Id.* at 5.

³ 47 U.S.C. § 227(b)(1)(A)(iii).

⁴ *Id.* § 227(a)(1).

⁵ *Id.* § 227(b)(3)(C).

⁶ 2015 Declaratory Ruling, 30 FCC Rcd. at 7974 ¶ 16.

⁷ *Id.* at 7999 ¶ 72.

⁸ *Id.* at 8000 ¶ 72.

⁹ D.C. Opinion at 23.

¹⁰ 2015 Declaratory Ruling, 30 FCC Rcd. at 7977 ¶ 21.

¹¹ D.C. Opinion at 17, 19 (quotations omitted).

¹² *Id.* at 26.

¹³ *Id.* at 29.

¹⁴ 47 U.S.C. § 227(b)(1)(A)(iii).

¹⁵ D.C. Opinion at 30 (quotation omitted).

¹⁶ *Id.* at 31.

¹⁷ *Id.* at 32.

¹⁸ *Id.* at 35-39.

¹⁹ *Id.* at 39-40.

²⁰ *Id.* at 40.

²¹ *Id.*

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