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## The D.C. Circuit Issues a Split Ruling on the FCC's 2015 Omnibus TCPA Order

The long-awaited ruling by the United States Court of Appeals for the District of Columbia on the Federal Communications Commission's ("FCC") 2015 Omnibus Telephone Consumer Protection Act (TCPA) order was finally released on March 16, 2018. The **opinion** reverses the FCC on the definition of an autodialer and vacates its approach to reassigned numbers while sustaining the agency's ruling on revocation of consent to receive calls and its limited exemption from the TCPA's consent requirement for certain health-related calls. The ruling appears to invite further FCC action on a number of remaining questions around what constitutes an autodialer and places pressure on the FCC to act on its reassigned numbers database proceeding. Although generally helpful to industry, the opinion leaves a number of unanswered questions that will likely foster continued litigation.

### Autodialers

The court overturned the FCC's definition of an automatic telephone dialing system ("ATDS" or autodialer) as any equipment that has the potential to generate and dial telephone numbers. What constitutes an ATDS is crucial because the TCPA generally bars calls to cellphones using an ATDS absent prior consent. The TCPA defines an ATDS as equipment that "has the capacity" to "store and produce telephone numbers to be called, using a random or sequential number generator," and to "dial the number." The FCC's 2015 Order defined "capacity" to include any equipment that could potentially have the ability to function in that manner, even if such functionality did not currently exist in the equipment. The court found two fundamental errors: (1) the FCC's definition of capacity was impermissibly overbroad; and (2) the agency failed to provide meaningful guidance on the specific functions required to constitute an autodialer.

In reversing the FCC's interpretation of "capacity," the court was heavily influenced by the argument that the FCC's "capacious" definition would render every smartphone an ATDS, a conclusion not disputed in the FCC's 2015 Order. The FCC's definition therefore turns the 80 percent of the U.S. population that uses smartphones into actual or potential TCPA violators. The court held that that FCC's interpretation was "utterly unreasonable in the breadth of its regulatory [in]clusion," rendering the FCC's action outside the zone of its delegated authority. The court also rejected the FCC's argument in its briefing that it did not reach a definitive conclusion that smartphones would qualify as autodialers. If that were the case, the court found the FCC's definition of capacity would be arbitrary and capricious because it would then offer no meaningful guidance as to what would constitute an ATDS.

The court also concluded that the FCC's effort to describe the functions necessary to qualify as an ATDS was unreasoned. For one, the court noted the FCC held contradictory views on whether equipment must itself have the ability to generate random or sequential numbers or whether it is sufficient that the device can call from a database of numbers generated elsewhere. The FCC indicated that equipment must have the ability to generate and dial random or sequential numbers, but also has found that equipment that calls preselected lists of numbers (so-called predictive dialers) constituted ATDS, even if it had no capacity to generate random or sequential numbers. The court also faulted the FCC for failing to clarify whether human intervention in the dialing process disqualified equipment from the ATDS definition. The court concluded that the **2015 Order's** "lack of clarity about which functions qualify a device as an autodialer compounds the unreasonableness of the Commission's expansive understanding of when a device has the 'capacity' to perform the necessary functions."

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Finally, taking the matter somewhat into its own hands and seemingly inviting a petition to the FCC, the court noted that it had not been presented arguments on the issue of whether a call had to be made using the autodialer functionalities in order to violate the TCPA, the position advocated by Commissioner O'Reilly in his dissent to the 2015 Order, or if it was sufficient that the equipment had those capabilities, even if not used to make the call. The court noted that the former interpretation would render theoretical questions about capacity irrelevant. It suggested that the FCC "could choose to revisit the issue in a future rulemaking or declaratory order, and a party might then raise the issue on judicial review." The court thus seems to have provided the agency a roadmap on how to address these open issues in the future.

### **Reassigned Numbers**

Millions of telephone numbers are reassigned each year. As a result, a company intending to call its customer that had provided consent may inadvertently call the new subscriber of the number who has not provided consent, and thereby violate the TCPA. The 2015 Order allowed callers to make one call to the reassigned number without incurring liability, but subsequent calls would result in a violation.

The threshold issue on appeal concerning reassigned numbers was the FCC's definition of the "called party" as the party that is currently subscribed to the number, not the party the caller was intending to reach. On this key issue, the court upheld the FCC's definition of the called party as the party that currently subscribes to the number. At the same time, and importantly for future action on this issue, the court concluded that the FCC was not compelled to define the called party in this way. The court's decision thus affords the FCC room to revisit the definition and reach a contrary finding if reasonably supported and explained.

Despite upholding the FCC's called party definition, the court vacated the FCC's reassigned numbers ruling on the grounds that the agency's one-call safe harbor was arbitrary and capricious. The key concept behind the FCC's approach was that the caller may reasonably rely on the prior consent given by the number's previous subscriber. In the absence of knowledge of reassignment, the FCC had concluded that reliance on prior consent was reasonable—but only for the one call. The court concluded that the FCC unreasonably failed to explain why it was reasonable for a caller without actual knowledge of a reassignment to reasonably rely on prior consent for one call but not for subsequent calls if that first call provided no indication that the number had been reassigned. The court's discussion suggests that, to the extent the FCC utilizes a reasonable reliance standard, a caller must have actual notice of the reassignment before facing liability.

Having invalidated the one-call safe harbor, the court concluded that it must invalidate the FCC's entire reassigned number approach. Without a one-call safe harbor, autodialed calls to reassigned numbers potentially creates strict liability, an approach the FCC regarded as too severe. The court thus concluded that the FCC may not have adopted its reassigned number approach in the absence of the safe harbor.

Where this leaves litigants is a bit muddled. By invalidating the FCC's entire reassigned number regime, the issue would seem no clearer than before the FCC's 2015 Order, in which case an autodialed call to a reassigned wireless number without consent creates liability. Nevertheless, the court clearly is uncomfortable with this result, as was the FCC. The court appears to approve of the FCC's use of the reasonable reliance principle. TCPA defendants thus conceivably could argue that a showing of actual notice of reassignment would be required before it becomes unreasonable to rely on prior consent.

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Importantly, the court did suggest one way to resolve the issue. It specifically noted that the FCC has an ongoing proceeding to establish a reassigned numbers database, including potentially creating a safe harbor for callers using the database. (In fact, the FCC is scheduled to consider further action on the reassigned numbers database at its March 22, 2018, open meeting). The court stated that the proposals under consideration in the reassigned number database proceeding “would naturally bear on the reasonableness of calling numbers that have in fact been reassigned, and have greater potential to give full effect to the Commission’s principle of reasonable reliance.”

### **Revoking Consent**

The court sustained the FCC’s ruling that a called party could revoke consent at any time through any reasonable means. The court does attempt to inject some common sense and limiting principles into this issue, which is the basis for a substantial number of TCPA lawsuits. For example, in rejecting concerns that the FCC’s interpretation would create excessive burdens on callers, the court pointed to the agency’s guidance that the method of revocation should not create “undue burdens,” meaning that callers do not “need to train every retail employee on the finer points of revocation.” Apparently cognizant of some called parties’ efforts to manufacture liability by revoking consent, the court stated that affording recipients “clearly-defined and easy-to-use opt-out methods” should render unreasonable “any effort to sidestep the available methods in favor of idiosyncratic or imaginative revocation requests.” The court here seems to be addressing cases where called parties refuse to use a prescribed opt-out procedure, such as where a called party refuses to enter “stop” as the provided method of revocation and instead responds with lengthy sentences, or even profanity, asking the caller to cease communicating. The court also noted that callers and the called party could mutually agree by contract to a specific method of revocation, touching on the question of whether a bargained-for method of revocation must be followed. The Second Circuit addressed this issue in [Reyes v. Lincoln Automotive Financial Services](#), which held that a consumer’s unilateral attempt to revoke consent was invalid when consent was given as a bargained-for-consideration in a contract.

### **Health-Related Calls**

The court upheld the 2015 Order’s limited exemption from the TCPA’s consent requirement for certain types of urgent health-related communications. It rejected arguments that the FCC’s failure to also exempt health-related billing and collection notifications conflicted with provisions in the Health Insurance Portability and Accountability Act (HIPPA), which permits such communications. The court found no conflict. The court also rejected arguments that the FCC acted arbitrarily by providing for a broader health care exemption for calls to residential lines than for calls to wireless numbers. The court noted that the TCPA “presupposes ... that calls to residential and wireless numbers warrant differential treatment.” Finally, the court rejected claims that all health-related calls fall under the TCPA’s emergency purposes exception, finding it implausible that billing- and collection-related calls would fall under that exception.

### **What’s Next**

Release of the court’s order would seem to clear the path for further FCC action. In many respects, the court invites such action. For example, as to the definition of an autodialer, the court was frustrated by the FCC’s failure or refusal to clarify exactly what kinds of functions are required to qualify equipment as an ATDS, and in particular, whether human intervention rendered equipment outside the scope of an ATDS and whether those functions had to be used for the calls at issue. The court’s reassigned number discussion also places pressure on the FCC’

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reassigned number database proceeding, which the court pointedly noted would “have a potential to give full effect to the Commission’s principle of reasonable reliance.” The court’s decision potentially offers a boost to advocates seeking to establish a safe harbor for those utilizing the database. In light of the court’s various rulings, both industry and consumer groups will have ample incentives to push for FCC action.

Because the court left a number of significant issues undecided, TCPA litigation likely will continue unabated. Although the court rejected and vacated the FCC’s expansive definition of autodialer capacity, the court noted that the precise parameters of the functions necessary to qualify as an ATDS remain unclear. Significantly, the court also called into question the FCC’s earlier declaration that predictive dialers constitute ATDSs. Moreover, the court’s resolution of reassigned numbers and methods of revocation leave ample room for further disputes.

At Brownstein Hyatt Farber Schreck, we regularly defend clients in TCPA-related cases and also help our clients in developing compliance strategies to protect them from TCPA regulatory and litigation risk. We are also actively assisting industry clients with TCPA-related proceedings before the FCC and TCPA-related lobbying. Please do not hesitate to contact us with any questions.

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