SUTHERLAND

REDIAL: 2015 TCPA YEAR IN REVIEW

Telephone Consumer Protection Act: Analysis of Critical Issues and Trends

INTRODUCTION

Sutherland is pleased to present REDIAL, an in-depth analysis of key Telephone Consumer Protection Act (TCPA) issues and trends. REDIAL reports on issues affecting the industries that face TCPA class action liability.

DID YOU KNOW?

2ND

For the third consecutive year, TCPA cases are the **second most filed** type of case in federal courts nationwide.

100,000

The FCC has reported that as many as 100,000 cell phone numbers are reassigned **EVERY DAY.**

3X

The TCPA imposes liability of $500 per call, text or fax, **trebled to $1,500** if the sender's conduct is deemed willful.

SUTHERLAND INDUSTRY KNOWLEDGE AND FOCUS

Few industries are immune from TCPA liability. In 2015, the insurance, financial services, energy and health sectors were uniquely affected by TCPA litigation. REDIAL analyzes key legal issues affecting these industries.

Sutherland tracks daily all TCPA cases filed across the country. This allows us to spot trends and keep our clients informed. We understand the law and our clients' businesses, allowing us to design compliance and risk management programs uniquely suited to our clients' specific needs and to spot issues before they result in litigation. If litigation is filed, Sutherland's litigation team has the depth of experience necessary to zealously defend our clients' interests in court.

WHY SUTHERLAND?

STRENGTH in representing the country's and the world's leading companies

STRENGTH in knowing our clients' businesses

STRENGTH in advising and counseling our clients on TCPA compliance

STRENGTH as trial lawyers in efficiently and zealously representing our clients in class actions filed in state and federal courts across the country

THE TCPA TRAFFIC LIGHT

	LANDLINE		CELL PHONE	
	MARKETING	NON-MARKETING	MARKETING	NON-MARKETING
AUTODIALED CALLS/TEXTS	DO NOT CALL LIST+		PRIOR EXPRESS WRITTEN CONSENT[1] *	PRIOR EXPRESS CONSENT[2]
PRERECORDED VOICE	PRIOR EXPRESS WRITTEN CONSENT *		PRIOR EXPRESS WRITTEN CONSENT *	PRIOR EXPRESS CONSENT
MANUALLY DIALED	DO NOT CALL LIST+		DO NOT CALL LIST+	
FAX	PRIOR EXPRESS PERMISSION OR ESTABLISHED BUSINESS RELATIONSHIP *			

[1] "Prior express written consent" requires a written agreement, signed by the consumer, that includes, among other things, the telephone number that specifically authorizes telemarketing by automatic dialing/texting or prerecorded voice, and that is not required as a condition of purchase. 47 C.F.R. § 64.1200(f)(8).

[2] For non-marketing purposes, providing a cell number in connection with a transaction generally constitutes prior express consent to be contacted at that number with information related to the transaction. 7 F.C.C.R. 8752 ¶ 31 (1992).

+ Do Not Call List restrictions apply broadly to telemarketing to both cell phones and landlines, but can be overridden by written consent from the consumer.

* Opt-out notice and mechanism must be provided. Specific requirements vary.

This chart does not constitute legal advice. ***The chart provides only a general overview of TCPA rules and does not reflect all details needed for compliance.***

CONTENTS

TCPA LITIGATION AND THE INSURANCE INDUSTRY

The following article is from National Underwriter's latest online resource, FC&S Legal: The Insurance Coverage Law Information Center.

As the number of class action case filings under the TCPA continues to grow, insurance companies are increasingly being drawn into these lawsuits either as defendants or as coverage carriers. Any insurance company that communicates with its insureds, potential customers, job applicants, and others by phone or text using an automated telephone dialing system—or that has independent or semi-independent agents engaging in such automated communications—faces potential litigation risk under the TCPA. More than two dozen insurers have been sued under the TCPA over the past 24 months. Other insurers may face TCPA risk under liability policies if their insureds are dragged into TCPA litigation. This article discusses recent TCPA cases involving insurers and analyzes some of the key issues facing the insurance industry under the TCPA.

INSURANCE AGENT MARKETING AND VICARIOUS LIABILITY ISSUES

In cases where insurance companies have been sued for alleged violation of the TCPA, one of the most significant issues has been the scope of the insurer's liability for the acts of its agents. Insurers may market their products through the use of independent and semi-independent sales forces. Where an agent or agency has allegedly violated the TCPA, the insurer may also be drawn into the litigation on a theory of vicarious liability.

This risk was evidenced in a 2014 decision in which an Illinois federal court found that a vicarious liability claim could be raised against an insurance company for the actions of its agents and the agents' third-party marketer. The plaintiffs sued three property and casualty insurers, alleging that they received prerecorded, unsolicited calls regarding car insurance policies on behalf of the respective companies. The calls were allegedly made by a third-party telemarketing company through the use of an automated dialing system. If a person answered the call, the telemarketing company would then join the call, take the individual's information, and pass it along to the insurance company's local agent. If the call was not answered, then the telemarketing company left a prerecorded voice message. The complaint acknowledged that the agents, and not the insurance companies, were the ones who had contracted directly with the marketing company.

In its decision, the district court first addressed the question of whether the insurance companies could be held directly and/or vicariously liable for the calls placed by the marketing company and the agents. Although the court determined that the insurance companies could not be found directly liable since they did not physically place the calls, the court concluded that one of the companies might be subject to vicarious liability for the actions of the agents. Specifically, the court held that nothing in the TCPA directly prohibits the application of principles of common law vicarious liability. Noting Congressional intent to protect individuals from receiving certain calls without providing prior consent, the court opined that the actual sellers—i.e., the insurers—were in the best position to monitor and police third-party telemarketers' compliance with the TCPA. Otherwise, in the court's view, there would be a disincentive to monitor telemarketers, and consumers would not have an effective remedy under the TCPA. Applying this rationale to the complaint, the court dismissed the complaints against several insurers, but found that the plaintiffs had alleged sufficient facts to support a basis for holding at least one of the insurance

companies liable for the marketing company's actions under a subagency theory, where the plaintiffs alleged that the insurance agents who hired the marketing company were legally agents of the insurance company.

Vicarious liability has also been asserted where a third-party contractor is making the calls. In 2013, a federal district court in California granted class certification to plaintiffs who allegedly received unsolicited text messages on their cell phones on behalf of a life insurance company in violation of the TCPA. In that case, the plaintiffs alleged that the defendant insurance company entered into a marketing agreement with a third-party marketing group to promote its life insurance products. The plaintiffs alleged that they received text messages sent by the marketing group encouraging them to call a toll-free phone number to claim a gift card voucher, which, according to the plaintiffs, did not exist. Rather, the plaintiffs alleged that the number connected callers to a call center operated by the marketing group that pitched the insurance company's products and services, as well as the products and services of the marketing group's other clients. Of particular importance to the issue of third-party liability, the insurance company specifically argued that neither it nor the marketing company had actually caused the text messages to be sent, but rather that third-party contractors actually carried out the operation. The court expressed its skepticism of that defense, stating that it was unlikely to be viable, and certified the plaintiff class. The case was later settled on a class basis. Note, however, that more recent case law in the U.S. Court of Appeals for the Ninth Circuit may provide additional support for a defense against vicarious liability where a third party has initiated the communications.[1]

COURTS MAY IMPOSE VICARIOUS LIABILITY ON INSURERS FOR CALLS PLACED BY THEIR AGENTS AND EVEN THIRD-PARTY MARKETING COMPANIES THAT CONTRACT WITH INSURERS AND CONTACT CONSUMERS VIA AUTOMATED CALLS, TEXT MESSAGES AND SO-CALLED "JUNK FAX ADVERTISEMENTS."

INSURER COMMUNICATIONS AND CONSUMER CONSENT

Cases against insurers and their affiliates often also involve the issue of whether the insurer obtained the proper consent prior to sending the communication. "Prior express consent" may be a defense to claims under the TCPA. Since October 2013, "prior express written consent" from the called party is required for marketing communications to cell phones or using prerecorded messages.

Several insurers have been sued in TCPA litigation as a result of so-called junk fax advertisements allegedly sent by the company's agents. The issue of consent is often central to these cases. In one case against a life insurer alleging that a third-party agent sent unsolicited fax advertisements for low-cost life insurance, a federal district court granted the plaintiff's motion for class certification. The plaintiff alleged that the faxes lacked the required language that would allow recipients to opt out of receiving future faxes. In arguing against class certification, the insurer asserted that determining whether each recipient consented to receipt of the fax was an individual issue that precluded certification. The court rejected that defense, stating that "no individual inquiry is necessary and [the] established relationship or voluntary consent defenses are unavailable where, as here, the opt-out requirement [of the TCPA] is alleged to have been violated." The case was settled on a class basis for $23 million.

Perhaps no issue has caused more problems and has given rise to more liability under the TCPA than the issue of consent for calls made to reassigned cell phone numbers. According to the FCC, approximately 100,000 cell phone numbers are reassigned to new users each day. There is no systematic means by which a business can track or even know when a subscriber has relinquished his or her cell phone number and whether that number has been reassigned to another user. Numerous companies have been sued under the TCPA for making calls to numbers that have been reassigned, even though the company received consent from the prior subscriber.

In a July 10, 2015 Declaratory Ruling and Order,[2] the FCC explicitly declined to create a good faith exception to the TCPA's strict liability standard. The FCC declined to exempt from liability calls made in good faith to the number last provided by the intended call recipient where the number has been reassigned to a new user without the caller's knowledge. That standard could be satisfied when the original cell subscriber notifies the caller that it has relinquished his or her cell number or when the party to whom the number has been reassigned notifies the company about the reassignment.

Instead, the FCC's Order only offered a modest safeguard that callers who make calls without knowledge of reassignment and have a reasonable basis to believe that they have valid consent from the prior subscriber may make one call after reassignment to determine whether the phone has been reassigned, whether or not the called party answers the phone and alerts the caller that the number has been reassigned. Without providing any practical guidance, the FCC cautioned businesses to institute new and better safeguards to avoid calling reassigned wireless numbers that may give rise to TCPA liability.

TCPA INSURANCE COVERAGE ISSUES

As the number of TCPA class action filings continues to rise, so too has the number of disputes with commercial liability insurers over coverage for their insureds' alleged TCPA violations. Whether TCPA defendants may seek coverage from liability insurers to defend and indemnify them for TCPA-related exposure often depends on the specific language of the policy at issue, including the policy's stated coverage exclusions. Commercial liability insurers may file declaratory judgment actions against their insureds seeking a declaration that there is no coverage for underlying TCPA claims. In other situations, plaintiffs have pursued claims against commercial liability insurers after agreeing to settlements that were to be satisfied exclusively from the proceeds of a defendant's insurance policies. Increasingly, commercial liability policies may contain a specific exclusion for TCPA claims.[3] Other commercial liability policies may have more general exclusions that can preclude coverage for TCPA claims, such as an exclusion for any loss resulting from a violation of a "statute, ordinance or regulation of any federal, state, or local government."[4]

Other coverage beyond commercial liability may be implicated by TCPA litigation, such as coverage for errors and omissions. In one recent favorable case, an Illinois appeals court ruled that a professional liability insurer has no duty to defend or indemnify an insurance agent in a class action alleging that the agent sent thousands of prerecorded telephone messages advertising the agent's services for selling life, accident, and health insurance. The court affirmed the lower court's decision that telephone solicitations did not constitute negligent acts, errors, or omissions for "rendering services for others," as required for coverage under the policy.[5] In other cases, however, the courts have found that professional and/or commercial liability policies may provide coverage for TCPA claims against the insured.[6]

CONCLUSION

The trend of high-dollar class action settlements has spurred a large increase in TCPA filings over the past few years, including an increase in complaints filed against the insurance industry. The issues facing insurers in these cases are similar to the issues facing companies in other industry segments: consent and the scope of that consent, vicarious liability issues arising from the acts of agents and third-party marketers, and large potential exposure due to TCPA statutory damages. Insurers will need to continue to stay on top of TCPA issues relating to marketing, compliance, and potential litigation exposure.

[1] *Thomas v. Taco Bell Corp.*, No. 12-56458 (9th Cir. July 2, 2014).

[2] In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278 (FCC July 10, 2015).

[3] See *James River Ins. Co. v. Med Waste Mgmt.*, No. 1:13-cv-23608, 2014 WL 4749551 (S.D. Fla., Sept. 22, 2014) (denying coverage based on a TCPA exclusion).

[4] See *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Papa John's Int'l*, No. 3:12-cv-00677, 2014 WL 2993825 (W.D. Ky., July 3, 2014).

[5] *Margulis v. BCS Insurance Co.*, No. 1-14-0286 (Ill. App. Nov. 26, 2014).

[6] *Landmark American Insurance Co. v. NIP Group, Inc.*, 2011 Ill. App (1st) 101155 (2011); *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352 (2006).

POWER SURGE: TCPA LITIGATION AND THE ENERGY INDUSTRY

Few industries have been spared from the recent wave of class actions filed under the TCPA. The energy sector is no exception. TCPA cases against electricity and natural gas providers are on the rise with more than half a dozen such cases filed in 2015 in federal courts in Texas, New York, Ohio, Florida, California, and other states, in addition to cases already pending. These cases focus principally on companies' use of automated communications to market their services to potential customers or to collect delinquent accounts.

A series of putative class actions has been filed against electricity and natural gas service providers alleging violations of the TCPA based on the manner in which these companies have marketed their services to potential customers. The cases often involve providers in deregulated markets. In one case, the plaintiff alleged that he received unsolicited, prerecorded telemarketing calls advertising electricity services. The plaintiff claimed the calls violated the TCPA because he had not given prior express consent to the company to call him for marketing purposes. *Bank v. Independence Energy*, 736 F. 3d 660 (2d Cir. 2013). In another case, the plaintiff alleged the defendant company violated the TCPA by sending unsolicited fax advertisements promoting the sale of natural gas and electricity and also promoting brokering services for other natural gas and electric providers. *Saf-T-Gard v. Vanguard Energy Serv.*, 12-cv-3671 (N.D. Ill., filed 2012). The complaint alleged that the faxes were sent without the recipients' consent and without any prior existing business relationship. The complaint further alleged that the faxes did not contain the required opt-out language that would allow the recipient to avoid receiving further solicitations. The court certified a class in late 2013, and the parties entered into a class settlement shortly thereafter.

In other cases, plaintiffs have challenged automated communications used in efforts to collect on delinquent electric and gas accounts. Such communications may be initiated either by an energy company directly or by a third-party debt collector. In one recent case alleging violations of the TCPA following attempts to collect on a debt to an electric company, the defendant successfully obtained summary judgment by establishing that it did not use an autodialer to make the calls at issue. *Gelakoski v. Colltech*, 12-cv-498, 2013 WL 136241 (D. Minn. 2013).

In another case involving debt collection calls by a utility, The U.S. Court of Appeals for the Second Circuit reversed a ruling for the defendant and took a narrow view of the scope of consent for receiving automated debt collection calls. *Nigro v. Mercantile Adjustment Bureau*, LLC, 769 F.3d 804 (2014). In that case, the plaintiff contacted the power company to request termination of electric service on behalf of his recently deceased mother-in-law.

In connection with that request, he provided his cell phone number. More than a year later, a collection agency made several calls to the plaintiff's cell phone using an autodialer in an effort to collect on the mother-in-law's delinquent account. The plaintiff claimed that he had not consented to the collection calls. The trial court disagreed and granted summary judgment in favor of the defendant, reasoning that the plaintiff "consented to calls regarding the subject of the transaction, namely the termination of [the] account," which included any effort to collect on any account delinquency. The Second Circuit, however, reversed and held that the plaintiff had not provided his number in connection with the debt and therefore had not consented to debt collection calls.

Energy service providers have not been spared from the recent surge in filings under the TCPA, and high-dollar settlements in TCPA cases will likely continue to drive a trend of new filings. The issues facing energy companies under the TCPA are similar to the issues facing companies in other industry segments: consent and the scope of that consent, vicarious liability issues arising from the acts of agents and third-party marketers and debt collectors, and large potential exposure due to TCPA statutory damages.

UTILITY COMPANIES AND ENERGY SERVICE PROVIDERS ALIKE HAVE FOUND THEMSELVES FACING TCPA LITIGATION FOCUSED PRINCIPALLY ON THEIR USE OF AUTOMATED COMMUNICATIONS TO MARKET THEIR SERVICES TO POTENTIAL CUSTOMERS OR TO COLLECT DELINQUENT ACCOUNTS.

A BAND-AID REMEDY?: NEW TCPA RULES FOR THE HEALTHCARE INDUSTRY

Companies in the healthcare industry, along with virtually every consumer-facing business, are adjusting to the impacts of the FCC's July 10, 2015 Order resolving more than 20 petitions seeking clarification of the TCPA. With the recent wave of TCPA class actions being filed across the country, healthcare is one of many industries focused on TCPA compliance in an effort to avoid litigation while also providing efficient and effective communications to patients and consumers. Unlike many other industries, however, the FCC's July 10 Order recognizes a variety of healthcare-specific exemptions to the TCPA that provide a safe harbor for some important healthcare calls. These exemptions are limited and contain a number of specific requirements and conditions but do not provide a blanket exemption to TCPA liability. Below is a summary of what healthcare companies need to know about the new rules.

PRIOR EXPRESS CONSENT

The FCC confirmed that providing a phone number to a healthcare provider constitutes prior express consent for non-telemarketing healthcare calls. This is consistent with previous FCC guidance stating "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary."[1] The July 10, 2015 Order clarifies that the prior express consent extends to communications not only for the healthcare provider, but also for calls "by or on behalf of the 'covered entity' as well as its 'business associates'" as defined in the HIPAA privacy rules, "if the covered entities and business associates are making calls within the scope of the consent given, and absent instructions to the contrary." Under HIPAA, a "covered entity" is defined as a "health plan," "health care clearinghouse," or certain "healthcare providers." A "business associate" is a person who maintains or transmits health information on behalf of a covered entity.[1]

INCAPACITATED PATIENTS/PERMISSIBLE THIRD-PARTY CONSENT

The FCC formally recognized that a third party may provide prior express consent on behalf of an incapacitated patient. The Order clarifies that when a patient is incapacitated and unable to provide a telephone number directly to a healthcare provider, but a third-party intermediary provides the number, the provision of the phone number by the third party constitutes prior express consent for healthcare calls to that number. In setting this standard, the FCC recognized that in certain healthcare situations it may be impossible for a caller to obtain prior express consent directly from the patient. But, the FCC stated, the prior express consent provided by the third party is no longer valid once the period of incapacity ends. That is, the consent expires with the period of incapacity without the subscriber having to opt out of receiving future calls.[2]

CALLS/TEXTS EXEMPT FROM TCPA CONSUMER CONSENT REQUIREMENTS

The FCC created a limited exemption from the TCPA's consumer consent requirements for certain calls and texts it deemed to be pro-consumer regarding vital, time-sensitive calls with a health-treatment purpose, subject to a number of conditions. The exemption is limited to the following types of calls:

- Appointment and exam confirmations and reminders
- Wellness checkups
- Hospital pre-registration instructions
- Pre-operative instructions
- Lab results
- Post-discharge follow-up intended to prevent readmission
- Prescription notifications
- Home healthcare instructions

This exemption for calls and texts to wireless numbers only applies if the call or text is not charged to the recipient, including not being counted against any plan limits that apply to the recipient (e.g., number of voice minutes, number of text messages). Any call or text must also meet seven specific conditions: (1) it may be sent only to the number provided by the patient; (2) it must state the name and contact information of the provider; (3) it must be limited to the purposes listed above; (4) it must be less than one minute or 160 characters; (5) a caller cannot initiate more than one message per day or three per week; (6) the call or text must offer an opt-out; and (7) any opt-outs must be honored immediately. Notably, the exemption does not apply to marketing calls or to healthcare communications which include accounting, billing, debt collection, or other financial content.

DESPITE CREATING A LIMITED EXEMPTION FROM THE TCPA'S CONSUMER CONSENT REQUIREMENTS FOR CERTAIN CALLS AND TEXTS THE FCC DEEMED TO BE PRO-CONSUMER, THESE VITAL, TIME-SENSITIVE CALLS OR TEXT MESSAGES WITH A HEALTH-TREATMENT PURPOSE MUST (1) BE FREE TO THE RECIPIENTS, (2) SATISFY SEVEN CONTENT-BASED CONDITIONS, AND (3) BE COMPLETELY UNRELATED TO MARKETING, BILLING OR OTHER NON-TREATMENT PURPOSES. THE FCC'S JULY 2015 ORDER ALSO ALLOWS A THIRD PARTY TO PROVIDE AN INCAPACITATED PATIENT'S PRIOR EXPRESS CONSENT BY GIVING THE CALLER THE PATIENT'S PHONE NUMBER. BUT HEALTHCARE ENTITIES SHOULD RECOGNIZE THAT THE CONSENT EXPIRES WHEN THE PERIOD OF INCAPACITY ENDS.

CONCLUSION

Many of the issues facing healthcare companies under the TCPA are similar to the issues facing companies in other industry segments: consent and the scope of that consent, reassigned numbers and opt-outs, and large potential exposure to TCPA statutory damages, among other issues. There are also elements of the TCPA rules specific to healthcare, including the new exemption created by the FCC's July 10, 2015 Order for certain time-sensitive healthcare messages. Healthcare providers communicating with their patients through automated calling or text message will need to pay particular attention to the details of these new rules.

[1] 1992 TCPA Order, 7 FCC Rcd at 8769, para. 31.

[2] See 45 C.F.R. § 160.103.

CALL (UN)ANSWERED: FCC ISSUES SWEEPING PACKAGE OF DECLARATORY RULINGS ON TCPA PETITIONS

In some of its most comprehensive guidance published in years, resolving more than 20 petitions requesting clarification of the TCPA, the Federal Communications Commission on July 10 published a 138-page Declaratory Ruling and Order. Given the opportunity to add much needed clarity and reason to the TCPA, which has spawned thousands of class action lawsuits over just the past few years, the FCC dialed a wrong number.

Acclaimed by the FCC's majority as providing guidance that "will benefit consumers and good-faith callers alike by clarifying whether conduct violates the TCPA and by detailing simple guidance intended to assist callers in avoiding violations and consequent litigation," the Order purports to "affirm the vital consumer protections of the TCPA while at the same time encouraging pro-consumer uses of modern calling technology." Even a casual reading of the Order, however, reveals that the FCC has left businesses unnecessarily exposed to liability because of an unwillingness to apply common sense rules that recognize the realities of modern day communication. As stated bluntly by FCC Commissioner Michael O'Rielly in dissent: "Today's order has been hailed as 'protecting' Americans from harassing robocalls and texts. That is a farce." FCC Commissioner Ajit Pai commented in a separate dissent that "the Order twists the [TCPA's] law's words even further to target useful communications between legitimate businesses and their customers. This Order will make abuse of the TCPA much, much easier. And the primary beneficiaries will be trial lawyers, not the American public."

In its simplest sense, the Order states the unremarkable and well-settled position that "if a caller uses an autodialer or prerecorded message to make a non-emergency call to a wireless phone, the caller must have obtained the consumer's prior express consent or face liability for violating the TCPA. Prior express consent for these calls must be in writing if the message is telemarketing, but can be either oral or written if the call is informational." The Order also confirms that text messages fall within the scope of the TCPA.

Moving beyond the surface, the Order addresses a number of important issues. Four main issues that have given rise to liability under the TCPA and that, given the FCC's failure to use common sense in its interpretation of the TCPA, will continue to vex customer-facing businesses that communicate with consumers by phone or text. These issues are (1) the intractable problem of reassigned phone numbers, (2) the definition of autodialer, (3) consent, including revocation thereof; and (4) issues unique to certain third-party providers. The Order also provides a safe harbor and exempts from TCPA liability certain types of calls from financial institutions and health-related providers. These issues are discussed in further detail below.

REASSIGNED CELL PHONE NUMBERS

Perhaps no issue causes more problems and has given rise to more liability under the TCPA than the issue of reassigned cell phone numbers. The FCC acknowledged that approximately 100,000 cell phone numbers are reassigned to new users each day and that there is no systematic means by which a business may track or even know when a subscriber has relinquished his or her cell phone number and whether that number has been reassigned to another user. Without providing any practical guidance, the FCC cautioned businesses to institute new and better safeguards to

INSTEAD OF PROVIDING CLARITY TO BUSINESSES THAT COMMUNICATE WITH THEIR CUSTOMERS BY PHONE OR TEXT, THE FCC'S JULY 2015 ORDER FAILED TO USE COMMON SENSE IN INTERPRETING THE TCPA REGARDING (1) THE INTRACTABLE PROBLEM OF REASSIGNED PHONE NUMBERS, (2) THE DEFINITION OF AUTODIALER, (3) CONSENT, INCLUDING REVOCATION THEREOF, AND (4) ISSUES UNIQUE TO CERTAIN THIRD-PARTY PROVIDERS.

avoid calling reassigned wireless numbers that may give rise to TCPA liability.

The FCC's Order only offered a modest safeguard that callers who make calls without knowledge of reassignment and have a reasonable basis to believe that they have valid consent from the prior subscriber may make one call after reassignment as an opportunity to gain actual or constructive knowledge of the reassignment, regardless of whether the called party answers the phone and alerts the caller that the number has been reassigned. Paradoxically, the FCC opined that "if this one additional call does not yield actual knowledge of reassignment, we deem the caller to have constructive knowledge of such." How a caller can be deemed to have constructive knowledge regarding reassignment when the call did not yield actual knowledge of the reassignment is a mystery.

The FCC explicitly rejected the pragmatic argument that would have created a good faith exception to the TCPA's strict liability standard by exempting from liability any call made in good faith to the number last provided by the intended call recipient, unless and until the caller has actual knowledge that the intended recipient has relinquished his or her cell phone number. That standard could be satisfied when the original cell subscriber notifies the caller that it has relinquished his or her cell number or when the party to whom the number has been reassigned notifies the company about the reassignment.

Commenting on the FCC's response to problems caused by reassigned cell phone numbers, FCC Commissioner O'Rielly stated "[t]he Commission's unfathomable action today further expands the scope of the TCPA and sweeps in a variety of communications either by denying relief outright or by penalizing companies that dial a number that, unbeknownst to them, has been reassigned to someone else. Indeed, the order paints companies from virtually every sector of the economy as bad actors, even when they are acting in good faith to reach their customers."

AUTODIALERS

The TCPA restricts the use of autodialers, which are defined 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." Also included within the FCC's definition of autodialers are predictive dialers, defined as "equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls."

Over the past few years, courts have begun to apply a common sense standard recognizing that a piece of equipment's capacity alone, without some showing that the functionality in question had been utilized, would not be sufficient to establish liability under the TCPA. *Gragg v. Orange Cab Co., Inc.*, 995 F. Supp. 2d 1189, 1196 (W.D. Wash. 2014). See also *Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1291-1292 (S.D. Cal. Oct. 23, 2014); *Glauser v. GroupMe, Inc.*, 2015 WL 475111 *3-4 (N.D. Cal. Feb. 4, 2015).

In its Order, the FCC disregarded this pragmatic trend and stated that the mere capacity or capability alone to store or produce, and dial random or sequential numbers, without any showing that such functionality had been utilized or even could have been utilized at the time the calls were made, would define whether equipment constitutes an autodialer, thus giving rise to potential TCPA liability for the use of such equipment, regardless of whether the autodialer functionality was actually used and even if the equipment was used only to dial numbers from customer telephone lists.

As if the FCC's broad definition of autodialer were not enough, the Order fails to provide meaningful guidance on the type of equipment that would not qualify as an autodialer under the FCC's definition. The FCC's Order observes that while "it might be theoretically possible to modify a rotary-dial phone to such an extreme that it would satisfy the definition of 'autodialer,' but such a possibility is too attenuated for us to find that a rotary-dial phone has the requisite 'capacity' and therefore is an autodialer." By resorting to comparisons with rotary phones as an example of what is not an autodialer, the FCC has left businesses with little practical guidance.

CONSENT

One aspect of the TCPA that has given rise to significant class action litigation is the issue of consent. Consent for certain types of calls may be established expressly, generally by providing a phone number. Consent for other types of calls must be in writing. Although not addressed in the text of the TCPA, the Order states unambiguously that consent may be revoked at any time by any reasonable means, and a caller may not limit or restrict the manner in which revocation may occur. The Order also highlights that the caller has the burden of showing that the requisite consent was provided.

Other issues relating to consent addressed by the FCC include:

- The fact that a consumer's wireless number is in the contact list on another person's wireless phone, standing alone, does not demonstrate consent to autodialed or prerecorded calls, including texts.
- Porting a telephone number from wireline residential service to wireless cell service does not revoke prior express consent. If a caller obtains prior express consent to make a certain type of call to a residential number and that consent satisfies all of the requirements for prior express consent for the same type of call to a wireless number, the caller may continue to rely on that consent after the number is ported to a wireless service.
- Individuals who might not be the cell phone subscriber, but who, due to their relationship to the subscriber, are the cell phone number's customary user may provide prior express consent for the call. The FCC found that it is reasonable for callers to rely on customary users, such as a close relative on a subscriber's family calling plan or an employee on a company's business calling plan, because the subscriber will generally have allowed such customary users to control the calls to and from a particular number under the plan, including granting consent to receive calls.
- Providing a retroactive waiver from October 16, 2013, to July 10, 2015, and a safe harbor for another 89 days (until October 7, 2015), for certain entities that obtained consent from individuals before October 16, 2013 (the effective date of the FCC's requirement that consent for telemarketing calls made to cell phones must be in writing) to obtain the prior express written consent required by the current rule.
- Clarification that recipients who request receipt of text messages are deemed to have provided consent for the receipt of such texts.

CALLS EXEMPT FROM TCPA LIABILITY

The FCC created an exemption from the TCPA's consumer consent requirements for certain calls and texts it deemed to be pro-consumer regarding time-sensitive financial and health-related issues.

With respect to healthcare calls, the FCC clarified that providing a phone number to a healthcare provider constitutes prior express consent for healthcare calls, and a third party may consent to receive calls on behalf of an incapacitated patient. The Order clarified that when a patient is incapacitated and unable to provide a telephone number directly to a healthcare provider, but a third-party intermediary provides the number, the provision of the phone number by the third party constitutes prior express consent "for healthcare calls to that number unless and until the patient requests otherwise." But, the FCC noted, the prior express consent provided by the third party is no longer valid once the period of incapacity ends. The FCC also recognized that providing a phone number to a healthcare provider constitutes prior express consent for healthcare calls subject to the Health Insurance Portability and Accountability Act

(HIPAA) by a HIPAA-covered entity and business associates acting on its behalf, as defined by HIPAA, if the covered entities and business associates are making calls within the scope of the consent given, and absent instructions to the contrary.

With respect to financial institutions, the FCC created an exemption for calls intended to prevent fraudulent transactions or identity theft, including data security breaches, provided that the messages do not include marketing, advertising, or debt collection, and that each message includes information regarding how to opt out of future messages. Financial institutions are limited to no more than three calls over a three-day period. According to the FCC, these types of calls are intended to address exigent circumstances in which a quick, timely communication with a consumer could prevent considerable consumer harm or mitigate the extent of such harm. The FCC also exempted from the consent requirement calls regarding money transfers, including notifying the recipient of steps to be taken in order to receive the transferred funds.

By contrast, the FCC did not provide express guidance on any other specific types of time-sensitive pro-consumer calls, such as calls made by utility companies regarding power outages and service interruptions.

THIRD-PARTY PROVIDERS

The TCPA does not define the terms "make" or "initiate" in connection with placing a call for purposes of establishing TCPA liability. In its Order, the FCC clarified these terms noting, among other things, that a business does not make or initiate a text or a call when it merely uses its service to set up auto-replies to incoming voicemails. A business will also not be deemed to make or initiate a call when an app user sends an invitational message using its app. Further, with respect to collect call services, the FCC clarified that, where a caller provides the called party's phone number to a collect call service provider and controls the content of the call, because the entity is so closely connected to the call, it will be deemed the maker of the call rather than the collect-call service provider that connects the call and provides information to the called party.

CONCLUSION

The full impact of the FCC's July 10 Order will unfold over the ensuing months and years as TCPA litigation continues to flourish. Given the opportunity to stem the tide of vexatious litigation affecting legitimate businesses that communicate with their customers in good faith, the FCC failed to introduce rationality in the interpretation and application of the TCPA. Some of the progress made in the courts, for example, by applying a common sense interpretation of what constitutes an autodialer, may have been undone. In its efforts to protect consumers, the FCC has thrown the proverbial baby out with the bathwater.

CALL ANSWERED: SUPREME COURT TO DECIDE IF OFFER OF JUDGMENT MOOTS TCPA CLASS ACTION AND SCOPE OF GOV'T CONTRACTOR LIABILITY

On May 18, the U.S. Supreme Court granted certiorari in *Campbell-Ewald Co. v. Gomez*,[1] a TCPA class action. The case raises two related questions that are the source of frequent litigation and circuit conflict in class actions: (1) whether a Federal Rule of Civil Procedure 68 offer of complete relief to a plaintiff moots the plaintiff's individual claim; and (2) whether that same offer of complete relief tendered before class certification moots a named plaintiff's class claim under Federal Rule of Civil Procedure 23. The Court will also clarify whether government contractors and subcontractors are protected from liability for damages under the TCPA, pursuant to the doctrine of derivative sovereign immunity.

In the underlying case, the plaintiff received a single, unsolicited recruitment text message from the defendant, a marketing consultant for the United States Navy. The plaintiff responded by filing a putative class action against the marketing consultant, alleging a single violation of the TCPA. Before any class was certified and before the plaintiff moved for class certification, the defendant marketing consultant attempted to resolve the case by offering the plaintiff complete relief on his claim. The marketing consultant made a Rule 68 offer of judgment to the plaintiff prior to class certification for $1,500 (the maximum amount of statutory damages the plaintiff could recover for a single violation of the TCPA), plus reasonable costs. The plaintiff declined the offer. Thereafter, the defendant moved to dismiss the plaintiff's claim, arguing that the claim was moot because it had already offered the plaintiff the full amount he could possibly recover under the TCPA. After the district court denied that motion, the defendant moved for summary judgment, claiming derivative sovereign immunity under *Yearsley v. W.A. Ross Construction Co.*[2] The district court granted the defendant's motion for summary judgment.

On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed, holding that derivative sovereign immunity did not extend to claims under the TCPA.[3] The Ninth Circuit also held that an unaccepted Rule 68 offer does not moot a plaintiff's individual claims or putative class claims. The court offered no further explanation. Although the mootness rulings were consistent with Ninth Circuit precedent, there is disagreement among several federal circuit courts of appeals on these issues. Following the Ninth Circuit's decision, the defendant/marketing consultant sought Supreme Court review.

In its petition to the Supreme Court, the defendant emphasized that the Ninth Circuit's ruling conflicts with the majority of other circuits addressing the effect of a Rule 68 offer of judgment. Specifically, the Third, Fourth, Fifth, Sixth and Seventh Circuits have each held that a Rule 68 offer of judgment that satisfies fully a plaintiff's claim moots a plaintiff's individual claim. Conversely, the Eleventh Circuit follows the Ninth Circuit's rule that an unaccepted Rule 68 offer of judgment does not moot a plaintiff's individual claim (and cannot moot a putative class claim based on that plaintiff's claim).[4] Adding to the fray, the Second Circuit adopted an intermediate approach, holding that a defendant's offer of judgment does not itself moot the

individual plaintiff's claim, but suggests that the defendant may seek a default judgment based on the offer.[5] In 2013, the Supreme Court had the opportunity to determine the effect of a Rule 68 offer of judgment in the context of a collective action under the Fair Labor Standards Act. See *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013). The Court's majority declined to address the mootness question, explaining that the issue was not properly before the Court. By granting certiorari in *Campbell-Ewald*, the Supreme Court is poised to resolve the circuit conflict.

In addition to the Rule 68 offer of judgment issues addressed above, the Supreme Court will decide whether the defendant/marketing consultant properly asserted the defense of derivative sovereign immunity as a defense to plaintiff's TCPA claim. The defendant raised the defense based on the premise that because the Navy has the authority to contract with firms to help with its recruitment efforts, and the marketing consultant acted at the discretion of the Navy, it may assert the same sovereign immunity defense available to the Navy. The marketing consultant also argued that the Ninth Circuit interpreted and applied *Yearsley* too narrowly, contending that the Court's opinion does not limit application of the derivative sovereign immunity doctrine only to cases involving property damage caused by public works projects. The marketing consultant cited to *Boyle v. United Technologies Corp.*,[6] where the Court favorably recounted its holding in *Yearsley* that "if [the] authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." According to the marketing consultant, derivative sovereign immunity applies because it operated within the scope of its delegated authority from the Navy.

Campbell-Ewald will likely have significant ramifications far beyond TCPA class actions. Rule 68 offers of judgment have evolved into a common class action defense strategy, and the *Campbell-Ewald* case will either expand that strategy or completely eliminate it. In the TCPA context, the case is one of first impression and should clarify the scope of immunity for government contractors performing duties within the scope of delegated authority and, more specifically, in connection with TCPA claims.

BY GRANTING CERTIORARI IN *CAMPBELL-EWALD CO. V. GOMEZ*, THE SUPREME COURT IS POISED TO RESOLVE A CONFLICT AMONG THE CIRCUITS ON WHETHER AN OFFER OF JUDGMENT MOOTS A TCPA PLAINTIFF'S INDIVIDUAL AND CLASS CLAIMS. THE COURT WILL ALSO CLARIFY WHETHER GOVERNMENT CONTRACTORS AND SUBCONTRACTORS CAN USE THE DOCTRINE OF DERIVATIVE SOVEREIGN IMMUNITY AS A DEFENSE TO TCPA LIABILITY.

This case is also significant because TCPA class actions are on the rise nationwide. Getting clarification from the Supreme Court and resolving the split among the circuits on the impact of Rule 68 offers of judgment will help entities across virtually every industry segment better understand and possibly control their potential TCPA liability. The Court's decision will also have applicability to class actions beyond the TCPA context.

[1] 768 F.3d 871 (9th Cir. 2014) petition for cert. filed (U.S. Jan. 16, 2015) (No. 14-857).

[2] 309 U.S. 18 (1940).

[3] 768 F.3d 871 (9th Cir. 2014).

[4] *Stein v. Buccaneers Limited Partnership*, 772 F.3d 698 (11th Cir. 2014).

[5] See *McCauley v. Trans Union, LLC*, 402 F.3d 340, 342 (2d Cir. 2005).

[6] 487 U.S. 500, 506 (1988).

PARTY LINE: THIRD CIRCUIT ISSUES EXPANSIVE INTERPRETATION OF RIGHT TO SUE UNDER THE TCPA

Interpreting broadly the scope of standing to bring suit under the TCPA, the U.S. Court of Appeals for the Third Circuit has held that even an unintended recipient of an automated call is within "the zone of interests protected by the law" and has standing to sue the caller. *Leyse v. Bank of America*, No. 14-4073 (3d. Cir. Oct. 14, 2015). This decision potentially heightens the risk to companies that communicate with their customers in good faith but have no way of knowing who may pick up the phone when they call.

The *Leyse* decision by the Third Circuit involved roommates who shared a phone line. The first roommate was the subscriber who the defendant company intended to call. The second roommate answered the phone and, having no relationship with the company, sued alleging a violation of the TCPA based on lack of consent.

The trial court dismissed the case for lack of standing, holding that the first roommate was the called party and, therefore, the second roommate could not bring suit because he was not the intended recipient of the call. The district court reasoned that the term "called party" under the TCPA means the intended recipient and not "an unintended and incidental recipient."

On appeal, the Third Circuit reversed and held that the zone of interests protected by the TCPA encompasses more than just the intended recipients of automated calls and extends to regular users of the phone line. The court noted that lower courts have split over the question of who is entitled to sue under the TCPA as the "called party." Some district courts have held that standing is limited to the intended recipient of the call. Other district courts have held that the subscriber or regular user of the phone has standing to sue. The Third Circuit concluded there were "good reasons to doubt" that the term "called party" should be limited to the "intended recipient," but found that it did not need to determine that question to find that the plaintiff was within the zone of interests protected by the TCPA and therefore had standing to bring suit.

The court did not address the merits of the case other than to suggest that the defendant caller may have a strong defense if, prior to placing the call, it received consent from the roommate with whom it had a business relationship. The court cited the July 10, 2015 FCC Order which defines "called party" as the "subscriber" or "customary user" of the phone number, finding it is "reasonable for callers to rely" on "consent to receive robocalls" from either a subscriber or customer user. Under this standard, both roommates would likely qualify as called parties and consent from either would shield the defendant from liability.

The Third Circuit's decision, which broadly interprets the scope of standing, implicates the ongoing problem of calls to phone lines with multiple subscribers and reassigned cell phone numbers, because under the Third Circuit standard the actual recipients of such calls,

whether or not they were the intended recipients, would have standing to sue. In the FCC's July 10, 2015 Order, the FCC acknowledged that approximately 100,000 cell phone numbers are reassigned to new users each day and that there is no systematic means by which a business may track or even know when a subscriber has relinquished a cell phone number and whether that number has been reassigned to another user. The FCC's Order offered only a modest safeguard for callers who make calls without knowledge of reassignment; they may make one call after reassignment to gain actual or constructive knowledge of the reassignment, regardless of whether the called party answers the phone and alerts the caller that the number has been reassigned.

The FCC explicitly rejected the pragmatic argument that would have created a good faith exception to the TCPA's strict liability standard by exempting from liability any call made in good faith to the number last provided by the intended call recipient, unless and until the caller has actual knowledge that the intended recipient has relinquished his or her cell phone number. That standard could be satisfied when the original cell phone subscriber notifies the caller that he or she has relinquished his or her cell number or when the party to whom the number has been reassigned notifies the company about the reassignment. The Third Circuit decision only exacerbates this problem by broadly interpreting standing to bring suit.

CITING THE FCC'S JULY 2015 ORDER, THE THIRD CIRCUIT HELD THAT THE ZONE OF INTERESTS PROTECTED BY THE TCPA ENCOMPASSES MORE THAN JUST THE INTENDED RECIPIENTS OF AUTOMATED CALLS AND EXTENDS TO REGULAR USERS OF A GIVEN PHONE LINE. THE THIRD CIRCUIT REVERSED THE DISTRICT COURT'S HOLDING THAT THE SUBSCRIBER'S ROOMMATE LACKED STANDING TO SUE THE CALLER UNDER THE TCPA AND REMANDED THE CASE FOR FURTHER PROCEEDINGS.

CHALLENGES MOUNT TO FCC'S JULY 2015 TCPA ORDER

Accusing the FCC of abdicating its responsibility to clarify areas of uncertainty under the TCPA and muddying the already murky waters of the TCPA, more than a dozen parties have filed appeals challenging the FCC's July 10, 2015 TCPA Declaratory Ruling and Order. The FCC's Order purported to clarify the rules governing the TCPA but, instead, created more confusion than certainty by failing to articulate common sense rules that recognize the realities of modern day communication.

The pending appeals, which have been consolidated before the U.S. Court of Appeals for the D.C. Circuit,[1] have been filed by a wide range of business interests challenging various aspects of the FCC's Order. The challenges[2] focus on four core areas of dispute: (1) the FCC's lack of meaningful guidance on dealing with the growing problem of reassigned cell phone numbers; (2) the FCC's overbroad and inconsistent definition of autodialer; (3) the agency's vague and overly broad standards for consent, including revocation; and (4) issues unique to financial institutions and healthcare providers.

REASSIGNED CELL PHONE NUMBERS

Despite acknowledging that approximately 100,000 cell phone numbers are reassigned to new users each day and that no systematic means exist for businesses to track or even know when a subscriber has relinquished his or her cell phone number and whether that number has been reassigned, the FCC cautioned businesses to institute new and better safeguards to avoid calling reassigned wireless numbers that may give rise to TCPA liability. The FCC failed, however, to provide meaningful guidance on how to achieve this result. At least nine of the petitioners in the consolidated appeal have included this issue in their petition for review.

The FCC's Order creates a "one-call" exemption from the strict liability that attaches under the TCPA for calls made to a cellular telephone number the caller believes belongs to a consumer who previously provided some form of consent. As the petitioners have pointed out, this exemption is virtually meaningless for several reasons. First, the exemption does not take into account whether the one and only "free" call is actually answered. Second, it does not consider whether the caller obtains actual knowledge that the telephone number has been reassigned. Third, the exemption fails to take into account that before placing a call businesses have no practical way of verifying the accuracy of a customer's consent, which would terminate upon the relinquishment and reassignment of the customer's cell phone number. The FCC ascribes constructive knowledge to the caller when it places the second call regardless of whether the first call "yield[s] actual knowledge of reassignment." As several petitioners pointed out, this construction is arbitrary and capricious.

Several petitioners also have pointed out that the Order improperly defines "called party" in the consent provisions as the "current subscriber (or non-subscriber customary user of the phone)" rather than the intended recipient or expected recipient. The petitioners asserted that this interpretation violates the First Amendment by deterring lawful communications through the TCPA's strict liability scheme. Two petitioners asserted that this definition is contrary to other portions of the Order and effectively makes it impossible for callers to ensure that at the time of any call or text, the prior express consent obtained for that phone number remains valid.

AUTODIALERS

The TCPA restricts the use of autodialers, defined 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." Also included are predictive dialers, defined as "equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls."

In several cases decided prior to the FCC's Order, courts were trending towards a common sense standard recognizing that a piece of equipment's capacity alone, without some showing that the functionality in question had been utilized, would not be sufficient to establish liability under the TCPA. *Gragg v. Orange Cab Co., Inc.*, 995 F. Supp. 2d 1189, 1196 (W.D. Wash. 2014). See also *Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1291-1292 (S.D. Cal. Oct. 23, 2014); *Glauser v. GroupMe, Inc.*, 2015 WL 475111 *3-4 (N.D. Cal. Feb. 4, 2015).

In its Order, however, the FCC disregarded this pragmatic approach. The FCC stated that the mere capacity or capability to store or produce, and dial random or sequential numbers—without any showing that the functionality had been utilized at the time the calls were made—determines whether the equipment constitutes an autodialer. Highlighting its lack of meaningful guidance on whether equipment is or is not an autodialer, the FCC provided the following example: "it might be theoretically possible to modify a rotary-dial phone to such an extreme that it would satisfy the definition of 'autodialer,' but such a possibility is too attenuated for us to find that a rotary-dial phone has the requisite 'capacity' and therefore is an autodialer."

At least 10 of the petitioners pointed out that the FCC improperly expanded the definition even further by including equipment that lacks the present capacity but has "more than a theoretical potential" of being "modified to satisfy the [autodialer] definition" in the future. These petitioners contend that this definition is overly broad because it allows for potential liability far beyond Congress' original intent to impose liability for calling unlisted specialized numbers through an autodialer's ability to dial randomly and call sequential blocks of numbers.

On the more basic question of what functionality a piece of equipment must have to qualify as an autodialer, 10 of the petitioners pointed to the varying and inconsistent conclusions contained in the Order. One section of the Order confirms Congress' statutory definition of autodialer while another section states that the equipment need only have the capacity "to store or produce telephone numbers." Another section defines autodialer as equipment that can dial "without human intervention," a standard that does not appear anywhere in the TCPA. According to the petitioners, these varying definitions violate the Administrative Procedure Act (APA) and the Due Process Clause because they are inconsistent and irreconcilable.

NINETEEN ENTITIES HAVE FILED CHALLENGES TO THE FCC'S JULY 2015 ORDER WITH THE D.C. CIRCUIT, FOCUSING ON: (1) THE FCC'S LACK OF MEANINGFUL GUIDANCE ON DEALING WITH THE GROWING PROBLEM OF REASSIGNED CELL PHONE NUMBERS; (2) THE FCC'S OVERBROAD AND INCONSISTENT DEFINITION OF AUTODIALER; (3) THE AGENCY'S VAGUE AND OVERLY BROAD STANDARDS FOR CONSENT, INCLUDING REVOCATION; AND (4) ISSUES UNIQUE TO FINANCIAL INSTITUTIONS AND HEALTHCARE PROVIDERS.

CONSENT

The issue of consent is one aspect of the TCPA that has given rise to significant class action litigation. Consent for certain types of calls may be established expressly, generally by the called party previously providing a phone number. Consent for other types of calls must be in writing. Although not addressed in the text of the statute, the FCC Order states unambiguously that consent may be revoked at any time by any means, and a caller may not limit or restrict the manner in which revocation may occur.

At least nine of the petitioners contend that this standard is arbitrary and capricious because it allows revocations to be delivered in ways that do not reasonably inform companies of the called party's preferences. For example, several of the petitioners noted that the Order would allow, for example, a customer's oral notification to an employee at a caller's in-store bill payment location to serve as valid revocation of consent. That employee may not have any reasonable means of communicating the revocation of consent to those in the company responsible for recording revocations. Two of the

petitioners asserted that this standard is also inconsistent with prior FCC statements and puts an undue and excessive burden on callers, particularly those communicating by text message. For example, when a business sends an automated text message with a list of words that allow the consumer to stop future text messages by responding with a specific word or phrase, the FCC takes the position that a consumer could respond with a word which does not appear in the list and then file suit claiming a violation of the TCPA following receipt of any future text messages from the business. Due to limitations on the ability of technology to recognize every expression of desire to revoke consent, the business would have to manually review responses to determine which ones were revocations.

SPECIAL RULES FOR CERTAIN FINANCIAL AND HEALTHCARE-RELATED CALLS

Despite creating an exemption from the TCPA's consumer consent requirements for certain calls and texts it deems to be pro-consumer regarding time-sensitive financial and health-related issues, the Order's guidance creates practical problems in both arenas.

In the financial context, the National Association of Federal Credit Unions (NAFCU) takes issue with the Order's treatment of the "free-to-end-user" call exemption. It exempts calls about fraudulent transactions/identity theft, possible data breaches of customer's personal information that includes information about measures consumers may take to prevent identity theft following a data security breach, and money transfer notifications from the TCPA. But these communications must be completely free of charge to the recipient regardless of whether they come in the form of calls or text messages. NAFCU contends that this requirement makes it functionally impossible for financial institutions to take advantage of the exemption because customers' cell phone plans are still largely individualized. Financial institutions have no ability to determine whether a given customer has an unlimited calling and/or texting plan versus a plan with a monthly allotment of minutes and messages.

In the healthcare arena, Rite Aid challenges the arbitrary distinction between calls delivering HIPAA protected healthcare messages when placed to residential telephone lines—to which no TCPA liability would attach—and the same calls delivering the same messages when placed to wireless telephone numbers, where TCPA liability would attach. In addition, Rite Aid notes that the FCC's defined category of calls "for which there is exigency and that have a healthcare treatment purpose" excludes some calls that are otherwise permitted under HIPAA. In its opening brief, Rite Aid contends that the FCC has violated both the First Amendment and the APA by taking these positions on HIPAA-protected healthcare calls.

CONCLUSION

This appeal will be closely watched by companies that communicate with their customers by phone and text message. The outcome of the appeal could reshape the law in several key areas and rein in the FCC's expansive omnibus Order. Further developments in the case are expected in 2016. Meanwhile, the business community continues to deal with the ongoing wave of TCPA class actions filed in courts across the country.

---

[1] The entities joining the appeal include the following:

- ACA International (15-1211)
- Conifer Revenue Cycle Solutions, LLC (15-1211)
- Council of American Survey Research Organizations, jointly intervening with Marketing Research Association (15-1211)
- Gerzhom, Inc. (15-1211)
- MRS BPO LLC jointly intervening in (15-1211) with:
  - Cavalry Portfolio Services, LLC
  - Diversified Consultants, Inc.
  - Mercantile Adjustment Bureau, LLC
- Sirius XM Radio Inc. (15-1218)
- Professional Association for Customer Engagement, Inc. (15-1244)
- Salesforce.com Inc. jointly petitioning with its wholly owned subsidiary, ExactTarget, Inc. (15-1290)
- Consumer Bankers Association (15-1304)
- U.S. Chamber of Commerce (15-1306)
- National Association of Federal Credit Unions (15-1306)
- Vibes Media LLC (15-1311)
- Rite Aid Hdqtrs. Corp. (15-1313)
- Portfolio Recovery Associates, LLC (15-1314)

[2] A joint brief has been filed on behalf of Petitioners ACA International, Sirius XM, Pace, Salesforce.com, ExactTarget, Consumer Bankers Association, U.S. Chamber of Commerce, Vibes Media, and Portfolio Recovery Associates. Rite Aid Hqtrs. Corp. has filed an individual brief.

TCPA TEAM LEADERS

Lewis S. Wiener, Co-Chair
Partner, Washington DC
lewis.wiener@sutherland.com
202.383.0140

Allegra J. Lawrence-Hardy, Co-Chair
Partner, Atlanta
allegra.lawrence-hardy@sutherland.com
404.853.8497

ABOUT SUTHERLAND

Sutherland is an international legal service provider composed of associated legal practices that are separate entities, doing business in the U.S. as Sutherland Asbill & Brennan LLP and as Sutherland (Europe) LLP in London and Geneva. More than 435 lawyers help the world's largest companies, industry leaders, sector innovators and business entrepreneurs solve their biggest challenges and reach their business goals. Seven major practice areas—corporate, energy and environmental, financial services, intellectual property, litigation, real estate and tax—provide the framework for an extensive range of focus areas.

For more information about Sutherland's TCPA experience, please visit **www.sutherland.com/tcpa.**