EVERSHEDS SUTHERLAND

5th Annual TCPA Year-in-Review

Redial: 2018 TCPA Year-in-Review

Analysis of critical issues and trends in TCPA compliance and litigation

Notes

Introduction

Eversheds Sutherland is pleased to present our 5th annual REDIAL, our in-depth analysis of key Telephone Consumer Protection Act (TCPA) issues and trends. REDIAL reports on issues affecting the industries that face potential TCPA liability.

Did you know?

6 billion

Estimated number of **text messages sent daily** in the US.

100,000

Number of **cell phone numbers** that are **reassigned each day**, according to the FCC.

3,579

Number of **TCPA lawsuits filed in 2018** through November 30.

Eversheds Sutherland industry knowledge and focus

Few industries are immune from TCPA liability. In 2018, the insurance, financial services, energy and health sectors were uniquely affected by TCPA litigation. REDIAL analyzes key legal issues affecting these and other industries.

Eversheds Sutherland tracks daily all TCPA cases filed across the country. This allows us to spot trends and keep our clients focused and 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. When litigation is filed, Eversheds Sutherland's TCPA team has the depth of experience necessary to efficiently and effectively defend its clients' interests in court.

Why Eversheds Sutherland?

Strength in representing leading companies worldwide

Strength in knowing our clients' businesses

Strength in advising and counseling our clients on TCPA compliance

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

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Alternative fax? FCC and TCPA defendants urge Supreme Court to reject review of lower court's junk fax ruling

Oppositions to a petition for certiorari were recently filed with the United States Supreme Court urging the Court to reject a proposed appeal filed by serial TCPA plaintiffs seeking review of a March 2017 ruling by the US Court of Appeals for the DC Circuit striking down a 2006 Federal Communications Commission (FCC) rule requiring opt-out notices to appear on solicited fax advertisements. On January 16, 2018, the FCC and a group of companies, which have been sued for alleged violations of the TCPA, separately urged the Supreme Court to reject a September petition for certiorari filed by several TCPA serial class action plaintiffs (the Petitioners) seeking review of the March 2017 DC Circuit panel decision. The filings signal the next phase of protracted litigation over the 2006 FCC fax rule.

The TCPA, as amended by the Junk Fax Prevention Act (JFPA), generally prohibits unsolicited fax advertisements and requires opt-out notices for unsolicited faxes. The TCPA/JFPA, however, is silent about whether solicited faxes—those sent with the permission of the recipient—also require opt-out language. In 2006, the FCC issued a rule requiring that opt-out notices must be included on all faxes, even those sent with the permission of the recipient.

In 2010, Anda Pharmaceutical Inc. (Anda), the defendant in a class action alleging Anda sent solicited fax advertisements to pharmacies without the opt-out notice required under the FCC rule, petitioned the FCC for a declaratory ruling clarifying that the JFPA does not require businesses to place opt-out notices on solicited faxes. In October 2014, the FCC issued an Order affirming that the JFPA allowed the FCC to require the inclusion of the notices on all fax advertisements, regardless of whether the recipient had given permission. Anda appealed the FCC's Order to the DC Circuit.

Although an FCC rule requiring opt-out notices on even solicited fax advertisements has been invalidated, including opt-out notices on such faxes remains a best practice. Companies should be mindful that the TCPA generally prohibits unsolicited fax advertisements, regardless of whether they include opt-out language, and that opt-out notices must be included even if the sender is transmitting the fax by virtue of having an established business relationship with the recipient.

In a March 31, 2017 ruling, the US Court of Appeals for the DC Circuit invalidated the 2006 FCC rule. The court, in *Bais Yaakov of Spring Valley et al. v. FCC*, 14-1234 (D.C. Cir. Mar. 31, 2017), held that the FCC lacked the authority under the TCPA to require opt-out notices on solicited faxes because the JFPA requires only that opt-out notices be included on unsolicited faxes. The majority of the court found that allowing the FCC to promulgate a rule requiring opt-out notices on solicited faxes was beyond the scope of the authority delegated by Congress. On June 6, 2017, the DC Circuit denied the FCC's request for an en banc rehearing of the March decision.

The Petitioners, led by Bais Yaakov of Spring Valley, filed a writ of certiorari to the Supreme Court in September 2017 seeking review of the March decision. The Petitioners argue that the DC Circuit's decision conflicts with other courts on how to interpret statutory silence under the standard set by the US Supreme Court in *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), "effectively rewrit[ing]" the *Chevron* test by interpreting "statutory silence" to prohibit the FCC from enacting the rule.

In opposing the writ, the companies—which include, among others, Anda Pharmaceutical Inc., Merck & Co., Purdue and ZocDoc Inc.—argue that the DC Circuit decision is nothing more than "a straightforward statutory-interpretation decision that does not implicate any division of authority" and therefore is not worthy of the Supreme Court's attention.

Both the companies and the FCC also question the practical value of reviewing the decision in light of the FCC's lack of opposition to the rule being vacated and the existence of retroactive liability waivers limiting the universe of businesses that the Petitioners could sue.

A decision on whether the Supreme Court will grant certiorari is expected later in the year. Going forward, even though the 2006 FCC rule remains vacated, businesses and their counsel should be mindful of the core requirements of the TCPA and the JFPA.

Best practices include the following:

- Unsolicited fax advertisements are generally prohibited by the TCPA, even if an opt-out notice is included on the fax.
- A fax advertisement may be sent to a party with whom the sender has an established business relationship (EBR), subject to various requirements. An opt-out notice is required if the sender is relying on the EBR.
- For a solicited fax advertisement (sent with the express permission of the recipient), an opt-out notice is no longer strictly required by the TCPA, but inclusion of an opt-out notice on all faxes is a best practice.
- An opt-out notice should contain each of the elements required by the FCC rules, which are specific on the mechanisms and disclosures that must be included.

For solicited faxes, businesses must maintain appropriate records so that they are aware of recipients who have provided express consent and those who have opted out of receiving further communications.

Deference or preference – Supreme Court to address agency authority in context of TCPA litigation

Are courts bound by FCC rulings and orders in deciding TCPA cases? The United States Supreme Court has agreed to take on a case raising this very issue. On November 13, 2018, the Supreme Court granted certiorari in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, Case No. 17-1705 (styled in the US Court of Appeals for the Fourth Circuit as *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 883 F.3d 459 (4th Cir. 2018)) to address whether the Hobbs Act requires federal district courts to defer to the FCC's legal interpretation of the TCPA.

The Hobbs Act grants the federal courts of appeal, with the exception of the United States Court of Appeals for the Federal Circuit, exclusive jurisdiction to set aside, suspend or rule on the validity of orders, rules and regulations issued by certain federal agencies, including final orders issued by the FCC. 28 U.S.C. § 2342. In light of the act's exclusive grant of jurisdiction to federal appellate courts, the debate has centered on whether federal district courts, in deciding private litigation, must forego what is known as the *Chevron* analysis and instead follow FCC guidance interpreting the TCPA.

Should the Supreme Court find that the Hobbs Act does not require district courts to adhere to FCC guidance, TCPA private litigants would be free to make arguments against FCC rulings and orders in private cases. This would upend the rules that currently apply to most TCPA litigation, where most courts strictly apply the FCC's rules.

United States Supreme Court to Address Application of the Hobbs Act

As happens so often in TCPA cases, *PDR Network* began with one fax. In December 2013, PDR Network, LLC (PDR), sent a fax offering a free eBook version of a medical reference book to Carlton & Harris, a chiropractic office. Following the adage that no good deed goes unpunished, Carlton & Harris sued, alleging that PDR violated the TCPA, which prohibits the use of facsimile communications to send unsolicited advertisements. 47 U.S.C. § 227(b)(1)(C).

The TCPA defines an unsolicited advertisement, in part, as "any material advertising the commercial availability or quality of any property, goods, or services" sent without the recipient's consent. *Id.* at § 227(a)(5). An FCC rule adopted in 2006 further expounds upon the definition by including "facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars." 21 FCC Rcd. 3787, 3814 ¶ 52 (2006).

Applying the traditional *Chevron* standard, the district court found that because the language of the TCPA is clear, it did not need to afford "substantial deference" to FCC guidance and interpretation of the statute. Importantly for the district court, neither party in the litigation challenged the validity of the 2006 FCC rule, and thus did not trigger the Hobbs Act's provision that exclusively reserves jurisdiction to federal appellate courts for challenges regarding the validity of agency orders.

The district court, in relying upon the TCPA's text, read the statutory definition to require that the fax have a "commercial aim." The district court found that PDR's fax was not an unsolicited advertisement because the medical reference book was free, and thus PDR did not "hope to make a profit" by offering the book. The district court further held that even if the 2006 FCC rule were operative, PDR's fax would not constitute an unsolicited advertisement because it did not promote a good in a commercial manner.

The United States Supreme Court has agreed to answer the question of whether federal district courts must follow FCC rulings and orders when deciding TCPA cases. The Supreme Court's decision will likely impact the strength of FCC guidance going forward, which in turn will impact the extent to which private litigants can successfully argue against FCC rulings and orders.

On appeal, a 2-1 Fourth Circuit panel vacated the district court's ruling and remanded the case to the district court, holding that the Hobbs Act set forth a "jurisdictional command" to the district court to apply the FCC's interpretation of the TCPA. The Fourth Circuit held that the Hobbs Act prevented the district court from ever applying *Chevron* by effectively "strip[ping] jurisdiction from the district court[]" to engage in the *Chevron* analysis. As a result, the Fourth Circuit held that the district court acted beyond the scope of its authority as set forth in the Hobbs Act by not deferring to the FCC's interpretation.

The Fourth Circuit, in applying the 2006 FCC rule, held that even the promotion of free goods and services constitutes an unsolicited advertisement. The fact that PDR's medical reference book was free did not, therefore, shield PDR from liability.

In its petition for certiorari, PDR asserted that should the Fourth Circuit's application of the Hobbs Act stand, its ruling would effectively place federal agencies above the judiciary by restricting courts' charge and duty to interpret the law. As suggested by PDR, this case involves one of the most fundamental aspects of American jurisprudence—the balance of powers and the respective roles among the Executive, Congress and the Judiciary in determining who has the power to determine what the law is and how it should be defined. Notably, the Supreme Court will not address the question of whether faxes that promote free goods and services are *per se* advertisements under the 2006 FCC rule.

Conclusion

PDR Network presents a number of compelling issues, including whether district courts are free to engage in the *Chevron* analysis, thus looking only to FCC guidance if the TCPA is ambiguous or whether the Hobbs Act requires that they automatically look to the FCC to interpret the TCPA. In the ever-evolving landscape of TCPA litigation and the interplay between the statutory text and the FCC's regulatory guidance, the Supreme Court's decision in PDR Network may provide TCPA litigants with clearer precedent and much sought-after answers. The Supreme Court's ruling, in either limiting or expanding the weight of FCC orders, will likely play a significant role in TCPA jurisprudence and the ability of litigants to both maintain and defend TCPA claims.

Call connected: DC Circuit finally weighs in, rejects significant parts of the Federal Communications Commission's 2015 TCPA order

In a long-awaited ruling, the US Court of Appeals for the DC Circuit trimmed the expansive scope of the TCPA. The appellants, in *ACA International v. Federal Communications Commission (FCC)*, challenged the FCC's July 2015 Omnibus TCPA Declaratory Ruling and Order (2015 TCPA Order), which had, among other things, expansively defined "automatic telephone dialing system" and afforded callers one opportunity to call a cell phone to determine whether the number had been reassigned, whether or not the cell subscriber answered the phone. The decision in *ACA International* should narrow the scope of potential TCPA liability by, among other things, more narrowly (and rationally) defining what constitutes an autodialer, and by taking a more practical approach to the rules regarding calls to the millions of cell phone numbers that are reassigned each year.

More specifically, the court considered four sets of challenges to the 2015 TCPA Order, striking down two parts of the FCC's TCPA rules while upholding two others. Specifically, the court:

- Struck down the FCC's overbroad definition of autodialer;
- Set aside the FCC's rules on calls to reassigned cell phone numbers;
- Upheld the FCC's ruling that a party can revoke consent through any reasonable means (while also suggesting that parties may by mutual consent agree to the manner in which consent may be revoked); and
- Upheld the scope of the FCC's exemption for time-sensitive, healthcare-related calls.

These decisions and their key implications are discussed below.

1. The Definition of Autodialer and the Scope of the TCPA

"It cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact."

On the most significant issue with the most far-reaching implications—the FCC's expansive definition of autodialer—the court unambiguously rejected the FCC's broad definition. The court held that the 2015 TCPA Order "falls short of reasoned decision making in 'offer[ing] no meaningful guidance' to affected parties" on whether their equipment is covered by the TCPA restrictions. The TCPA generally makes it unlawful to call a cell phone using an automated telephone dialing system, or ATDS, and defines an ATDS as equipment with the capacity to perform each of two enumerated functions: (i) storing or producing telephone numbers "using a random or sequential number generator" and (ii) dialing those numbers. In the 2015 TCPA Order, the FCC defined capacity to include "potential functionalities," including potential modifications such as software changes, rather than limiting the scope to present capacity. The appeal challenged the expanded definition as impermissibly vague and imposing liability beyond the original intent of Congress when it enacted the TCPA in 1991.

The court agreed with the appellants in finding that the FCC's definition would include not only traditional calling equipment, but even a typical smartphone would fall within the FCC's overly broad definition of autodialer. It is undisputed that by downloading an app, nearly any modern phone can make automated calls. Based on this fact, the court

eviscerated the FCC's expansive definition as "eye-popping" and unreasonable, because it would cover "the most ubiquitous type of phone equipment known, used countless times each day for routine communications by the vast majority of people in the country," and would leave every smartphone user open to TCPA liability for sending a call or text without prior consent. That result would yield a "several-fold gulf" between the statute's intent and its application, and render nearly every American a serial TCPA violator. The TCPA was enacted to curb abuses by telemarketers, not to constrain "hundreds of millions of everyday callers." The court concluded that, in this regard, the 2015 TCPA Order was arbitrary and capricious.

The court also pointed to other inconsistencies and unanswered questions that left businesses "in a fog of uncertainty about how to determine if a device is an ATDS." On the issue of whether a device qualifies as an ATDS only if it can generate random or sequential numbers to be dialed, the court observed that the FCC provided "no clear answer (and in fact seems to give both answers)." On the element of human intervention, the court observed that under the FCC Order, the basic function of an autodialer is to dial numbers without human intervention, but "a device might still qualify as an autodialer even if it cannot dial numbers without human intervention." The court stated that "[t]hose side-by-side propositions are difficult to square."

Implications of the Court's Ruling

Although the court struck down the FCC's definition, the decision does not immediately put in place a new definition. Unfortunately, this means there will be a lack of clarity about what functions qualify a device as an autodialer. With the FCC's definition now set aside, it is unclear exactly what features are required elements of an ATDS, and which features would take a calling system outside the scope of the TCPA. Nor is it clear what level of human intervention in a call will disqualify a device as an ATDS. Finally, the court specifically declined to address whether the TCPA applies to non-automated calls (i.e., manually dialed calls) made with a device that otherwise qualifies as an autodialed device based on its capacity. These issues are likely to be reconsidered by the FCC, although there is no timetable for doing so.

2. Calls to Reassigned Cell Phone Numbers

"We set aside the [FCC's] interpretation [of TCPA liability for calling reassigned cell phone numbers] on the ground that the one-call safe harbor is arbitrary and capricious."

The court also struck down the FCC's rules on the intractable problem of calls to reassigned cell phone numbers. Perhaps no issue has caused more unintended problems under the TCPA than reassigned cell phone numbers. Millions of wireless numbers are reassigned every year, but there is no systematic and reliable way for callers to track those reassignments. This situation has left callers facing a potential liability trap solely based on routine, good faith communications directed to their own customer lists.

Under the 2015 TCPA Order, a caller could be strictly liable for a call to a reassigned cell phone number even where the caller had consent from the prior subscriber and the call to that number was made on the good faith belief that the caller was trying to reach the original subscriber. What's more, the "safe harbor" is anything but—it is limited to one call, regardless of whether the caller obtained any information from that call that would give it any reason to believe that the number was reassigned. Although the FCC is working on new rules for a database to track reassigned numbers, businesses are not presently able to track when a subscriber has relinquished his or her cell phone number, or whether that number has been reassigned to another user.

On appeal, the DC Circuit found that the FCC's one-call safe harbor rule is arbitrary and capricious. As the court observed, the FCC itself acknowledged "that even the most careful caller, after employing all reasonably available tools to learn about reassignments, may nevertheless not learn of reassignment before placing a call to a new subscriber." And the FCC failed to "give some reasoned (and reasonable) explanation of why its safe harbor stopped at the seemingly arbitrary point of a single call or message." Instead, the court questioned why a "reasonable reliance" standard was not adopted, to protect callers who rely in good faith on the consent from the prior subscriber when making the call.

Implications of the Court's Ruling

The court's ultimate holding on this issue is particularly helpful for businesses. Rather than simply striking the one-call safe harbor, the court found that the appropriate remedy was to set aside the FCC's treatment of reassigned numbers in its entirety. The court noted that the FCC is already working on a regime for allowing tracking of reassigned numbers, so the court may expect that the FCC will revisit its rulemaking approach on this issue to be more realistic.

The DC Circuit in *ACA International* struck down portions of the FCC's 2015 TCPA Order, most notably by invalidating the FCC's broad definition of autodialer and the one-call safe harbor rule for calls made to reassigned cell phone numbers. Other portions of the 2015 TCPA Order remain in place including the FCC's holding that consumers may revoke consent through reasonable means and the FCC's liability exemption for exigent healthcare calls.

3. Revocation of Consent Rules Upheld

After striking down the 2015 Order on two key issues, the court upheld the FCC's rulemaking on standards for revocation of consent. The FCC had concluded that consumers may revoke consent to be called "by any reasonable means." This rule precluded callers from unilaterally prescribing the exclusive means for revocation. The court held that this was a valid exercise of the agency's rulemaking authority, and the court rejected the appellants' argument that tracking opt-outs through many channels would cause undue burden. Instead, the court opined that the rule would incentivize callers to offer convenient opt-out methods, and that consumers' attempts to opt out by unconventional means should be viewed as unreasonable.

Implications of the Court's Ruling

The court limited its holding, and its interpretation of the FCC Order, to apply only to unilateral imposition of revocation rules by callers, in contrast to conditions set by contract. The court stated that its decision "does not address revocation rules mutually adopted by contracting parties" and "nothing in the Commission's order thus should be understood to speak to parties' ability to agree upon revocation procedures." The decision in *ACA International* leaves intact revocation standards agreed to by contract, including the Second Circuit's standard that consent is not revocable at all if included as a term of a written contract. *See* *Reyes v. Lincoln Automotive* 861 F.3d 51 (2nd Cir. June 22, 2017).

4. Limits on Healthcare Exemption Survive

Finally, the court upheld the FCC exemption on calls to wireless numbers "for which there is exigency and that have a healthcare treatment purpose." One of the petitioners challenged the limited scope of the exemption, which applies only to time-sensitive calls that have a healthcare treatment purpose, specifically, such as 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, and home healthcare instructions. The exemption does not cover calls "that include telemarketing, solicitation, or advertising content, or which include accounting, billing, debt-collection, or other financial content." On this issue, the court upheld the 2015 TCPA Order, finding that the FCC was empowered to draw a distinction between different types of calls.

Eversheds Sutherland Evaluation: What Does It All Mean?

Assuming it becomes final in its current form, the implications of the court ruling are significant.

First, the decision could result in a significantly narrowed TCPA, most notably with respect to the definition of what constitutes use of an autodialer. Since the FCC issued its 2015 TCPA Order, courts have struggled to apply the standard in pending cases, while businesses have grappled with questions about whether their calling equipment falls within the restrictions set by the TCPA. A revised definition from the FCC would—hopefully—provide clarity, and any new standard is almost certain to be narrower and more clearly defined than the FCC's 2015 definition.

Second, assuming the FCC chooses to craft a new definition of autodialer, the new rule will be set by a politically reconstituted FCC, where the dissenting commissioners from 2015 are now in the majority. With the shift to Republican control of the administration after the 2016 election, former minority commissioner Ajit Pai is now Chairman of the FCC and leads a 3-2 Republican majority on the commission. In 2015, Chairman Pai, along with Commissioner Michael O'Rielly, was strongly critical of the approach taken by the FCC in the 2015 TCPA Order, and he issued a harsh dissenting statement at the time the 2015 TCPA Order was issued. This history suggests that the new FCC could go in a very different direction from the 2015 TCPA Order.

Third, the decision may foreshadow the end of the ongoing wave of litigation based on calls to reassigned cell phone numbers. These lawsuits have been a trap for businesses which are operating in good faith and which have

had essentially no way to avoid making at least some calls to reassigned cell numbers. Combined with the FCC's new effort to create a tracking system for reassignments, the court's decision to invalidate the rule on reassigned numbers may ultimately provide relief to businesses on this issue.

Fourth, defendants in TCPA class actions will use this ruling as new ammunition in their defense of ongoing cases, many of which have been stayed as parties and courts awaited the DC Circuit's ruling.

Finally, it bears mentioning that the DC Circuit's decision is not yet final. Either side may ask for reconsideration by the Circuit *en banc*. A petition for rehearing must be made within 45 days (given that the US government is a party), and either side may file a petition for certiorari to the US Supreme Court within 90 days of entry of judgment of this decision or an en banc decision, should one be issued.

In most other cases, an appeal by the US government would be a virtual certainty. In this case, however, now that the FCC is controlled by Republican commissioners, the FCC may welcome the DC Circuit's decision in *ACA International*.

Eversheds Sutherland Practice Point: The *ACA International* decision has widespread implications in TCPA jurisprudence as it signals an attempt by the DC Circuit to curb the overly expansive autodialer definition recognized by the FCC and to provide more practical safeguards for liability issues surrounding calls made to reassigned cell phone numbers.

SPEAK UP – FCC invites comment on proposed rules governing calls to reassigned cell phone numbers and attendant TCPA liability

On March 22, 2018, the FCC issued its Second Further Notice of Proposed Rulemaking and is seeking comments on the intractable problem of TCPA liability stemming from calls to reassigned cell phone numbers. This second open comment period on this topic has now taken on greater urgency following the March 16, 2018, reversal of significant portions of the FCC's July 2015 Omnibus TCPA Order by the US Court of Appeals for the DC Circuit.

Specifically, the Second Notice:

- Proposes to ensure that one or more databases are available to provide callers with the comprehensive and timely information they need to avoid calling reassigned numbers.
- Seeks comment on the information that callers need if they choose to use a reassigned number database.
- Seeks comment on the best way for service providers to report that information and for callers to access that information, including the following three alternatives:
  - » Requiring service providers to report reassigned number information to a single, FCC-designated database;
  - » Requiring service providers to report that information to one or more commercial data aggregators; or
  - » Allowing service providers to report that information to commercial data aggregators on a voluntary basis.
- Seeks comment on whether, and how, the FCC should adopt a safe harbor from TCPA liability for those callers that choose to use a reassigned number database.

The FCC stated in the Second Notice that it would not require callers to utilize the database, but seeks further comment on whether the implementation and use of a comprehensive database would be an effective way to allow companies to avail themselves of a newly created TCPA safe harbor. During the first open comment period, some commenters criticized the creation of a reassigned number database on the grounds that it could drive up compliance costs for good actors while not deterring spam callers from calling consumers. The FCC also acknowledged that some commenters would like a safe harbor for those callers that use "existing commercial solutions" to attempt to avoid calling reassigned cell phone numbers.

Following the DC Circuit's holding in *ACA International* that the FCC's one-call safe harbor regarding reassigned cell phone numbers was "arbitrary and capricious," the FCC issued a notice of proposed rulemaking, seeking public comment on how to address various liability concerns stemming from calls made to reassigned cell phone numbers, thereby giving the industry a valuable opportunity to suggest practical policy solutions to this issue.

The US Court of Appeals for the DC Circuit held that the FCC's one-call safe harbor rule relating to reassigned cell phone numbers was "arbitrary and capricious." With the FCC back to square one on how to deal with the problem of reassigned cell phone numbers, and with millions of cell phone numbers being reassigned each year, the open comment period provides businesses that call and text their customers a rare opportunity to have an impact on an area that has been a source of significant TCPA liability.

In its July 2015 Omnibus TCPA Declaratory Ruling and Order (2015 TCPA Order), the FCC crafted a rule that afforded callers one opportunity to call a cell phone to determine whether the number had been reassigned so that callers could establish whether they had consent to place the call. Under the FCC's rule, however, the caller was deemed to have knowledge on whether the number had been reassigned (and therefore, did not have consent from the current subscriber), even if the

cell subscriber did not answer the phone. If the caller made a second call to the reassigned number, TCPA liability could attach, even if the caller had consent from the prior subscriber, and the call to the number (since reassigned) was made in good faith to reach the original consenting subscriber.

As a result, calls made to customers from whom companies believed they had consent were actually made to non-consenting cell phone subscribers in violation of the TCPA. To compound the issue, the recipient of the calls had no obligation to alert the caller of the mistake, and instead could let the calls—and accompanying statutory damages—accumulate.

Recognizing the inherent unfairness in the FCC's approach, the DC Circuit struck down the one-call safe harbor as arbitrary and capricious. The court also questioned why the FCC had not adopted a reasonable reliance standard to try to protect good-faith callers while also preventing a flood of unwanted calls to consumers. The DC Circuit set aside the FCC's rule on reassigned cell phone numbers, leaving it to the FCC to revisit the issue.

There is currently no systematic and reliable way for callers to track reassigned cell phone numbers. This situation has left callers facing a potential liability trap solely based on routine, good-faith communications directed to their own customer lists. The FCC is, therefore, working on new rules for databases to track reassigned numbers. Specifically, in the Second Further Notice of Proposed Rulemaking (Second Notice), which was adopted on March 22, 2018, the FCC proposes and seeks comment on ways to address the problem.

The DC Circuit's rejection of the prior safe harbor rule is not the only extenuating factor to consider. The political makeup of the FCC itself has changed considerably since the 2015 Order, with Republican Chairman Ajit Pai now helming the Commission. Chairman Pai and fellow Republican Commissioner Michael O'Rielly dissented vigorously from the 2015 Order, and recent comments suggest strongly that the FCC will take a different approach to the issue of reassigned numbers than it did three years ago.

In the press release accompanying the Second Notice, Chairman Pai commented that "[w]ith a robust record [from commenters], we hope to adopt an approach that's easy-to-use and cost-effective for callers while minimizing the reporting burdens on service providers." Commissioner O'Rielly also noted that "we have to have real data [from commenters] about the costs and benefits of creating a reassigned numbers database." Commissioner O'Rielly indicated that he "wonder[s] whether the benefit of a new database will exceed the costs of creating it and potentially requiring service providers to keep it or other databases current." He opened the door to the option of "encourag[ing] voluntary reporting to existing, commercially available databases with appropriate legal protections for those that decide to do so."

In other words, the FCC is taking a different approach to this issue than it did in its 2015 Order. As the FCC has made clear, companies that are impacted by the thorny issue of reassigned cell phone numbers have an opportunity to effectuate real policy change through participation in the comment period.

Frequently asked questions about the DC Circuit's *ACA International* decision

Here are answers to many of the Frequently Asked Questions arising from the DC Circuit's decision in *ACA International*.

1. TCPA R.I.P.?

No. The DC Circuit struck down two of the FCC's most controversial rules—the expansive definition of autodialer and the rules regarding calls to reassigned numbers—but ultimately the decision raises more questions than it answers. Although two of the old rules are gone, the decision leaves it to the FCC to fashion new rules. The court resoundingly rejected some of the expansive interpretations from the Obama-era FCC but simultaneously acknowledged that the FCC continues to enjoy broad discretion in setting the scope of new rules, including on the definition of autodialer/ATDS. Further, even after *ACA International*, many key aspects of the TCPA remain in place, including restrictions on prerecorded calls, standards for prior express consent and prior express written consent, and statutory damages for violations.

2. What is an "automated telephone dialing system" (ATDS)?

That's still not clear. Although the court struck down the FCC's definition, which was so broadly written that it encompassed virtually every smartphone in the country (making every man, woman and child a potential TCPA violator), the decision does not immediately put a new definition into place. Unfortunately, this means there will continue to be a lack of clarity about what qualifies a device as an autodialer. For example, it is unclear whether a device is an ATDS if it can only dial from a list of numbers, or whether an ATDS must also have the capacity to generate numbers. Nor is it clear what level of human intervention involved in placing a call will disqualify a device as an ATDS. Until the FCC promulgates new rules, parties in litigation should look to the plain language of the statute.

3. Is a predictive dialer an ATDS?

This is expected to be one of the most hotly disputed issues in any new FCC rulemaking process. Under the plain language of the statute, an ATDS must have "the capacity… to store or produce telephone numbers to be called, using a random or sequential number generator." For many years, FCC rules have suggested that the capacity to dial from a list of numbers is sufficient, and FCC rules going back more than 10 years have indicated that a predictive dialer is an autodialer. The DC Circuit struck down the FCC rules on these matters, but did not answer the underlying question: "Does a device qualify as an ATDS only if it can generate random or sequential numbers to be dialed, or can it so qualify even if it lacks that capacity?" The court suggested that the FCC may have authority to adopt either interpretation, as long as the rules are clear.

4. Can a manually dialed call violate the TCPA?

On this question, the 2015 TCPA Order was expansive: any call, even if manually dialed, could be a potential autodialing violation if the call were placed using a system with the potential "capacity" to make automated calls, even if the autodialing feature was not used and arguably even if system lacked the present capacity to autodial. This issue was not raised in the *ACA International* appeal, but the DC Circuit wrote several paragraphs highlighting problems with the FCC's standard. Quoting from one of the dissents from the 2015 TCPA Order, the court suggested that the FCC consider limiting the reach of the TCPA to calls actually made using autodialing features. Expect the FCC to consider this issue when it looks at this matter anew.

5. How is the FCC likely to define ATDS going forward?

This is an open question, but it seems to be a virtual certainty that the new definition will be more narrowly tailored than the 2015 TCPA Order. Current FCC Chairman Ajit Pai and Commissioner Michael O'Rielly, both of whom dissented from the 2015 TCPA Order, are now in the majority, and they both issued statements immediately following the DC Circuit's decision applauding the decision and indicating a desire to trim the expansive scope of the TCPA.

Will they curtail the scope of the TCPA significantly and open up the rules for placing calls to consumers? It's possible. But the politics are also important. Consumers are already disgusted with robocalls, so more permissive calling rules could result in a political blowback if consumers feel an increase in unwanted call volume. Expect the FCC to attempt to balance the competing interests of protecting consumers from unwanted calls while also creating more workable compliance rules for businesses that are acting in good faith.

The DC Circuit's decision in *ACA International* arguably raised more questions than it answered by creating gaps needed to be filled by new FCC rules. Due to these now noticeable voids in FCC guidance, *ACA International* has created uncertainty in TCPA litigation by requiring the FCC to return once again to the proverbial drawing board.

6. What's the rule on calling reassigned cell phone numbers?

As with the rules on ATDS, the DC Circuit opinion struck down the FCC rule, leaving a potential vacuum in its place. Under the old FCC rule, an ATDS call to a cell phone could not be made without the consent of the "called party." "Called party" was defined as the current subscriber of the phone number rather than the intended recipient and person who may have initially provided consent. The result was that a call to a reassigned cell phone number was a violation of the TCPA since the "called party" was not the party who provided consent. In the 2015 TCPA Order, the FCC created a one-call safe harbor exception to this rule: callers could place a single call, free from TCPA liability, to a reassigned cell phone number to find out if the current subscriber (the "called party" is the same person who originally provided consent). The safe harbor expired, however, even if the subscriber did not answer the phone or the caller otherwise had no way of knowing that the number had been reassigned. This unworkable standard was compounded by an intractable compliance problem for callers arising from an absence of reliable methods to track reassignments.

The court set aside, for now, not only the one-call safe harbor for calls to reassigned numbers, but also the concept that the new subscriber is the "called party" when the caller was attempting to call someone else. Although this broader rejection of the FCC's standard is generally helpful to business, the absence of clear rules in the short term creates a potential risk. Even before the FCC adopted its 2015 rules, several courts of appeal had interpreted the TCPA as imposing potential liability for calls to reassigned cell phone numbers, and without any safe harbor. Until the FCC weighs back in with a rule governing reassigned cell numbers, the courts may apply their own interpretation of the statute and the consent provisions of the TCPA.

7. How will the FCC address the issue of reassigned cell phone numbers?

The FCC is already considering a system for tracking reassigned numbers that will enable businesses to identify reassigned cell phone numbers and update their customer information. On the issue of TCPA liability for calls to reassigned cell phone numbers, the FCC could go in several directions. It could define "called party" as the "intended recipient," which would mean that calls to reassigned numbers would not run afoul of the TCPA if the caller had consent from the prior subscriber. Or it could establish a more limited safe harbor and good faith exception for calls to reassigned numbers in situations where the caller had no practical way to identify the reassignment prior to call.

In the interim, there are a number of court decisions—including several that predate the 2015 TCPA Order—that hold that calls to reassigned cell numbers do violate the TCPA. Hopefully, the FCC will move quickly to address the uncertainty for businesses making calls in good faith to their own customers.

8. Does a company still have to accept an opt-out request by any means, i.e., can the consumer revoke consent in many ways?

The court upheld the FCC rule that a consumer may revoke consent by any reasonable means, and that callers cannot unilaterally prescribe the methods for opting out. But the court also suggested that there must be reasonableness limits. If a caller makes available "clearly-defined and easy-to-use opt-out methods," then it would be unreasonable for consumers to make "idiosyncratic or imaginative revocation requests." This continues to put the burden on businesses to accept revocations through a variety of channels, but consumers cannot opt out through unreasonable means.

9. Can a consumer's right to opt out be limited by contract?

The DC Circuit kept the window open to permit businesses to impose contractual terms that define the manner in which consumers may opt out. The court stated that its decision "does not address revocation rules mutually adopted by contracting parties" and "nothing in the Commission's order thus should be understood to speak to parties' ability to agree upon revocation procedures." As for broader restrictions on opt-outs, several courts have held that consent is irrevocable if it is a term of a contract.

10. How does this ruling impact pending litigation?

It will depend on the issue in dispute in individual cases. By striking down the 2015 TCPA Order, the court created a void with respect to certain TCPA rules. In those instances the plain language of the statute should arguably govern, along with prior court authorities that predated the rules. Parties should consider whether it makes sense to litigate under existing precedent, or whether they should seek a stay of their cases pending development of new rules at the FCC.

Bonus Q&A: When will the DC Circuit's opinion become final?

Although the FCC is unlikely to continue the litigation, the decision is not final until the court issues a mandate. A petition for rehearing would need to be made within 45 days (given that the US government is a party), and assuming no such petition is filed, the mandate would be issued within seven days thereafter. Alternatively, either side could seek a stay of the mandate and file a petition for certiorari to the US Supreme Court within 90 days of the decision, or within 90 days of an en banc decision, should one be issued.

Now's your chance – FCC asks for help defining autodialer, other TCPA issues

"What is an autodialer?" The FCC wants to know what you think.

For years, the question of what constitutes an autodialer has confounded courts, the FCC, and companies that call and text their customers. The implications of that confusion cannot be overstated, as liability under the TCPA often depends on whether a company used an autodialer without the consent of the recipient of the call. The US Court of Appeals for the DC Circuit recently struck down the FCC's prior definition of autodialer, leaving open this central question of law. The FCC now seeks to fill that void, and is soliciting comments on what constitutes an "automatic telephone dialing system," along with other important TCPA issues. The comment period offers a unique opportunity for companies that call and text their customers to influence public policy.

The TCPA defines an autodialer as any "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." In its 2015 Declaratory Ruling and Order (2015 Order), the FCC's interpretation of "capacity" means that any equipment requiring the addition of software satisfies the TCPA's definition. The FCC's interpretation of capacity was so overbroad that it encompassed all smartphones, and the DC Circuit set it aside in March 2018, in a long-awaited decision on the 2015 Order.

On the issue of autodialer, the FCC's Public Notice poses more than a dozen questions to commenters. With respect to interpreting the term "capacity" under the TCPA, how much effort should be required to convert a non-autodialer to an autodialer? And can equipment have capacity to be an autodialer if all it requires is that the user flip a switch or click a button? The FCC also seeks help to interpret the term "automatic" in automatic dialer, and specifically just how much human intervention is required before a dialing system crosses the line into being a "manual" dialer. Similarly, the FCC requests comments on whether an autodialer must be able to dial random or sequential numbers, an issue that the FCC's 2015 Order failed to adequately address. Finally, the FCC asks whether the autodialing software must be used to initiate a call for that call to be subject to the statutory prohibition, or if any call made from equipment that has autodialing software is subject to the TCPA's rules on autodialers, even if the call is placed without using the autodialing software.

In the same Public Notice, the FCC also asks for comment on the issue of reassigned wireless numbers. Under the TCPA, a caller must have prior express consent of the "called party" to dial a cell phone number using an autodialer. The FCC previously provided a one-call "safe harbor" for calls made to reassigned cell phone numbers, but the DC Circuit struck that down as "arbitrary and capricious." The FCC now asks whether some form of a safe harbor makes sense and whether "called party" should mean different things in different contexts. For example, should the called party mean the subscriber, the intended recipient, the person who answers the call, or something different?

The FCC next raises the question of revocation of prior express consent to receive autodialed calls, and specifically "what opt-out methods would be sufficiently clearly defined and easy to use" for callers and consumers alike.

This particular Public Notice presents companies that call and text their customers with a rare opportunity to encourage the FCC to issue sensible, straightforward, and business-friendly guidelines for the TCPA.

The FCC, tasked with implementing new rules defining what constitutes an autodialer and the extent to which liability under the TCPA should be imposed on calls made to reassigned cell phone numbers, initiated a comment period to seek public input on more than a dozen questions. FCC Commissioner Ajit Pai and Commissioner Michael O'Rielly, both now in the Republican majority on the FCC, strongly encouraged public comment, hopefully signaling the FCC's responsiveness to industry feedback and proposals.

Crunch time – Courts split on definition of autodialer under TCPA and FCC requests immediate supplemental comments

On October 3, 2018, the FCC instituted a brief, immediate, supplemental comment period as it seeks to resolve an issue at the heart of thousands of lawsuits filed under the TCPA over the last several years, namely what constitutes an "automatic telephone dialing system" (ATDS). As highlighted by a recent Ninth Circuit decision, courts have been unable to agree on the proper definition of an ATDS. The FCC will now attempt to resolve the issue in an expected upcoming order, following its supplemental comment period.

The definition of an ATDS (or "autodialer") under the TCPA hinges on the statute's use of the word "capacity." To fall within the TCPA's definition of autodialer, equipment need only have the "capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). In its July 2015 Omnibus TCPA Declaratory Ruling and Order (2015 TCPA Order), the FCC expounded on the broad concept of capacity by opining that an autodialer is distinguished from other equipment solely by its capability to store or produce random or sequential telephone numbers and subsequently dial said numbers. In other words, the 2015 TCPA Order held that if a machine has the capacity to act as an ATDS, it is an ATDS, even if it is not actually used as one.

Nearly three years later, in March 2018, the US Court of Appeals for the DC Circuit rejected the FCC's definition as overly broad and "eye-popping," holding that the 2015 TCPA Order was arbitrary and capricious. *ACA International v. FCC*, Case No. 15-1211, 2018 WL 1352922 (D.C. Cir. Mar. 16, 2018). But the DC Circuit did not offer an alternative definition and remanded the issue to the FCC.

To aid its inquiry and determination of a legally supportable and rational definition, the FCC instituted an open comment period in May 2018. Unfortunately, while the FCC considers the issue, courts and litigants are left without clear guidance on the proper definition of an ATDS. In the interim, courts sought to fill that void, with mixed results.

Off the hook: Ongoing divergence illustrated by *Marks and Glasser*

Most notably, the month of September saw conflicting decisions on the definition of ATDS from the Ninth Circuit and the Middle District of Florida.

In *Marks v. Crunch San Diego, LLC*, Case No. 14-56834, 2018 WL 4495553 (9th Cir. Sept. 20, 2018), the Ninth Circuit adopted an expansive autodialer interpretation. The defendant, a gym, utilized a "Textmunication" system to send text messages to potential and current gym members. The Textmunication system enabled the gym to send text messages to telephone numbers that were stored either via: (1) manual entry by a Textmunication operator; (2) a current or potential customer's text response to a marketing campaign; or (3) a customer's response to a consent form located on the gym's website. As described by the Ninth Circuit, the gym's employees would send promotional text messages by "log[ging] into the Textmunication system, select[ing] the recipient phone numbers, generat[ing] the content of the message, and select[ing] the date and time for the message to be sent."

The gym utilized the Textmunication system to send three promotional text messages to the plaintiff, prompting the plaintiff's filing of a class action suit based on allegations that the gym's use of the Textmunication system violated the TCPA ATDS protections. The district court granted the defendant's summary judgment motion by finding that the Textmunication

system did not constitute an autodialer because it was not equipped with a random or sequential number generator as required by the plain language of the statute. The Ninth Circuit reversed. Notwithstanding the plain language of the statute, the Ninth Circuit viewed the ATDS statutory definition as "ambiguous on its face," and the court adopted a broad autodialer definition by relying upon the TCPA's context and structure as well as the Congressional intent to "regulate devices that make automatic calls." In so doing, the court found that an autodialer includes devices that can call telephone numbers created by a "random or sequential number generator" (quoting 47 U.S.C. § 227(a)(1)) and devices that *can* automatically dial from a stored list of telephone numbers.

The court also addressed the element of human intervention, stating that "[c]ommon sense indicates that human intervention of some sort is required before an autodialer can begin making calls… Congress was clearly aware that, at the very least, a human has to flip the switch on an ATDS." The *Marks* decision is therefore at odds with the DC Circuit's rejection of an overly broad definition of an ATDS, and is instead more aligned with the overturned 2015 TCPA Order.

Conversely, in *Glasser v. Hilton Grand Vacations Co.*, Case No. 8:16-cv-952-JDW-AAS, 2018 WL 4565751 (M.D. Fla. Sept. 24, 2018), the Middle District of Florida found that human intervention is a dispositive factor in defining an autodialer. The defendant, a travel company, utilized the "Intelligent Mobile Connect" system to make promotional telephone calls to the plaintiff. In using the Intelligent Mobile Connect system, the defendant's employees manually made telephone calls by selecting a "Make Call" button on the system's computer screen. The *Glasser* court granted the defendant's summary judgment motion and found that "human intervention was required before a cell number could be dialed by Defendant's system." The crucial inquiry for the court was whether the system could dial telephone numbers without the assistance of human intervention. Unlike in *Marks*, the court in *Glasser* found the necessity of human intervention dispositive and disqualified the telephone system from constituting an autodialer.

The disarray on this issue among the courts is not limited to *Marks* and *Glasser*. See, e.g., *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018) (granting a summary judgment motion in favor of defendant where an Email SMS Service delivered text messages only to manually entered telephone numbers); *Fleming v. Associated Credit Services, Inc.*, Case No. 16-3382 (KM) (MAH), 2018 WL 4562460 (D. N.J. Sept. 21, 2018) (granting a summary judgment motion in favor of defendant as to plaintiff's TCPA claim where a predictive dialer system utilized a "clicker agent" to dial telephone numbers from a number list "not randomly or sequentially generated" at the time of its compilation); *Maddox v. CBE Group, Inc.*, Case No. 1:17-CV-1909-SCJ, 2018 WL 2327037 (N.D. Ga. May 22, 2018) (holding that a Manual Clicker Application requiring defendant's agents to initiate telephone calls via a manual click did not constitute an ATDS due to human intervention). In light of these and other diverging court decisions, the FCC opted to add a supplemental period to its earlier open comment period.

The FCC's supplemental comment period

The FCC's newest request cites *Marks*, and points out that the Ninth Circuit's definition of an ATDS is directly at odds with the DC Circuit's reversal of the 2015 TCPA Order. The FCC now seeks comments on the following questions.

- "To the extent the statutory definition is ambiguous, how should the Commission exercise its discretion to interpret such ambiguities here?
- Does the interpretation of the *Marks* court mean that any device with the capacity to dial stored numbers automatically is an automatic telephone dialing system?
- What devices have the capacity to store numbers?
- Do smartphones have such capacity?
- What devices that can store numbers also have the capacity to automatically dial such numbers?
- Do smartphones have such capacity?
- In short, how should the Commission address these two court holdings?
- Any other issues addressed in the *Marks* decision that the Commission should consider in interpreting the definition of an "automatic telephone dialing system"?

Conclusion

The courts have been struggling with defining what constitutes an autodialer under the TCPA for years. The FCC is expected, after the conclusion of the comment period, to release a new interpretation that will hopefully add clarity to this key issue that determines the scope of the TCPA in many cases. Until then, defendants in TCPA litigation are subject to varying interpretations of the definition, depending on the circuit or district court in which they are sued. Unless and until the FCC provides a narrower definition than that used by the Ninth Circuit, use of the kind of technology described above to contact consumers will continue to carry a risk of TCPA liability.

Following the DC Circuit's decision in *ACA International v. FCC*, partially overturning the FCC's broad definition of autodialers by their mere "capacity" and the Ninth Circuit's decision in *Marks v. Crunch San Diego, LLC*, directly at odds with the DC Circuit, the FCC opened a supplemental comment period in October for the public to weigh in on how autodialers should be regulated. The FCC's expected order will hopefully provide much-needed guidance on how autodialers are defined, thus providing businesses with more clarity as to their potential exposure to TCPA liability.

Narrowing the scope of TCPA litigation (for now) – FCC creates reassigned number database and option to block spam text messages

According to the FCC, approximately 100,000 cell phone numbers are reassigned in this country every day, resulting in millions of wireless numbers being reassigned each year. Reassigned cell phone numbers have created an intractable problem and have exposed companies to the risks of TCPA liability because no systematic and reliable way exists for business callers to track these numbers. Oftentimes businesses may call wireless numbers believing they have consent from the cell phone subscriber only to discover, usually through the filing of a complaint, that the number has been reassigned, and the calls were made in violation of the TCPA.

In an effort to address this problem, the FCC has adopted new rules that will hopefully reduce potential TCPA liability for calls made to reassigned cell phone numbers. Specifically, on December 12, 2018, and as incorporated in a December 13, 2018, Second Report and Order, the FCC unanimously adopted the creation of a comprehensive reassigned number database to enable companies to verify the status of phone numbers and to prevent calls to reassigned numbers. This long-awaited development will now allow business callers to screen out reassigned numbers and hopefully avoid litigation.

The FCC also approved, in a 3-1 vote, to classify short message service (SMS) text messages as "information services" under the Communications Act, which gives wireless providers the ability to block unwanted text messages, reminiscent of the power given to broadband providers in last year's net-neutrality decision.

Reassigned Number Database

The FCC's December 13, 2018, Second Report and Order on reassigned cell phone numbers provides much needed relief to businesses that in the past had no workable means to achieve compliance with the old rules. Businesses faced a potential liability trap based solely on routine, good faith communications directed to their own customer lists in situations where a cell phone number had been reassigned to a new user. Without a method to track those reassignments or know that the numbers had been reassigned, callers faced potential TCPA exposure for calls made to reassigned numbers.

Under the FCC's July 2015 Omnibus TCPA Declaratory Ruling and Order (2015 TCPA Order), a caller could be held strictly liable for a call to a reassigned cell phone number even where the caller had consent from the prior subscriber, and the call to that number was made on the good faith belief that the caller was trying to reach the original subscriber. What's more, the "safe harbor" implemented by the 2015 Order was anything but—it was limited to one call, regardless of whether the call was answered, or whether the caller obtained any information from that call that indicated that the number was reassigned. To compound the issue, the recipients of the calls had no obligation to alert the caller of the mistake, and instead could let the calls—and accompanying statutory damages—accumulate.

On appeal of the 2015 TCPA Order, the US Court of Appeals for the DC Circuit, in *ACA International v. Federal Communications Commission (FCC)*, found that the FCC's one-call safe harbor rule was arbitrary and capricious. As the court observed, the FCC itself acknowledged "that even the most careful caller, after employing all reasonably available tools to learn about reassignments, may nevertheless not learn of reassignment before placing a call to a new subscriber." And the FCC failed to "give some reasoned (and reasonable) explanation of why its safe harbor stopped at the seemingly arbitrary point of a single call or message."

On December 12, 2018, the FCC unanimously adopted the creation of a reassigned number database that will be a resource for callers to determine whether telephone numbers have been reassigned. Companies using the database will be able to determine if telephone numbers on their calling lists have been disconnected and made eligible for reassignment. Any such numbers can then be purged from their call lists,

On December 12, 2018, and as incorporated in a December 13, 2018, Second Report and Order, the FCC unanimously adopted the creation of a comprehensive reassigned number database to enable companies to verify the status of phone numbers and to prevent calls to reassigned numbers. This long-awaited development will now allow business callers to screen out reassigned numbers and hopefully avoid litigation.

thereby decreasing the number of calls to consumers who did not provide consent to the caller. Participation in the database will be voluntary. However, to further encourage use of the database, the FCC is providing callers with a safe harbor from liability for any calls made to reassigned numbers due to a database error. Callers will have the burden to prove that they checked the most recent and up-to-date database.

The approved order includes the following steps to implement the reassigned number database: (1) establish a single, comprehensive reassigned number database that will enable callers to verify whether a telephone number has been permanently disconnected, and is therefore eligible for reassignment, before calling that number; (2) a minimum aging period of 45 days before permanently disconnected telephone numbers are eligible to be reassigned by a service provider; (3) service providers would report on a monthly basis information regarding permanently disconnected numbers to the database; and (4) select an independent third-party database administrator, using a competitive bidding process, to manage the reassigned number database. It is unclear when the new database will be launched.

In its press release, the FCC stated, "The rules respond to consumer groups, trade associations, and state and federal authorities that asked the Commission to establish a single, comprehensive database as the best solution to reducing calls to reassigned numbers while minimizing burdens on both callers and providers." The FCC estimates that it will cost approximately $2 million to set up the database and less than $2 million annually to maintain the database.

FCC Commissioner Michael O'Rielly stated, "While I am hopeful that the database will accomplish its intended purpose, it would be naive to think that it will comprehensively fix the reassigned numbers problem… Informing our expectations, we should be wise to keep in mind the costly and ineffective do not call registry, which never stops bad actors from calling those on the list. Ultimately, only the honest and legitimate callers will consult the reassigned numbers database, not the criminals or the scammers."

While the FCC has provided an additional tool to facilitate compliance and minimize potential TCPA litigation risk, Commissioner O'Rielly notes that the effectiveness of the database will be determined in the months and years to come.

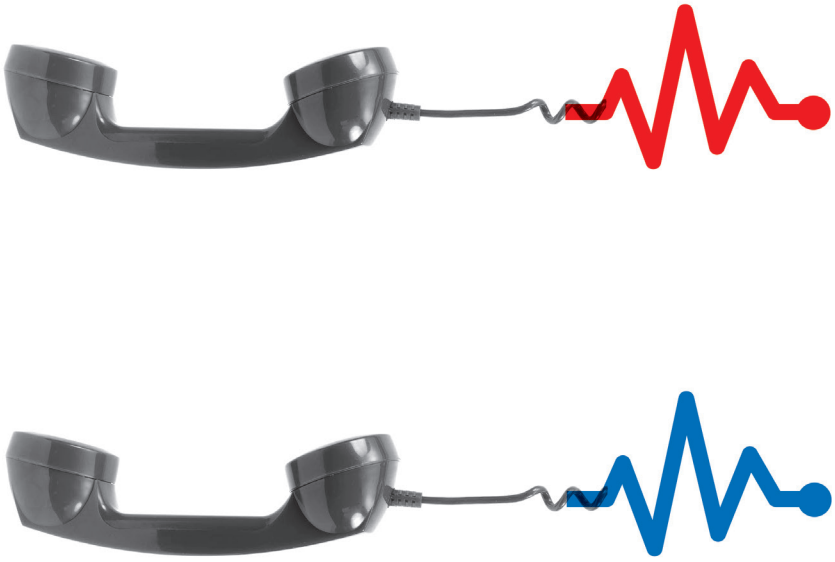
Wireless Carriers Have an Option to Block Text Messages

The FCC also approved the FCC's November 21, 2018, Wireless Messaging Service Declaratory Ruling that permits wireless companies to block unwanted texts sent to consumers via robotext-blocking, anti-spoofing measures and other anti-spam features. In a 3-1 vote, the FCC ruled to classify SMS and multimedia messaging service (MMS) as a "Title I – Information Services" under the Communications Act of 1934, rather than a "Title II – Telecommunication Services," which gives wireless providers more authority to combat spam and robotexts. The FCC also concluded that SMS and MMS are not commercial mobile services or their functional equivalent.

The FCC said that "[w]ith this decision, the FCC empowers wireless providers to continue taking action to protect American consumers from unwanted text messages." FCC Chairman Ajit Pai noted: "The FCC shouldn't make it easier for spammers and scammers to bombard consumers with unwanted texts… and we shouldn't allow unwanted messages to plague wireless messaging services in the same way that unwanted robocalls flood voice services." However, this decision was not unanimous, and the new measure has been criticized by some lawmakers and consumer groups that contend the rules may allow providers to censor text messages.

Conclusion

The FCC's creation of the reassigned number database, and the safe harbor from TCPA liability for database error, is a welcomed development for businesses because it will provide callers with a workable mechanism to comply with the rules and minimize TCPA exposure. The full impact of the new text message classification on TCPA risk remains unclear on whether wireless providers will be effective in limiting the volume of unwanted texting.



Do as I say, not as I do: Third-party liability and the TCPA

Many companies employ third parties to assist with communications to consumers, or to market their products and services through semi-independent agents, brokers or contractors. As a result, companies may face vicarious liability risk arising from the TCPA based on the actions of these third parties. Unfortunately, courts across the country have not applied a consistent standard when it comes to third-party liability and the TCPA.

All is not lost, however, as demonstrated by two recent court decisions. These cases illustrate some of the ways to defend against TCPA lawsuits where the defendant company is not directly responsible for sending the allegedly offending communications.

Ratification and Summary Judgment

On January 10, 2018, the US Court of Appeals for the Ninth Circuit upheld dismissal of a certified class action lawsuit arising from a single marketing text. The plaintiff in *Kristensen v. Credit Payment Srvcs. Inc.*, 879 F.3d 1010 (9th Cir. 2018), alleged that he received an unsolicited text from a company named AC Referral, allegedly in violation of the TCPA. The plaintiff did not sue AC Referral. Instead, the plaintiff sued three lenders along with a lead generating company named LeadPile with whom the lenders contracted, and Click Media, a company hired by LeadPile to accumulate leads. Click Media, in turn, contracted with AC Referral to generate leads via text campaigns. The contract between Click Media and AC Referral specifically stated that AC Referral must comply with the TCPA.

Lenders ➔ LeadPile ➔ Click Media ➔ AC Referral

The plaintiff alleged, on behalf of the class, that the lenders, LeadPile and Click Media were all vicariously liable for the messages sent by AC Referral. The defendants moved for summary judgment, on the basis that they were not liable for the acts of AC Referral, and the District of Nevada dismissed the case. The plaintiff appealed to the Ninth Circuit.

On appeal, the plaintiff argued that the defendants ratified AC Referral's unlawful text campaign by accepting leads "while unreasonably failing to investigate" AC Referral's texting methods. *Id*. at 1013. The Ninth Circuit rejected this theory.

Relying on guidance from the Restatement (Third) of Agency, the court first explained that AC Referral was not an agent or purported agent of the lenders or LeadPile. Those defendants did not contract with and, significantly, were not even aware of AC Referral. Accordingly, they could not have ratified AC Referral's acts. Although not cited by the court here, this outcome is consistent with the earlier Ninth Circuit decision in *Thomas v. Taco Bell Corp.*, 582 Fed. App'x 678 (9th Cir. 2014), where the court applied agency principles and found that the defendant Taco Bell was not liable under the TCPA for texts ostensibly sent on its behalf by a third party, about which Taco Bell was unaware.

The Ninth Circuit then found that Click Media also did not ratify the texting, despite having a contract with AC Referral to send text messages to potential leads. There was no evidence submitted at summary judgment to show that Click Media knew that texts were being sent in violation of the TCPA, nor was there evidence that Click Media "had knowledge of facts that would have led a reasonable person to investigate further." Simply because Click Media knew about texting—which the court dubbed "an otherwise commonplace marketing activity"—was not enough to raise a red flag with Click Media. 879 F.3d at 1015.

Interestingly, the court pointed out in a footnote that Click Media had knowledge of AC Referral's unlawful texting, as evidenced by communications between the companies. Those communications came after the close of the class period, however, so Click Media had no reason to know about AC Referral's unlawful text campaign at the time it sent the text to the plaintiff. Had those communications preceded the text to the plaintiff, the court's analysis would have been different.

Agency Principles and Lack of Personal Jurisdiction

The Northern District of California also addressed agency principles in the context of a TCPA suit in *Knapp v. Sage Payment Solutions, Inc.*, No. 17-cv-03591-MMC (N.D. Ca. Feb. 1, 2018). In that case, the plaintiff alleged that the defendant Sage was liable for TCPA violations arising from alleged unlawful faxing undertaken by its co-defendant Merchant Service, Inc. (MSI), with whom Sage had contracted for advertising services.

Sage moved to dismiss the complaint on the basis that the California court did not have personal jurisdiction because Sage has no physical presence in California, and it did not engage in any faxing to the plaintiff in California. Sage argued that MSI acted without its implied or apparent authority, and that it did not ratify MSI's actions. According to Sage, the plaintiff could not attribute MSI's activities in California to Sage. In analyzing these questions, the court relied heavily on the advertising services agreement between Sage and MSI.

First, the court analyzed a 10-factor test to conclude that MSI did not act with Sage's implied authority. Most notably, the court found that:

- Sage had, at most, limited control over MSI's activities;
- MSI is an independent business;
- Sage did not provide MSI with the tools to engage in the challenged faxing (or any advertising for that matter);
- Sage paid MSI on a commission basis; and
- The parties' contract reflected their subjective intent that MSI was acting as an independent contractor.

These factors outweighed any neutral factors or findings in favor of implied agency, including that marketing was a regular part of Sage's business.

Second, the court determined that MSI did not act with Sage's apparent authority. Sage, as the principal, did not do anything that would reasonably lead another person to believe that MSI had authority to act on Sage's behalf in sending faxes. Most notably, the fax to the plaintiff did not reference Sage.

Third, the court concluded, as had the Ninth Circuit in *Kristensen*, that the alleged principal (here, Sage) did not do anything to ratify the actions of the alleged agent (MSI). Even if Sage had benefited from the faxing—and it did not—Sage had no knowledge of the faxing before it happened so it was not reasonable to expect Sage to investigate.

Courts rely upon agency principles such as ratification and apparent and actual authority to determine vicarious liability for third-party communication. Specifically, the Ninth Circuit declined to impose vicarious liability when the defendant had no reason to know that a party with whom it contracted sent unlawful text messages to consumers. The Northern District of California ruled similarly by relying upon the defendant's lack of knowledge.

Takeaways

Although the defendants in *Kristensen* and *Knapp* avoided liability, these cases highlight the potential pitfalls of engaging outside vendors, even on an expressly limited basis. Maintaining control over one's own consumer-facing activities is difficult enough. Given the potentially exorbitant damages at play in successful TCPA class actions, it is imperative for businesses that employ third-party vendors to text, call or fax on their behalf to take necessary steps to protect themselves, including:

- Vetting all third parties for past TCPA violations, and not engaging third parties on an informal or non-contractual basis.
- Expressly limiting the role of the third party's responsibilities and clearly defining the third party as a contractor, as in the *Sage* case above.
- Periodically reviewing the policies and practices of the third parties to ensure their compliance with the TCPA.

Eversheds Sutherland Practice Point:
Despite these rulings, companies should take care to limit and specifically define the role of third parties in customer communications.

The future is calling: "Voice over Internet Protocol" and the TCPA

One of the many criticisms of the TCPA, enacted in 1991, is that it has not kept pace with developments in communications technology. Instead, the FCC, the courts and litigants have tried to bridge the gap between the TCPA's language and rapid changes in how calls, texts and faxes are sent. A perfect example of this discord is evident in "Voice over Internet Protocol" (VoIP) technology, which allows users to make phone calls over the Internet. This technology did not exist when the TCPA was enacted. Two recent decisions, from different US district courts, show how courts are approaching the question of whether and where VoIP fits within the TCPA framework.

Voice over Internet Protocol – The Basics

VoIP works by routing calls to a cell phone either directly through the Internet, or through an adapter connected to a traditional landline. VoIP technology can generally be used to route calls to different numbers or to a single cell phone number. VoIP technology also facilitates other common means of communications, including Skype, FaceTime, Google Voice and Hangouts.

Two Recent VoIP Decisions

Two recent district court decisions highlight the significance of VoIP calling being largely free of cost for the called party, and the implications for defendants involved in TCPA litigation.

Most recently, the District of Massachusetts added to the growing number of decisions that recognize that calls made to VoIP numbers may trigger TCPA liability if the called party incurs a charge for the call. In *Breda v. Cello P'ship*, No. 16-11512-DJC (D. Mass. Nov. 17, 2017), the named plaintiff in a putative class action was a former Verizon Wireless customer who alleged she continued to receive calls from Verizon in error allegedly in violation of the TCPA's prohibition against autodialed calls made to cell phones without consent, even after terminating her account.

When she allegedly received these calls, the plaintiff had subscribed to Republic Wireless, a telephone service that uses VoIP for the transmission of calls. Republic "ported" or transferred the plaintiff's phone number to Bandwidth, a third party that provides VoIP service, by connecting the call to the plaintiff's cell phone. Significantly, the plaintiff paid a fixed monthly fee for this service and was not charged for each of Verizon's mistaken calls.

Verizon moved for summary judgment, claiming that the calls to the plaintiff fell outside of the TCPA's protections under Section 277(b)(1)(A)(iii), which provides that it is unlawful to make a call, other than those made for emergency purposes or with the prior express consent of the called party, using an automatic dialing system or artificial voice to a telephone number assigned to a cellular telephone service, or any service *that charges the called party for the call* (emphasis added). The court interpreted this provision to require that the defendant: (1) call a cellular telephone service, or a service for which the called party is charged on a per-call basis; (2) using an autodialer; and (3) without the recipient's prior consent.

> Calls placed with VoIP technology fall outside the scope of TCPA liability, according to both the District of Massachusetts and Western District of Pennsylvania. These cases demonstrate how evolving technology in the telecommunications industry presents ongoing compliance questions for businesses operating within this space.

The court held that VoIP telephone service is not cellular telephone service *per se* under the TCPA, and thus it is not generally subject to Section 277(b)(1)(A)

(iii). Further, the court found that where a defendant has no knowledge that a cellular subscriber uses VoIP services, liability may not attach under Section 227(b)(1)(A)(iii). In granting summary judgment for Verizon, the court focused primarily on the fact that under her plan with Republic, the plaintiff paid a flat monthly fee for unlimited calls rather than paying for each call. The court also reasoned that the plaintiff's number became indistinguishable from a VoIP number once she switched to Republic, because her number was ported to offer VoIP-preferred services. The plaintiff also provided no evidence that she communicated to Verizon that her VoIP service was connected to a cellular phone.

The *Breda* decision follows a similar case from the Western District of Pennsylvania, where the court held that TCPA liability was not triggered by calls made to the plaintiff's free Google VoIP service number. In *Klein v. Commerce Energy, Inc.*, 256 F. Supp. 3d 563 (W.D. Pa. 2017), the court interpreted the statutory language of Section 227(b)(1)(A)(iii), which requires a plaintiff to establish that a call was made to one of five categories of "receptors":

(1) a paging service,

(2) a cellular telephone,

(3) a specialized mobile radio,

(4) a common carrier service, or

(5) any service for which the called party is charged for the call.

Following the statute, the court took special notice that the calls were dialed to the number assigned to the plaintiff's free VoIP service, and no calls were made directly to the number assigned to a cellular (non-VoIP) telephone service. Accordingly, the court held that free VoIP services do not fall within the scope of TCPA protection.

Where do we go from here?

There are still only a handful of TCPA decisions analyzing whether VoIP technology implicates liability under the TCPA. As the technology continues to evolve, these decisions can be used as guideposts for companies seeking to maintain compliance with the TCPA and avoid potential high-dollar liability for violations, however inadvertent or unknowing they may be. Providers and litigants should receive additional guidance in the coming months, because the plaintiff in *Breda* is currently appealing the dismissal of her suit to the US Court of Appeals for the First Circuit. That will be the first circuit court decision on VoIP and the TCPA.

How FCC ruling could impact viability of TCPA fax cases

In a decision that may have ripple effects in other pending TCPA actions, on June 2, 2018, the US District Court for the Middle District of Florida issued a stay in *Scoma Chiropractic PA v. Dental Equities LLC*, a junk fax case brought against MasterCard International Inc., pending a ruling from the FCC regarding whether online fax services that allow a recipient to receive facsimiles by computer fall within the scope of "telephone facsimile machines," or TFMs, under the act.

Background — Telephone Facsimile Machines

The TCPA, as amended by the Junk Fax Protection Act of 2005, makes it "unlawful for any person… to use any telephone facsimile machine, computer, or other device to send, *to a telephone facsimile machine*, an unsolicited advertisement."[1] A "telephone facsimile machine" is defined under the TCPA as any "equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper."[2] When the TCPA was enacted in 1991, the definition of "telephone facsimile machine" described a traditional fax machine that utilized a "regular telephone line" to send or receive text or images.

> The Middle District of Florida's decision to stay proceedings in a junk fax case pending the FCC's ruling on what constitutes a telephone facsimile machine suggests that defining these machines in the modern era remains an open question for both the courts and the FCC as emerging cloud-based facsimile technology was non-existent, and thus not considered by Congress, when the TCPA was passed in 1991.

One of the primary harms cited by Congress in enacting the TCPA was the cost fax recipients assumed in having their telephone lines tied up, and the use of the recipients' toner and paper to automatically print unwanted faxes. Since the TCPA was enacted, fax technology has evolved. Modern online fax providers use cloud-based fax servers to receive and store faxes without the need for on-site physical fax machines. Online fax services also convert faxes into digital files thus making the files available to recipients through an online portal or as an email attachment. Generally, fax logs do not distinguish between faxes transmitted to traditional fax machines and those sent to cloud-based fax services.

AmeriFactors Petition

On July 13, 2017, AmeriFactors Financial Group LLC filed a petition for an expedited declaratory ruling with the FCC.[3] The AmeriFactors petition, now almost a year old, seeks a declaratory ruling that online fax services, which make facsimiles available to recipients through email or an online portal, do not fall under the definition of "telephone facsimile machines" in the TCPA, or fit within the plain meaning of the TCPA.[4] The petition highlighted that online fax services, which make faxes available to recipients exclusively in the digital space, eliminate the core harm that the TCPA was designed to address, namely the unwanted use of the recipient's phone line, paper, toner and ink.

1 47 U.S.C. § 227(b)(1)(c) (emphasis added).
2 47 U.S.C. § 227(a)(3).
3 CG Docket Nos. 02-278, 05-338, filed July 13, 2017 (Doc. #145-5, the AmeriFactors Petition).
4 *See id.*

Motion for Stay

In May 2018, MasterCard moved for a stay of the *Scoma* action pending a ruling on the AmeriFactors petition, arguing that the primary jurisdiction doctrine compelled a stay to allow the FCC to rule on the definition of "telephone facsimile machines." MasterCard also noted that a ruling from the FCC excluding online fax services from the definition of TFMs would have a significant impact on the case. One of the named plaintiffs received her fax electronically through the use of an online fax service, and the logs of the facsimile transmissions at issue could not distinguish between faxes sent to online fax services and those sent to traditional fax machines.

The plaintiffs objected to the stay, arguing that the FCC already determined the issues raised by the AmeriFactors petition in previous rulings, including but not limited to, the 2015 ruling on the Westfax petition. Citing to *Bowen v. Georgetown University Hospital*,[5] the plaintiffs also argued that even if the petition were granted, the change in interpretation would be a mere clarification that would not apply retroactively to the faxes at issue in the case.

The Decision

In granting the stay, the court held that deferring to the FCC would advance the basic purpose of the primary jurisdiction doctrine because the "specialized knowledge of the FCC is needed to answer the questions before the court" on "[w]hether TFMs encompass online fax services."[6] The court also noted that if the case were to proceed "there is a risk that the court could reach a determination that is inconsistent with the FCC's ultimate decision on the AmeriFactors petition" on an issue that directly implicates whether plaintiffs can meet the requirements for class certification.[7]

The court rejected the plaintiffs' argument that the issue had already been ruled on by the FCC, specifically noting that "[a]lthough there have been prior occasions when the FCC has addressed whether certain computerized faxing technology falls within the TCPA's prohibitions... none appear to be directly applicable to the issues raised here with regard to sending and receiving faxes using cloud-based servers, raising a potential first-impression interpretation for the FCC."[8] The court also noted that whether the ruling will retroactively apply to the faxes at issue depends on whether the FCC's decision is a rulemaking or a clarification (or both), but reserved that issue for after a ruling by the FCC.[9]

Impact and Open Questions

The *Scoma* court's ruling acknowledges the potentially significant impact that the FCC ruling could have on the viability of junk fax cases. As noted above, fax logs generally do not distinguish between faxes transmitted to traditional fax machines and those sent to cloud-based fax services. Moreover, a growing number of businesses, like one of the plaintiffs in the *Scoma* action, have abandoned traditional fax machines in favor of cloud-based services that make faxes available electronically via computer. As the *Scoma* court recognized, a ruling from the FCC excluding fax services, which do not deliver faxes to traditional physical fax machines, could present ascertainability, commonality and predominance issues that would create significant hurdles for certification of classes in junk fax class actions.

However, it remains undetermined whether the FCC's ruling will be a clarification, applying only prospectively, or a rulemaking, that would apply retroactively to actions already in progress. This uncertainty, coupled with the larger question of how the FCC will rule, makes it difficult to assess whether the stay in the *Scoma* action is the first in a coming wave or an outlier.

Conclusion

Any ruling excluding cloud-based fax services, whether applying prospectively or retroactively, will have a profound impact on the viability of junk fax class actions. In the interim, defendants in junk fax cases may consider the potential impact the ruling could have on their cases, and whether seeking a stay may be warranted.

5 *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208-09 (1988).
6 See *Scoma Chiropractic PA v. Dental Equities LLC*, 16-cv-62942 (M.D. Fla. May 4, 2018) (Dkt. No. 164).
7 *See id.*
8 *Id.*
9 *See id.*

Who's calling? Standards for third-party liability under the TCPA

Companies that market products through third-party agents or distributors face a particular risk under the TCPA when their agents call, text or fax consumers without obtaining the necessary consent. TCPA cases often implicate issues of vicarious liability when a third party initiated the communications on behalf of another party. Courts generally apply traditional agency principles in cases involving telephone calls and text messages, but the standard has been less clear in so-called junk fax cases.

Several court decisions have suggested, in dicta, the possibility of applying a strict liability standard against a company whose goods or services are advertised in an unsolicited fax, whether or not that company sent the fax directly or through a third party. In a recent decision, however, the US Court of Appeals for the Sixth Circuit rejected what it considered to be an overbroad application of third-party liability for faxing and dismissed claims against defendants that were not involved directly in sending unsolicited faxes. *See Health One Med. Ctr., Eastpointe P.L.L.C. v. Mohawk, Inc.*, 889 F.3d 800 (6th Cir. 2018).

Calls and Texts and Traditional Agency Principles

The TCPA makes it unlawful "to initiate" certain telephone calls and text messages, and both the FCC and courts have agreed that traditional agency principles govern the application of third-party or vicarious liability. The 2012 FCC declaratory ruling, *In re Dish Network*, 28 FCC Rcd. 6574 (2012), has been interpreted to establish that a person who does not physically initiate a telephone call, but rather relies on a third party to do so, may be held liable under the TCPA under the common law of agency, based on actual approval, apparent authority and ratification. Subsequent cases have applied the vicarious liability standard articulated in *In re Dish Network* to assess third-party liability under the TCPA.

Fax Advertisements and a Shifting Standard

For faxing, the TCPA imposes liability on the "sender" of the fax, but for purposes of assessing third-party liability, courts have disagreed about whether to apply a traditional agency standard or some different standard. The Seventh Circuit, which expressly adopted an agency test, and the Sixth Circuit, which rejected an agency test, had seemingly created a circuit split, but a recent decision by the Sixth Circuit has resolved some of the tension between the circuits regarding the application of vicarious liability.

The Seventh Circuit has applied a traditional agency standard to TCPA fax cases. In *Bridgeview Health Care Ctr. Ltd. v. Clark*, 816 F.3d 935 (7th Cir. 2016), the Seventh Circuit affirmed the dismissal of claims against a small business where the unsolicited fax advertisements were sent outside the scope of the business owner's express authorization. The defendant had authorized a marketing company to send faxes advertising its services within a 20-mile radius of its location. Despite this specific limitation, the marketing company sent more than 5,000 faxes across three states. In its analysis, the Seventh Circuit examined the three types of common law agency—express actual authority, implied actual authority and apparent authority—and, finding that no theory of agency applied, limited the defendant's liability to only the faxes the defendant authorized and that were sent within the authorized 20-mile radius. The court's holding articulated a common sense approach to assessing third-party fax liability under the TCPA, in line with vicarious liability standards used for telephone calls and texts. The court reaffirmed this approach in *Paldo Sign v. Wagener Equities, Inc.*, 825 F.3d 793 (2016), and specifically rejected a reading of the regulations that would apply strict liability against any company whose goods or services were advertised in a fax.

In *Siding and Insulation Co., v. Alco Vending, Inc.*, 822 F.3d 886 (6th Cir. 2016), by contrast, the Sixth Circuit took an alternative approach and expressly declined to apply common law agency principles for assessing third-party liability, as had the Seventh Circuit. Instead, the court applied an "on-whose-behalf" standard that involved a hybrid analysis blending "(1) federal common-law agency principles, such as whether and to what extent one entity controlled the other, and (2) policy considerations designed to address which entity was most culpable in

causing a TCPA violation, such as whether and to what extent each entity investigated the lawfulness of the fax broadcasts at issue." The court noted several relevant factors under the "on-whose-behalf" standard including, but not limited to, the degree of input and control the defendant exercised over the preparation and content of the faxes, awareness of the circumstances of the broadcast (including facsimile list and transmission information), and measures taken to ensure compliance with the TCPA. Applying these (non-exhaustive) factors, the court found facts that weighed both for and against the defendant's liability and therefore remanded the case for further proceedings under the new legal standard.[1]

Although the Sixth Circuit applied an "on whose behalf" standard to the facts in *Alco Vending*, the Sixth Circuit also suggested, in dicta, that liability for faxes sent under current FCC rules might be assessed under a strict liability standard. In 2006, the FCC adopted a new definition of "sender" in 47 C.F.R. § 64.1200(f)(10), after the faxing at issue in *Alco Vending*. As defined by FCC regulations since 2006, the "sender" is the person on whose behalf the advertisement is sent or the person "whose goods or services are advertised or promoted in the unsolicited advertisement." In *Alco Vending*, the Sixth Circuit referred to this definition as a "strict-liability standard" that might impose strict liability on any person whose goods or services were advertised, regardless of whether the fax was sent on that person's behalf or even with their knowledge. This potential application of strict liability would be a significant divergence from the agency standard applicable in the Seventh Circuit and even from the "on whose behalf" standard that the Sixth Circuit applied to faxes sent before 2006.

Keeping the situation from falling in an abyss, recently, in *Health One Med. Ctr. v. Mohawk, Inc.*, 889 F.3d 800 (6th Cir. 2018), the Sixth Circuit declined to apply the strict liability test against defendants that were not involved in sending the faxes. The *Health One* decision clarified that the Sixth Circuit standard still requires a material connection between the defendant and the faxing.

In *Health One*, the plaintiff brought a class action lawsuit against pharmaceutical manufacturers whose products had been marketed by fax by a third party without their knowledge or consent. Under those facts, the court stated that strict liability would be a "legal alchemy" that cannot be imposed on a defendant that was not involved in sending the fax. Instead, the court held that only the "sender" can be liable and stated that the regulation "does not strip the 'send' out of sender" simply because a defendant's product happens to be marketed by a third party without its involvement. The court specifically distinguished the fact pattern from *Alco Vending*, where the defendant had hired a fax broadcaster to send faxes on its behalf. By rejecting strict liability outright, the decision is a material development that limited over-broad application of third-party liability in the Sixth Circuit and brings the standard closer in line with the Seventh Circuit's agency standard or the Sixth Circuit's earlier "on whose behalf" standard.

> The fact that a company's products are advertised by third parties via unsolicited faxes, without more, is not enough to impose strict liability on the company according to the Sixth Circuit. The Sixth Circuit required that companies have a material connection with third-party senders in order to be liable, thus signaling that it is reigning in its prior broad application of third-party liability in junk fax cases.

Conclusion

Third-party liability issues arise with frequency in TCPA cases, and companies should be aware of the manner in which third parties are marketing their products. Regardless of the legal standard, courts are likely to consider any limits placed upon the scope of authorization provided to third parties to distribute marketing materials. Courts will consider whether there was a defined scope of authority for the content of the materials, the method and scope of transmission, the number of communications, and the intended recipients.

1 On remand, the district court held that the third-party liability issue was a question of fact for trial. The case ultimately settled on an individual basis.

You can't unring a bell – More courts reject revocation of consent under the TCPA

Whether and in what form a consumer has given consent to be contacted via an automatic telephone dialing system (ATDS) may be a crucial aspect of determining liability under the TCPA. Consent may preclude certain TCPA claims altogether, since the TCPA prohibits certain types of calls, including those using an ATDS, to the extent that the caller does not have "the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A)-(B).

Recently, a growing (but not unanimous) number of courts have held that a consumer may not revoke consent if it is a term of a bargained-for contract between the consumer and caller. As a result, the ability of consumers to revoke contractually agreed-upon consent to automated communication remains unsettled and potentially ripe for a circuit split. Following these decisions and understanding the extent of their holdings could dramatically impact exposure and liability under the TCPA.

Reyes: Irrevocability of Consent in a Bilateral Exchange

In June 2017, the United States Court of Appeals for the Second Circuit held that a consumer may not unilaterally revoke consent in a bargained-for, bilateral exchange. *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 53 (2d Cir. 2017). In holding that a consumer's consent is irrevocable when contractually agreed-upon, the *Reyes* court grounded its decision in "black-letter" contract law. The court looked to a fundamental aspect governing contractual relationships, namely that one party cannot alter or revoke a term of a bilateral agreement without the other party's consent.

The *Reyes* court found that a consumer, having consented to be contacted via an ATDS, could not unilaterally revoke such consent without the caller's permission. Importantly, the Second Circuit distinguished prior case law from the Third and Eleventh Circuits where consumers retained their ability to revoke consent because such consent was "freely and unilaterally given" in credit applications, rather than as part of a bilateral contract.

A number of federal district courts across the country have followed the Second Circuit's lead in *Reyes*. Despite a noticeable trend following *Reyes*, the case law is not unanimous. While consent provisions in consumer contracts may prove to be a valuable means of limiting exposure to the TCPA, the extent to which such provisions reduce or even eliminate the risk of TCPA liability remains an area of continued development and interpretation by the courts.

Recent District Court Decisions

In August 2018, the Middle District of Florida in *Medley v. Dish Network, LLC*, Case No. 8:16-cv-2534-T-36TBM, 2018 WL 4092120, at *10 (M.D. Fla. Aug. 27, 2018), held that the TCPA does not diverge from common law contract principles, and therefore consent provided by contract cannot be unilaterally revoked. Specifically, the court noted that "[n]othing in the TCPA indicates that contractually-granted consent can be unilaterally revoked in contradiction to black-letter law." The plaintiff in *Medley* signed a contract with DISH in which the plaintiff explicitly consented to receive calls placed via an ATDS. The *Medley* court, in granting the defendant's motion for summary judgment, held that a consumer who has consented to automated communication in a contract for services cannot later revoke such consent. In short, the court declined to "alter[ ] the common-law notion that consent [agreed to by contract] cannot be unilaterally revoked" without Congressional intent in the TCPA expressing otherwise. The court granted the defendant's motion for summary judgment. The plaintiff has since filed a notice of appeal in *Medley* on September 7, 2018, which remains pending.

Similarly, the District of Connecticut declined to require that irrevocability be expressly agreed to by the parties. In *Harris v. Navient Sols., LLC*, Case No. 3:15-cv-564 (RNC), 2018 WL 3748155, at *2 (D. Conn. Aug. 7, 2018), the District of Connecticut rejected the plaintiff's argument that irrevocability of consent is contingent on the parties agreeing that consent is irrevocable. Rather, the court followed the *Reyes* rationale that prior consent is irrevocable even if the contract is "silent on revocation." *See also Barton v. Credit One Fin.*, Case No. 16CV2652, 2018 WL 2012876, at *3-4 (N.D. Ohio Apr. 30, 2018) (holding that

consumer's attempted oral revocation was ineffective when contract required written revocation).

Some district courts, however, have diverged from the *Reyes* rationale. Three months following the *Reyes* decision, the Western District of Pennsylvania in *McBride v. Ally Fin.*, Inc., Case No. 15-867, 2017 WL 3873615, at *2 n.4 (W.D. Pa. Sept. 5, 2017), declined to adopt *Reyes* "absent clearer indications in the law of [the Third] Circuit." Nevertheless, the *McBride* court acknowledged that "the detailed common-law and statutory interpretations in *Reyes* are not without logical appeal" and that *Reyes* "reflects a potential sea-change in the area of TCPA-litigation."

A growing, but not unanimous, number of courts have followed the Second Circuit's decision in *Reyes v. Lincoln Auto. Fin. Servs.*, holding that consumers cannot revoke consent to automated communication when they provided such consent in a contract.

Additionally, the Middle District of Tennessee in *Ammons v. Ally Fin., Inc.*, Case No. 3:17-cv-00505, 2018 WL 3134619, at *15 (M.D. Tenn. June 27, 2018), relied upon the FCC 2015 Omnibus TCPA Declaratory Ruling and Order to hold that "consumer consent may be revoked at any time by any reasonable means." In the court's view, the 2015 TCPA Order "set forth a right of revocation pursuant to statute" and "allowing consumers to revoke consent is in keeping with the remedial, consumer-protection purposes of the TCPA." As held by the *Ammons* court, consumers retain the ability to revoke their prior consent despite having a bilateral agreement with the caller.

In August 2018, the Northern District of Alabama, in *Few v. Receivables Performance Mgmt.*, Case No. 1:17-CV-2038-KOB, 2018 WL 3772863, at *2 (N.D. Ala. Aug. 9, 2018), originally held that a consumer could not revoke prior express consent given via contract. In *Few*, the plaintiff signed a television and internet services contract with DISH, which authorized DISH and any debt collection agency or debt collection attorney retained by DISH to contact the plaintiff via an ATDS to collect any outstanding payment. When the defendant, a debt collection agency hired by DISH, called the plaintiff, the plaintiff attempted to revoke consent. The defendant continued to contact the plaintiff, and the plaintiff subsequently brought suit alleging that the defendant's ongoing communication violated the TCPA. The *Few* court, in applying *Reyes*, originally granted the defendant's motion for summary judgment and held that the plaintiff's attempt to revoke consent was ineffective because she provided consent via contract and "not merely gratuitously." Despite its prior opinion, on November 13, 2018, the Few court granted the plaintiff's motion for reconsideration in holding that it erroneously relied on *Reyes*. *See Few v. Receivables Performance Mgmt.*, Case No. 1:17-CV-2038-KOB, 2018 WL 5923765, at *1 (N.D. Ala. Nov. 13, 2018) (holding that the court should have relied upon binding Eleventh Circuit precedent allowing for revocation of consent in the absence of a contractual restriction on the means by which a consumer may revoke consent). The *Few* court entered a separate opinion and order denying an alternative TCPA argument presented by the defendant in a dispositive motion as premature because the parties have not yet engaged in discovery. *See Few v. Receivables Performance Mgmt.*, Case No. 1:17-CV-2038-KOB, 2018 WL 5923767, at *1 (N.D. Ala. Nov. 13, 2018).

Conclusion

Revocation of consent will remain at the forefront of TCPA-related jurisprudence as this issue continues to develop in the federal district and appellate courts. While there is a trend towards enforceable consent by contract, divergence does exist among the district courts. Furthermore, to the extent that the FCC attempted to weigh in on this issue in its July 2015 TCPA Order by ruling that consumers can revoke consent "at any time and through any reasonable means," in March 2018, the United States Court of Appeals for the DC Circuit held that the order does not address the ability of contracting parties to adopt revocation rules and procedures. *ACA Int'l v. FCC*, Case No. 15-1211, 2018 WL 1352922, at *18 (D.C. Cir. Mar. 16, 2018). As a result, the law in this area will continue to evolve until more circuit court precedent is established, or the FCC provides clear guidance on this question. This divergence from the bench brings the risk of TCPA liability and a lack of clarity for defendants in TCPA litigation.

Eversheds Sutherland Observation:
Although there is not unanimity among the courts, the *Reyes* decision serves as valuable precedent for companies seeking to limit their exposure to TCPA liability by requiring their customers to provide consent via contract.

Recent TCPA developments for healthcare providers

Healthcare providers are uniquely affected by the TCPA, which regulates the manner in which a business may advertise its products and services to consumers by phone, text and fax.[1] The TCPA is a strict liability statute that has been used with great success by plaintiffs' attorneys to extract large settlements from businesses in a wide variety of industries. Although some healthcare communications are exempt from the TCPA, a 2015 Order from the FCC appears to undercut that exemption. Healthcare providers are pushing back against the Order, which is presently on appeal. This article discusses recent developments in the TCPA sphere and analyzes how healthcare providers are uniquely affected by the statute.

TCPA Background

Enacted in 1991 to protect consumers from unsolicited telemarketing calls and faxes (and more recently text messages), the TCPA specifically prohibits the use of an "automated telephone dialing system" or an "artificial or prerecorded voice" to make calls to cell phones without obtaining the recipient's prior consent. This prohibition applies to both telemarketing and non-telemarketing calls, including debt collection and informational calls. The TCPA also requires prior written consent for most automated telemarketing communications, particularly those made to cell phones.

Class action litigation risk under the TCPA can be considerable. Because the TCPA is a strict liability statute with statutory damages of $500 per violation (trebled to $1,500 per violation if the violation is deemed willful or knowing) with no maximum cap on liability, potential exposure in a TCPA class action can quickly escalate. Multi-million-dollar settlements are commonplace. The healthcare industry is no stranger to class action litigation risk under the TCPA.[2]

Healthcare Providers' Concerns About the FCC's 2015 Order

In 2012, the FCC issued an Order in which it, among other things, exempted healthcare calls covered by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) from TCPA liability.[3] The FCC is authorized under the TCPA to issue such orders.[4]

Then, in July 2015, the FCC issued another TCPA Order (2015 Order), in which it provides, in part, that not all calls or texts to patients are healthcare communications exempt from the TCPA.[5] Specifically, if the calls or texts relate to telemarketing, advertising or bill collection, they are not exempt.

In an effort to mitigate the impact of the TCPA, healthcare providers appealed the 2015 Order as it relates to healthcare communications. The appeal was one of many appeals of the 2015 Order that were consolidated before the DC Circuit under *ACA Int'l v. FCC*.[6]

1 47 U.S.C. § 227(b)(1)(B).
2 Targets of class action lawsuits include health insurers, insurance agents, hospitals, and pharmacies, to name a few. *See, e.g.*, Bonnie Eslinger, Vertex To Pay $4.75M To End TCPA Case Over Hep C Faxes, Law 360 (Feb. 5, 2018), https://www.law360.com/articles/1008880/vertex-to-pay-4-75m-to-end-tcpa-case-over-hep-c-faxes.
3 *Rules & Regs. Implementing the Tel. Cons. Prot. Act of 1991*, 27 FCC Rcd. 1830 (2012).
4 47 U.S.C. § 227(b)(1)(B).
5 *Rules & Regs. Implementing the Tel. Cons. Prot. Act of 1991*, 30 FCC Rcd. 7961 (2015).
6 No. 15-1211.

The appeal argues, in relevant part, that communications between a healthcare provider and its patients are regulated by HIPAA and HIPAA's implementing regulations.[7] According to the appellants, these regulations strike the appropriate balance between allowing the flow of necessary health information to patients while protecting the privacy of that information.[8] The appellants argue that the FCC improperly adopted TCPA compliance standards, including different restrictions based on the type of call and the type of number called, in conflict with HIPAA regulations that provide broad immunity for healthcare providers to call patients. In essence, the FCC expanded the reach of the TCPA into an area already regulated by HIPAA.

The appellants identify three areas where healthcare providers should be protected by HIPAA, but under the FCC's 2015 Order they are now potentially exposed to class action litigation under the TCPA:

- No consent required for HIPAA-protected calls to residential phone lines;
- Prior express consent required for HIPAA-protected calls to cell phones; but
- Calls to wireless numbers that have an "exigent… healthcare treatment purpose" are exempt from consent requirements if they are not charged to the called party.[9]

This third 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

Notably, however, this exemption for calls and texts to cell phones applies only 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.[10] Interestingly, the exemption does not apply to marketing calls or to healthcare communications that include accounting, billing, debt collection or other financial content.

The appellants further fault the FCC for the regulations on calls to wireless numbers because the exemption's requirement for "exigency" conflicts with HIPAA's definition of "health care," which includes all calls concerning "care, services or supplies related to the health of an individual."[11] The appeal contends that the FCC generally has an obligation to interpret the TCPA consistently with HIPAA, not in conflict with it.[12]

The FCC argues in response that the prior exemption of HIPAA-protected calls, from the FCC's 2012 Order, related only to calls to residential lines and did not include calls to cell phones.[13] The FCC further asserts that while HIPAA treats calls to residential and wireless numbers in the same way, the TCPA is not required to do so. The FCC maintains that differentiating between calls to residential lines versus cell phones is reasonable because calls to cell phones "can be more costly and intrusive than calls to residential numbers."[14]

The DC Circuit will ultimately have to decide whether the FCC overstepped its authority in its 2015 Order regarding HIPAA-protected calls. It has been more than 16 months since oral argument in the case, and there is no indication if a decision is imminent, or if the DC Circuit is waiting for the FCC to amend or revoke the Order instead, given the different political make-up of the FCC following the change in presidential administration. The FCC now is led by a Republican Chairman, Ajit Pai, who dissented in the 2015 Order as a member of the minority party. Even if the court overturns the FCC's interpretations of the TCPA as it relates to healthcare companies, the FCC will likely go back to the proverbial drawing board to create new rules and regulations.

7 42 U.S.C. § 1302(a); 45 C.F.R. §§ 164.502; .506.
8 2016 WL 750706 (D.C. Cir. Feb. 24, 2016).
9 2015 Order at ¶ 146.
10 *Id.* at ¶ 138.
11 45 C.F.R. § 160.103.
12 2016 WL 750706, at *10.
13 2016 WL 194146 (D.C. Cir. Jan. 15, 2016).
14 *Id.* at *70.

In the meantime, there is some good news for healthcare providers. For example, the US Court of Appeals for the Second Circuit recently held that a healthcare provider was protected from TCPA liability when it sent a single text message to a patient reminding him to get a flu shot. In *Latner v. Mount Sinai Health Sys.*, the plaintiff had provided his cell phone number to be contacted for "treatment."[15] According to the Second Circuit, the plaintiff therefore provided "prior express consent" under the 2012 Healthcare Exception, and "written" consent was not necessary. This decision is a good one for healthcare providers, and is hopefully a sign to come for those entities anticipating a ruling on the appeal of the FCC's 2015 Order.

Healthcare providers face continued exposure to TCPA liability, and thus should take care to employ best practices in communicating with patients including being aware of what consent is required prior to the communication, limiting the authority of third parties who may be contacting patients on the providers' behalf, and understanding whether the communications could be classified as marketing under the TCPA.

Conclusion

Healthcare providers are being sued under the TCPA not only for their own actions (and omissions) but also for the actions (and omissions) of third parties contacting patients on their behalf through theories of vicarious liability. These lawsuits arise out of all aspects of communications ranging from the method (call, text or fax) to the type of phone line called (residential or wireless) to the specific content of the communications and beyond.

With the risk of exorbitant statutory damages that arises in a TCPA class action lawsuit, healthcare providers need to consider the following questions when it comes to communicating with their patients and customers:

- What type of communications are providers sending? Are they marketing or non-marketing?
- Do you know what type of consent (express or written) is required to engage in marketing versus non-marketing communications?
- Has the provider obtained the necessary consent?
- Are third parties communicating on the provider's behalf?
- If so, has the provider limited its authority in any way? Is the provider abiding by those limits?
- Does the provider know whether the phone numbers it or its third-party vendor are calling are wireless or residential numbers?
- Is the provider giving patients the proper opportunity to opt out of further communications?

Healthcare providers should consider implementing communications policies and review any existing ones that will help them avoid exposure under the TCPA. These policies should focus on the questions raised above regarding the method and content of communications, along with issues involving consent, revocation of consent and the involvement of third parties.

– ABA Health eSource

15 879 F.3d 52 (2d Cir. 2018).

DC Circuit upholds narrow TCPA exemption for healthcare providers

The TCPA uniquely impacts the healthcare industry. In a 2015 Order, the FCC limited the exemption of the TCPA to certain healthcare-related communications. The FCC's TCPA Order was appealed to the US Court of Appeals for the District of Columbia, and on March 16, 2018, the DC Circuit issued its decision (more than 16 months after oral argument). Although the DC Circuit struck down certain provisions of the 2015 TCPA Order,[1] the court upheld the provisions that relate specifically to the healthcare industry.

The FCC's 2015 TCPA Order limited the exemption for healthcare provider calls to wireless numbers "for which there is exigency and that have a healthcare treatment purpose."[2] Specifically, the scope was limited to calls for non-marketing purposes, including 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, and home healthcare instructions. The exemption does not cover calls "that include telemarketing, solicitation, or advertising content, or which include accounting, billing, debt-collection, or other financial content."[3]

On this issue, the DC Circuit upheld the 2015 TCPA Order, finding that the FCC was empowered to draw a distinction between different types of calls.[4]

The DC Circuit's decision is not yet final. Either side may ask for reconsideration by the Circuit *en banc*. A petition for rehearing must be made within 45 days (given that the US government is a party), and either side may file a petition for certiorari to the US Supreme Court within 90 days of entry of judgment of this decision or an *en banc* decision, should one be issued.

Assuming that the DC Circuit's decision becomes final, healthcare providers must continue to abide by the narrow exemption in the FCC's 2015 TCPA Order regarding exigent and healthcare-related calls to cell phones. Providers should continue to implement and enforce policies and remain aware of the method and content of communications, including those made by third parties on their behalf.

– ABA Health eSource

Eversheds Sutherland Practice Point: The DC Circuit in *ACA International* upheld limited healthcare exemptions recognized by the FCC, allowing healthcare providers to make calls to wireless numbers for non-marketing purposes related to patients' treatment and for which there is exigency. Although these exemptions work to shield healthcare providers from some degree of liability under the TCPA, they are narrow in scope.

1 The DC Circuit struck down the FCC's definition of autodialer and its one-call "safe harbor" relating to reassigned cell phone numbers.
2 *Rules & Regs. Implementing the Tel. Cons. Prot. Act of 1991*, 30 FCC Rcd. 7961 (2015).
3 *Id.*
4 *ACA Int'l v. Federal Comm's Comm.*, No. 15-1211, --- F.3d ---, 2018 WL 1352922 (D.C. Cir. Mar. 16, 2018).

Dialing-in: Top five TCPA issues for 2019

Companies in consumer-facing industries face a continued wave of class action filings under the TCPA. In 2018, TCPA lawsuits remained one of the most filed types of class actions in courts across the country, and unsettled law continues to place a compliance burden on companies that communicate with consumers by phone, text or fax. Looking ahead in 2019, the FCC is expected to issue revised rules that could significantly reshape the contours of the TCPA landscape, including redefining the standards for automated dialing and revocation of consent. Meanwhile, courts continue to grapple with issues such as agency deference and the standards for third-party liability.

Here are five issues to watch for in 2019.

1. The FCC is expected to redefine "automated telephone dialing system"

For years, the question of what constitutes an autodialer has confounded courts, the FCC and companies seeking to communicate with their customers by phone and text. The implications of this confusion cannot be overstated, because liability under the TCPA often depends on whether a company used an autodialer without the consent of the recipient of the call. In a 2015 Order, the FCC expanded the definition of autodialer to encompass any equipment that has the capacity or capability to produce, store and dial numbers randomly or sequentially without human intervention, even if it is not used in that capacity. In early 2018, this definition was struck down by the US Court of Appeals for the DC Circuit as arbitrary and capricious, and the FCC solicited comments on developing a new rule.

The FCC is expected to issue new guidance in 2019 and provide a revised and refined definition. The search for a clear definition has proved elusive thus far, but the business community is hopeful that the FCC will finally provide a standard that callers can rely on to understand when they must comply with TCPA restrictions on automated dialing.

2. The standards for revocation of consent

Several federal district courts have held that a recipient of an autodialed phone call may not revoke consent where consent was included as a term in the underlying contract between the recipient and the caller. These courts, such as the Middle District of Florida and the District of Connecticut, followed the reasoning of the Second Circuit in *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 53 (2d Cir. 2017), in which the Second Circuit held that a consumer's consent is irrevocable when contractually agreed-upon. As a matter of "black-letter" contract law, courts adopting *Reyes* held that consumers cannot unilaterally revoke such consent without the permission of the other contracting party.

Some district courts, however, have diverged from the *Reyes* rationale by finding that consumers retain the ability to revoke prior consent despite having a contract with the caller. The Middle District of Tennessee, for example, declined to adopt *Reyes* and instead held that allowing consumers to revoke consent, even if contractually provided, "is in keeping with the remedial, consumer-protection purposes of the TCPA."

The case law in this area is not unanimous and, as a result, the ability of consumers to revoke contractually provided consent remains unsettled. The standards for revocation of consent will continue to evolve until more circuit court precedent is established or the FCC adopts clear guidance on this issue.

3. Implementation of the reassigned number database and safe harbor

The FCC's December 13, 2018, Second Report and Order unanimously adopted the creation of a reassigned number database that will be a resource for callers to determine whether telephone numbers have been reassigned. The rule also creates a potential safe harbor from

TCPA liability. Until now, businesses have faced a potential liability trap based solely on routine, good faith communications directed to their own customer lists in situations where a cell phone number had been reassigned to a new user.

Companies that use the reassigned number database will be able to determine if telephone numbers on their calling lists have been disconnected and are eligible for reassignment. These numbers can then be purged from a company's call lists, thereby decreasing the number of calls to consumers who did not provide consent to the caller. To further encourage use of the database, the FCC is providing callers with a safe harbor from liability for any calls made to reassigned numbers due to a database error. Callers will have the burden to prove that they checked the most recent and up-to-date database.

For 2019, key issues will include the timing and the specifics of the reassigned number database, and the steps that companies will need to implement to take advantage of the safe harbor from liability.

4. The Supreme Court's review and consideration of the scope of agency deference

The United States Supreme Court has agreed to hear *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, Case No. 17-1705, from the Fourth Circuit to address whether federal district courts are bound by FCC guidance in TCPA cases. Specifically, the Supreme Court will address whether the Hobbs Act, which grants exclusive jurisdiction to federal appellate courts to set aside, suspend or rule on the validity of certain federal agency guidance, requires district courts to defer to FCC rulings and orders interpreting the TCPA. At the center of the dispute is whether district courts in private litigation are required to defer to the FCC under the Hobbs Act, or whether they have authority to interpret and apply unambiguous statutory provisions that conflict with FCC rules.

The Supreme Court's ruling could potentially limit or expand the weight of FCC guidance in TCPA private litigation, thus impacting the ability of litigants to maintain and defend TCPA claims. For example, should the Supreme Court find that district courts are not required to adhere to FCC guidance under the Hobbs Act, TCPA private litigants would be free to make arguments against FCC rulings and orders in private cases. This would upend the rules that currently apply to most TCPA litigation, where most courts strictly apply FCC guidance.

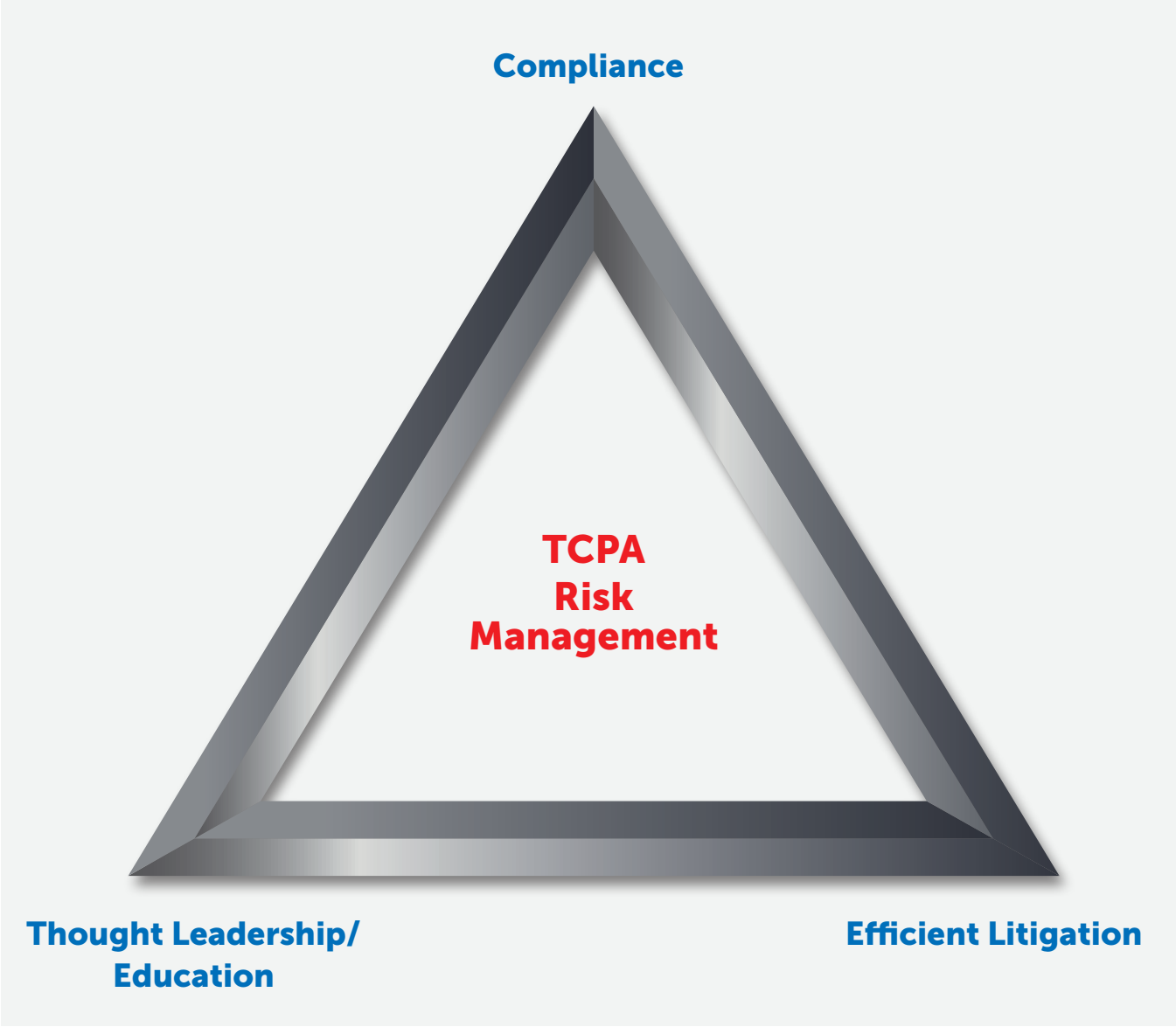
5. Third-party liability issues

Companies frequently use third-party vendors to assist with communications or market their products and services through semi-independent agents, brokers or contractors. As a result, companies may face vicarious liability risk based on the actions of these third parties. Court decisions have highlighted a tension between the legal standards for third-party liability under the TCPA. Under the TCPA, it is unlawful "to initiate" certain phone calls (including text messages) and "to send" unsolicited fax advertisements. This small difference in the language of the TCPA has led some courts to apply different legal standards for third-party liability for phone calls and faxes. For phone calls and texts, courts apply a vicarious liability standard based generally on common law agency principles, consistent with the FCC's declaratory ruling in *In re Dish Network*, 28 FCC Rcd. 6574 (2012). For faxes, however, courts have disagreed about whether to apply a traditional agency standard or a different standard for third-party liability. It will be important to watch how these different approaches continue to unfold in 2019.

Conclusion

With the wave of TCPA litigation expected to continue in 2019, developments in these key areas, among others, will shape the TCPA landscape. Class action plaintiffs' lawyers will continue to target many different industries, so a strong TCPA compliance program is essential to help businesses avoid TCPA lawsuits and potential exposure.

The TCPA Iron Triangle



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If you would like to learn more about Eversheds Sutherland's TCPA compliance and litigation team, please contact us.

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Eversheds Sutherland attorneys speaking on TCPA

November 27, 2018: *Business Insurance*
Supreme Court Could Set Boundaries on Scope of FCC Guidance

Eversheds Sutherland Partner Lewis Wiener is quoted in this *Business Insurance* article discussing the US Supreme Court's decision to review a TCPA case by stating: *"Arguably, under the existing legal standard courts have no discretion but to follow the FCC's guidance. These are high-dollar, high-exposure cases, and there is a parade of horribles that could result if this occurs. When you have tens if not hundreds of thousands of transmissions in a matter of hours, the liability becomes astronomical, and that gives plaintiffs a lot of leverage in settling cases."*

June 14, 2018: *Law360*
FCC Looks to Redefine Autodialer

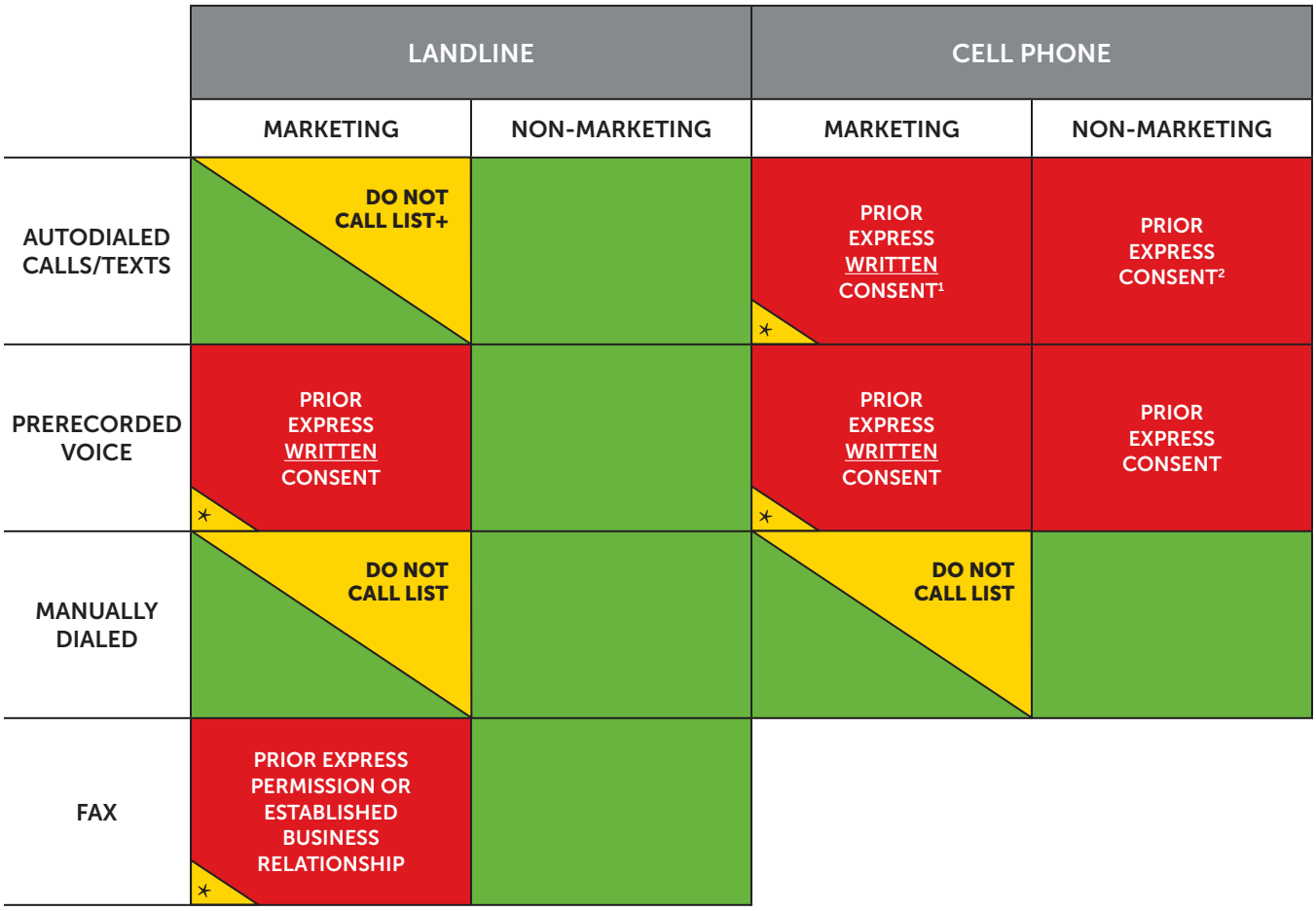
Discussing if the FCC could bring a more modern understanding to the TCPA Eversheds Sutherland Partner Lewis Wiener is quoted saying *"With the majority of the FCC now being those commissioners who dissented, and dissented vigorously, vehemently, to the FCC's July 2015 omnibus TCPA order, we're all waiting to see how the FCC deals with these issues now that it has an opportunity to revisit them."*

January 10, 2018: *Law360*
Flu Shot Text Row Boosts TCPA Defense As Big Ruling Looms

Eversheds Sutherland Partner Lewis Wiener is quoted in this *Law360* article discussing the Second Circuit ruling in the TCPA-related case, *Latner v. Mt. Sinai Health System, Inc.*

"The TCPA and TCPA complaints are like Damocles' sword. Potential liability for companies if they are found to have violated the TCPA is so great that it forces settlements because no one wants to test how strong the string is on the sword. They're just worried about how sharp the blade is. Any decision that adds clarity to the parameters of the TCPA is helpful to the business community. The Second Circuit's decision in particular gives health care providers 'another quiver in the arrow' that allows them to 'stand up to the TCPA plaintiffs' bar and say that situations where they've had similar contact with a patient and obtained similar consent is permissible."

The TCPA traffic light



[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.***

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