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WHITE PAPER

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Back to the Statute: D.C. Circuit Levels the TCPA Playing Field

In a much-anticipated decision, the U.S. Court of Appeals for the District of Columbia Circuit has set aside the Federal Communications Commission's *2015 Declaratory Ruling*, which broadly interpreted the Telephone Consumer Protection Act's restrictions on calls to wireless numbers.

The court held that the mere ability to reprogram a piece of equipment to perform as an "automatic telephone dialing system" ("ATDS") does not suffice to give the equipment the requisite "capacity"; that the Commission has never satisfactorily explained exactly what it thinks ATDSs must be able to do; and that the Commission's one-call safe harbor arbitrarily limited callers' ability to rely on consent they had previously received.

This Jones Day *White Paper* explores the probable implications of the court's decision.

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In the summer of 2015, the Federal Communications Commission's *2015 Declaratory Ruling* broadly interpreted the Telephone Consumer Protection Act's restrictions on calls to wireless numbers. Under its interpretation, any equipment that could be reprogrammed to dial from a list arguably qualified as an "automatic telephone dialing system" ("ATDS") subject to the statute's restrictions, and callers who accidentally reached numbers that had been reassigned from a consenting consumer to another, nonconsenting one were on the hook for every call or text after the first.

Nearly three years later, the D.C. Circuit has now swept much of the Commission's view aside. First, it held that the mere ability to reprogram a piece of equipment to perform ATDS functions does not suffice to give the equipment the requisite "capacity"; otherwise, ordinary smartphones would be ATDSs. Second, it held that the Commission has never satisfactorily explained exactly what it thinks ATDSs must be able to do; instead, it has arbitrarily espoused multiple, contradictory positions. Finally, the D.C. Circuit held that the Commission's one-call safe harbor arbitrarily limited callers' ability to rely on consent they had previously received.

These rulings represent a sea change in TCPA law. By sweeping away the Commission's orders and putting the brakes on an expansive view of "capacity," the decision leaves defendants free to make—and courts free to accept—arguments from the statute itself, which by its terms covers only equipment that, as programmed, can "store or produce telephone numbers to be called, *using a random or sequential number generator*." 47 U.S.C. § 227(a)(1)(A) (emphasis added). If that argument prevails, defendants will be free to use modern dialing equipment (including most predictive dialers) without fear of crushing TCPA liability. The D.C. Circuit's decision also leaves the Commission—led by Chairman Pai, who dissented from these parts of the *Ruling*—to fashion a fair and sensible solution to the problem of reassigned numbers.

THE TELEPHONE CONSUMER PROTECTION ACT AND THE *2015 DECLARATORY RULING*

In the late 1970s and 1980s, telemarketers hit upon a new way of cheaply moving products: using machines instead of humans to make telemarketing calls. These machines, referred to as "autodialers," randomly or sequentially generated telephone numbers and often delivered to consumers automated or prerecorded voice messages. These machines were particularly disruptive to nascent wireless technologies: because they unthinkingly dialed randomly or sequentially generated numbers, autodialers clogged up wireless networks and forced people to pay expensive per-minute charges.

Congress responded with the Telephone Consumer Protection Act of 1991 ("TCPA"), specifically targeting these "artificial telephone dialing system[s]"—that is, equipment that "has the capacity … to store or produce telephone numbers to be called, using a random or sequential number generator." 47 U.S.C. § 227(a)(1)(A), (b)(1)(A)(iii). Using an ATDS carries a steep price tag: unless the consumer provided prior express consent, each call or text costs at least $500 (if made innocently) and up to $1,500 (if made "willfully or knowingly"). Id. § 227(b)(3).

From 1991 to 2003, this provision hummed along quietly, generating little litigation as telemarketers moved away from unlawful (and unproductive) autodialers. The Federal Communications Commission, however, wasn't satisfied with that success: although the TCPA's ATDS definition was clear enough, the Commission wanted to block more calls. It started with predictive dialers—equipment that dials a group of numbers, transferring any calls that are actually answered to a live agent. Even though many of those dialers did not (and do not) generate random or sequential numbers, as required by the statute, the Commission nonetheless suggested that they were categorically covered. The loose and imprecise language employed by the Commission in reaching that conclusion spawned TCPA jurisprudence that provided almost no sensible guidance for honest businesses trying to figure out what exactly is against the law.

The Commission's earlier orders culminated in its *2015 Declaratory Ruling*. *See* 30 FCC Rcd. 7961 (2015). The *Ruling* expanded TCPA liability enormously in three main ways:

- **What Does It Mean to Have the "Capacity" to Do Something?** According to the Commission, "capacity" means not just what calling equipment can actually do as currently constituted, but also what it *could* do if, hypothetically speaking, it were reprogrammed or reconfigured. Remarkably, the Commission identified one lone example of a kind of equipment too difficult to turn into an ATDS under this test—a *rotary phone*.

- **What Must an ATDS Be Able to Do?** At times, the *2015 Declaratory Ruling* suggested that equipment had to be able to generate random or sequential numbers to constitute an ATDS. But at other times, it indicated that the ability to dial from a list sufficed. Similarly, the *2015 Declaratory Ruling* at times indicated that any autodialer must be able to dial without human intervention. Elsewhere, however, it expressly disclaimed any such requirement.
- **What If a Number Has Been Reassigned?** Because wireless numbers are frequently reassigned, callers often inadvertently reach a number's new owner, one who (unlike the previous owner) has not provided consent to be called. Callers facing TCPA claims in that scenario argued that "called party" in the phrase "prior express consent of the called party" refers to the call's intended recipient, not the actual recipient. The Commission disagreed, but to avoid the "severe" result of "strict liability," it allowed a caller to reasonably rely on the first consumer's consent until the caller knew about the reassignment. In the next breath, however, it concluded that callers constructively know about that assignment after *a single call or text* to a reassigned number, even if the call or text provided no indication that the number had been reassigned.

The *2015 Declaratory Ruling*'s interpretation of the ATDS provision was remarkably broad. It arguably covered calls or texts from any device that could be reprogrammed to dial from a list—in other words, every smartphone in America. And even where callers secured consent, they could not safely rely upon it because consumers often fail to update their contact information.

THE D.C. CIRCUIT'S DECISION

Led by Sirius XM (represented by Jones Day), a coalition of petitioners challenged the *2015 Declaratory Ruling* before the D.C. Circuit. In a unanimous decision authored by Judge Sri Srinivasan, the court unanimously vacated these portions of the order. *See ACA Int'l v. FCC*, ___ F. 3d ___, 2018 WL 1352922 (Mar. 16, 2018).

Capacity. The court framed the "capacity" question posed by the statute as "how much is required to enable the device to function as an autodialer: does it require the simple flipping of a switch, or does it require essentially a top-to-bottom reconstruction of the equipment?" Slip op. 13–14. To decide where on the spectrum to draw that line, one must consider "what kinds (and how broad a swath) of telephone equipment" would qualify as an ATDS. *Id.* at 14.

The *2015 Declaratory Ruling* flunked this test. Most naturally read, it would, incredibly, cover calls from one smartphone to another. In the agency's view, if equipment could perform the requisite functions after downloading an app, then the equipment had the relevant "capacity," whether or not the app had actually been installed. But "[i]t is undisputed that essentially any smartphone, with the addition of software, can gain the statutorily enumerated features of an autodialer and thus function as an ATDS." *Id.* "If every smartphone qualifies as an ATDS" in this fashion, then "the statute's restrictions … assume an eye-popping sweep"—indeed, an "utterly unreasonable" one. *Id.* at 16–17, 19.

The Commission tried to dodge this conclusion by arguing that the *Ruling* didn't actually address smartphones. The court wouldn't have it. For starters, it is "highly difficult" to read the *Ruling* that way. *Id.* at 21. And even if you could, that distinction would itself be arbitrary. The Commission made clear that the ability to "upgrade" equipment "via the addition of software" generally gives equipment the relevant "capacity." *Id.* at 23. It never explained how smartphones could possibly lack that ability, thereby "fail[ing] arbitrary-and-capricious review." *Id.* at 23.

Functions. With respect to the functions that render equipment an ATDS, the court framed the interpretive choice as whether the device "*itself* [must] have the ability to generate random or sequential numbers to be dialed" or whether "is it enough if the device can call from a database of telephone numbers generated elsewhere?"

The court set aside the *Ruling* on this point because, as in prior orders, the Commission was "of two minds on the issue": at times, it adopted the former approach, at others, the latter. *See id.* at 25–27. Indeed, the Commission was of two minds on related questions about the impact of human intervention: it stated that the ability to dial "without human intervention" was a "basic function" of an autodialer, but it also refused to clarify that "a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention." *Id.* at 28.

These differences matter; today's predictive dialers, for instance, often dial automatically from a list, and they do not themselves generate random or sequential numbers. *See id.* at

27. By speaking out of both sides of its mouth, the Commission "fail[ed] to satisfy the requirement of reasoned decisionmaking" and "compound[ed] the unreasonableness of [its] expansive understanding of when a device has the 'capacity' to perform the necessary functions." *Id.* at 29.

Reassigned Numbers. The court agreed that "called party" in the TCPA could reasonably be construed to refer to the actual recipient rather than the intended recipient, as the Commission had hoped. *See id.* at 34–35. But the court then found the one-call safe harbor "arbitrary." *Id.* at 35. The Commission "consistently adopted a 'reasonable reliance' approach [to] 'prior express consent,'" but it "gave no explanation of why reasonable-reliance considerations would support limiting the safe harbor to just one call or message"—a call or text that, by the Commission's own concession, might not reveal a reassignment. *Id.* at 36.

As a remedy, the court set aside the *Ruling*'s entire discussion of reassigned numbers, not just the safe harbor. *See id.* at 39–40. The Commission had rejected a "strict-liability regime," so the court could not be sure it "would have adopted the severed portion"—that is, the interpretation of "called party," without the safe harbor—on its own. *Id.* at 39.

THE NEW NORMAL: A RETURN TO THE ACTUAL STATUTE AND THE EQUIPMENT IT TARGETED

The D.C. Circuit's decision should spur a monumental shift in TCPA suits. Prior to the decision, the Administrative Orders Review Act prohibited defendants from challenging the validity of the *Ruling* (or its predecessors) in private litigation. *See, e.g.*, *CE Design, Ltd. v. Prism Business Media, Inc.*, 606 F.3d 443 (7th Cir. 2010). The D.C. Circuit's decision wiped away these aspects of the agency's orders, leaving defendants free to make their best argument: read the statute. By its plain terms, the statute does not cover equipment that, as programmed, cannot generate random or sequential numbers.

Capacity. The court strongly suggested that any interpretation of "capacity" that turns smartphones into ATDSs is too broad. Because smartphones are reprogrammable, the court's smartphone test greatly circumscribes the scope of "capacity," no matter what functions you think an ATDS must perform: it's just as easy to reprogram a smartphone to dial from a list as it is to make it generate and dial random numbers. As a result, "capacity" must be limited to something like the court's example—if you can "flip[] … a switch" to activate autodialer functions, *id.* at 14, you may have an autodialer on your hands.

Even under the most plaintiff-friendly reading of the court's decision and the rest of the TCPA, such a limited approach to "capacity" should allow callers to use many contemporary dialing devices. For example, equipment specifically programmed to call wireless and wireline numbers differently—the former by live operators individually initiating each call, the latter by predictive dialers, with technological blocks thwarting any crossover between the two—falls closer to the reprogramming side of the line than the flip-a-switch side, even if courts take an erroneously broad view of the functions that an ATDS must be able to perform.

The court did not decide, however, that the ability to flip a switch to turn on the relevant functions sufficed to make an ATDS. Indeed, the opposite: it breathed life back into the argument that, if you don't actually flip the switch when making calls with such equipment, you haven't "us[ed] an [ATDS]" for purposes of the statute. Courts have largely rejected that position, focusing on the word "capacity" in the definition of an ATDS. *See e.g.*, *Satterfield* v. *Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009). But the D.C. Circuit put it back on the table, noting that it "would substantially diminish the practical significance of the Commission's expansive understanding of 'capacity,'" slip op. 30, solving the problem of smartphones in the process. Indeed, if the purpose of the TCPA actually matters in the inquiry, this argument has considerable force: what difference could it make to a consumer if she is called by a human even though the caller's equipment happens to have autodialer capabilities as well? By raising this previously foreclosed argument and suggesting it might have merit, the court invited the Commission to consider this claim anew.

Functions. With respect to ATDS functions, the decision is significant in two main respects: it swept away the FCC orders that had given rise to such chaos in this area, and it strongly suggested that autodialers must be able to dial without human intervention.

Prior Orders. Earlier FCC orders spoke just as confusingly about the functions required to be an ATDS. *See, e.g.*, *2003 Order*, 18 FCC Rcd. 14014 (2003). Those statements are gone, too. Slip op. 23–24. Defendants are finally free to argue from the statute itself: to be an ATDS, equipment must be currently

programmed in such a way that it can "store or produce telephone numbers to be called, *using a random or sequential number generator*." 47 U.S.C. § 227(a)(1)(A) (emphasis added).

If defendants win that argument, ATDS liability for legitimate businesses will be a thing of the past: no one uses equipment programmed to generate and dial random or sequential numbers any more. And there is hope that defendants will win that argument. One circuit court has already accepted that interpretation, although admittedly in an unpublished opinion. *See Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 372–73 & n.2 (3d Cir. 2015). Moreover, FCC orders prior to 2003 *themselves* declared it. *See* 7 FCC Rcd. 8752 ¶ 47 (1992) (the ATDS provision does not cover equipment that can "speed dial[]" "because the numbers called are not generated in a random or sequential fashion"); 10 FCC Rcd. 12391 ¶ 19 (1995) (the ATDS provision does not apply to calls "directed to [a] specifically programmed contact number[]" rather than to "randomly or sequentially generated numbers").

Human Intervention. Whatever functions an ATDS must be able to perform, the D.C. Circuit's opinion strongly suggested that it must be able to perform them without human intervention. The panel noted that prior Commission rulings had emphasized this requirement and then noted: "That makes sense given that 'auto' in autodialer—or, equivalently, 'automatic' in [ATDS]—would seem to envision non-manual dialing of telephone numbers." Slip op. 28. Most courts had already accepted this view, but the D.C. Circuit's logic ought to settle any lingering doubt.

Reassigned Numbers: In a very real sense, the D.C. Circuit's decision regarding the scope of the ATDS provision could eliminate the problem of reassigned numbers, no matter how the Commission ultimately decides to shape any safe harbor. Since very little equipment qualifies as an ATDS under the best reading of the statute, very few callers *need* prior express consent.

Where prior express consent remains relevant—for example, for calls made to deliver an automated or prerecorded voice message—the impact of the court's decision is unclear. On the one hand, defendants will struggle even more in arguing that "called party" refers to the call's intended rather than actual recipient; other circuits have already rejected that view, and the D.C. Circuit added its voice to the mix by upholding the Commission's interpretation as at least reasonable. On the other hand, the Commission itself recognized that callers may reasonably rely on the first consumer's consent when making calls, and the court recognized that reasonable reliance could extend beyond the first call.

As a result, the situation regarding reassigned numbers is in flux: defendants are free to argue that the statute allows reasonable reliance on prior consent, but plaintiffs are free to argue that it doesn't. Hopefully the Commission's ongoing rulemaking proceedings—headed by Chairman Pai, who dissented from the *2015 Declaratory Ruling*'s treatment of reassigned numbers—will lead to practical solutions that eliminate this source of unpredictable, inequitable liability.

CONCLUSION

When petitioners sought review almost three years ago, there was considerable cause for concern: the D.C. Circuit has been quite deferential toward agency action in recent years, and the Commission's action here was supposedly motivated by a desire to protect consumers from unwanted robocalls. *ACA International*, however, proves that all is not lost for those challenging onerous agency action: when an agency adopts an "utterly unreasonable" view of a statute, or can't even decide which of two interpretations to adopt, its decision will be set aside.

The court's shot across the bow should help in dramatically slowing the wave of TCPA litigation sweeping the nation, allowing callers to contact their customers in reasonable, efficient ways. One hopes that it will also caution other agencies to avoid the sweeping, unreasoned decision-making that doomed the *2015 Declaratory Ruling*.

THREE KEY TAKEAWAYS

1. Defendants in ATDS cases are now free to make their best argument—that the statute covers only equipment that generates and dials randomly or sequentially generated numbers—without hindrance from the Commission's contrary suggestions.

2. Defendants in reassigned-number cases should focus first on whether the equipment in question was an ATDS, where they have a good chance of winning. Whether other arguments will prevail—such as the claim that the caller reasonably relied on the first customer's consent—remains an open question.

3. Going forward, businesses should be able to find ways to use more efficient dialing equipment—most notably, predictive dialers—with significantly diminished risk of TCPA liability.

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