

Client Alert

March 2018

DC Circuit Issues Highly-Anticipated TCPA Opinion On Autodialers, Reassigned Numbers, and Revocation of Consent

After nearly a year and a half of intense speculation and anticipation, the United States Court of Appeals for the District of Columbia Circuit issued its decision in *ACA International, et al. v. Federal Communications Commission*. On March 16, 2018, the Court issued its opinion addressing whether various interpretations and rules set forth by the FCC in its 2015 Declaratory Ruling and Order interpreting the Telephone Consumer Protection Act (“TCPA”) are valid under the Administrative Procedures Act.

SUMMARY OF THE DECISION

In a 51-page opinion (available [here](#)), the Court made the following significant rulings:

- **FCC’s interpretation of autodialers is overbroad.** The Court found the FCC’s interpretation of “automatic telephone dialing system” (ATDS) to be overbroad, as it would include devices such as smartphones. Importantly, the Court also noted that the FCC’s 2015 Order lacks clarity and offers “no meaningful guidance” as to whether certain equipment, such as predictive dialers used by many in the consumer finance industry, qualifies as an ATDS, particularly when such equipment lacks the capacity to *generate* random or sequential numbers, as opposed to simply dialing such numbers.
- **FCC’s “one-call, post-reassignment safe harbor” rule is invalid as arbitrary, and therefore FCC’s “treatment of reassigned numbers as a whole” set aside.** The Court found the FCC’s interpretation of “called party” to be valid, thereby approving the prohibition on autodialer calls without the prior express consent of the number’s *current subscriber*. However, regarding reassigned numbers – i.e., telephone numbers that were provided by a customer but are then reassigned to a new owner often without knowledge of the caller – the Court found 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.” The Court then went further, recognizing that simply setting aside the FCC’s “one-call, post-reassignment safe harbor” rule would leave a strict liability (i.e., no safe harbor) rule, and therefore the Court “must set aside the Commission’s treatment of reassigned numbers as a whole.”
- **Revocation of consent by “any reasonable means” valid.** The Court approved the FCC’s conclusion that “a called party may revoke consent at any time and through any reasonable means – orally or in writing – that clearly expresses a desire not to receive further messages.” The Court explained that while revocation may be oral or in writing, “[t]he Commission’s ruling absolves callers of any responsibility to adopt systems that would entail ‘undue burdens’ or would be ‘overly burdensome to implement,’” and therefore “callers would have no need to train every retail employee on the finer points of revocation.” The Court also stated that “callers will have every incentive to avoid TCPA

liability by making available clearly-defined and easy-to-use opt-out methods,” and that “[i]f recipients are afforded such options, any effort to sidestep the available methods in favor of idiosyncratic or imaginative revocation requests might well be seen as unreasonable.”

- **Parties may mutually agree to revocation procedures.** Importantly, the Court was careful to note that the FCC’s 2015 Order “did not address whether contracting parties can select a particular revocation procedure by mutual agreement.” While the FCC’s 2015 Order precludes the *unilateral* imposition of revocation rules by the caller, “[n]othing in the Commission’s order thus should be understood to speak to parties’ ability to agree upon revocation procedures.”

Thus, the D.C. Circuit has now invalidated major parts of the FCC’s 2015 Order, which was generally regarded as a win for the TCPA plaintiffs’ bar. The FCC may appeal to the Supreme Court, or may revise its 2015 Order in light of the *ACA International* opinion.

THE DECISION WILL BE SEEN AS A GAME-CHANGER

ACA International plunges TCPA litigation into deeper uncertainty and could be a “game changer” in the following ways:

1. Defendants now have additional support for the defense that their equipment is not an ATDS, an issue that was often conceded pre-*ACA International*.
2. Any “reassigned number” TCPA case is potentially derailed in its entirety, given that the Court “set aside the Commission’s treatment of reassigned numbers as a whole.”
3. Regarding revocation of consent, *ACA International* supports the parties’ ability to mutually agree to revocation procedures.
4. And while the Court affirmed that revocation by “reasonable means” generally can be oral or in writing, the opinion’s discussion of “reasonable means,” including its statement that “idiosyncratic or imaginative revocation requests might well be seen as unreasonable,” could impact class certification issues because reasonableness is generally a fact issue, and will likely depend on what was said, in what context, and to whom.
5. Given that attorneys’ fees are generally not recoverable in TCPA litigation, the prospect of protracted litigation over the above-described issues may chill new filings.

The precedential value of the D.C. Circuit’s *ACA International* opinion on TCPA litigation nationwide appears to be a disputed issue among federal district courts. Some district courts have stated that they will be bound by the opinion (either because it consolidated various cases, or under the Hobbs Act), some courts have said they would not, and some have simply admitted that the issue is unclear. Regardless, *ACA International* is sure to be highly persuasive in every court, given the depth of the D.C. Circuit’s Administrative Procedures Act and *Chevron* jurisprudence.

WHAT TO DO NOW?

With the issuance of *ACA International*, companies that utilize non-manual dialing methods, including consumer finance companies and banks, should consult with competent TCPA counsel to evaluate any impact *ACA International* may have on their TCPA consent/revocation policies and procedures, dialing equipment and programming used, reassigned number policy, and their TCPA contract and website terms. And for companies currently defending a TCPA case, *ACA International* should be evaluated to determine what impact, dispositive or otherwise, the decision may have on the case.

Contacts

Eric R. Hail
ehail@hunton.com

Jarrett L. Hale
jhale@hunton.com

Tara L. Elgie
telgie@hunton.com

Grayson L. Linyard
glinyard@hunton.com

Aliza Pescovitz Malouf
amalouf@hunton.com

© 2018 Hunton & Williams LLP. Attorney advertising materials. These materials have been prepared for informational purposes only and are not legal advice. This information is not intended to create an attorney-client or similar relationship. Please do not send us confidential information. Past successes cannot be an assurance of future success. Whether you need legal services and which lawyer you select are important decisions that should not be based solely upon these materials.