

## The Robocalls and Class Actions Continue as FCC's Omnibus TCPA Ruling Fails to Slow Surge of Lawsuits

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*In the face of ongoing uncertainty regarding permissible uses of modern telephone equipment under the TCPA, lawsuits and important precedents continue to pile up.*

The Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227 *et seq.*, and the rules of the Federal Communications Commission (FCC) implementing it, regulate telephone solicitations to residential landlines and *all* calls to cellular phones, as well as the sending of fax transmissions. In particular, the TCPA and FCC rules prohibit using an automated telephone dialing system (also referred to as an autodialer or ATDS) or a pre-recorded message to make telephone solicitations to residential landlines or any calls to cellular phones, unless the recipient of the call has granted prior express consent (or in cases of emergency). The stated purpose of the TCPA is to protect individuals from unwanted robocalls, which the FCC interprets as including both voice *and* text messages, while ostensibly still permitting legitimate telemarketing practices.

In the early years, TCPA litigation was relatively uncommon, but the rapidly expanding market for smartphones has opened up new, often more efficient and even pro-consumer, ways for businesses to communicate with their customers that were not conceived of when the TCPA was originally drafted. The FCC's broad interpretation of "autodialer" to include almost all modern telephone equipment except a rotary dial telephone, and the proliferation of text messaging, however, have led to confusion as to whether using new device capabilities, particularly in light of changes they have brought about in the way users communicate today, in fact violates the 25-year-old statute. In addition, the TCPA's authorization of \$500 in statutory damages per call (or text), trebled in the case of a knowing violation, has resulted in most TCPA suits being brought on a class action basis.

According to recently published statistics,<sup>1</sup> an astonishing 3,710 TCPA cases were filed in state and federal courts in 2015, as compared with only fourteen cases in 2007,<sup>2</sup> and 2016 could be another record-breaking year. Given this proliferation of TCPA litigation, and the many significant monetary judgments

<sup>1</sup> See [Web Recon LLC](#).

<sup>2</sup> See *Id.*

against a wide variety of consumer-facing companies that have resulted from it, businesses that communicate with consumers via telephone desperately need clarity. Dozens of businesses have filed petitions with the FCC seeking exemption from the TCPA for a variety of calling/texting practices. The FCC issued an Omnibus Order addressing a number of these petitions, however, as described in Section I below, that ruling also raised new questions and is currently being appealed by numerous parties. Thus, the Omnibus Order has not served to clearly distinguish practices that violate the TCPA from many ordinary calling behaviors. Accordingly, businesses must continue to stay abreast of the numerous TCPA cases making their way through the courts and administrative process. To that end, three recent cases that significantly impact TCPA jurisprudence and the way in which companies conduct TCPA litigation are discussed in Section II below.

### 2015 FCC Omnibus Order

On July 10, 2015, the FCC issued the agency's long-awaited omnibus Declaratory Ruling and Order (Omnibus Order) resolving nearly two dozen petitions seeking specific exemptions or clarification of the TCPA to permit the various businesses to conduct what they perceive to be their ordinary business activities free from concern for class action TCPA litigation.<sup>3</sup>

Among the Omnibus Order's most broadly-applicable holdings were:

- Despite the confusion it has wrought, the term ATDS must continue to be defined very broadly as any device with the "capacity"—that is, that has "more than a theoretical potential"—to be modified to dial random or sequential numbers (including dialing in sequence numbers on a list or from a database, as well as devices called "predictive dialers"), even if the device does not have that capacity at the time a complained-of text or call is made;<sup>4</sup>
- A called party must always have the opportunity to revoke previously given consent at any time and through any reasonable means, i.e., callers cannot limit the means by which called parties can opt-out of receiving more calls;<sup>5</sup>
- Callers to a reassigned telephone number can still face liability under the TCPA despite having had consent from the prior holder of the telephone number, although unknowing callers may make one liability-free call after which they are deemed to have learned of the reassignment of the telephone number, regardless of whether they actually did;<sup>6</sup>
- Callers are permitted to send one text in response to a text requesting specific information, such as sending a coupon or discount code in response to an in-bound text directed to the short code contained in an advertisement advising of the availability of that coupon/code;<sup>7</sup> and
- Certain free, pro-consumer financial- and health-care-related messages that comply with strict conditions and limitations to protect consumer privacy are exempt from the consumer-consent requirement.<sup>8</sup>



<sup>3</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, et al.*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) ("2015 FCC Ruling").

<sup>4</sup> 2015 FCC Ruling, ¶ 16. ("[T]he capacity of an autodialer is not limited to its current configuration but also includes its potential functionalities.")

<sup>5</sup> 2015 FCC Ruling, ¶¶ 47.

<sup>6</sup> 2015 FCC Ruling, ¶¶ 71-72.

<sup>7</sup> 2015 FCC Ruling at ¶ 104.

## D.C. Circuit Appeal Challenging the 2015 FCC Omnibus Order

As expected, litigation ensued almost immediately after the Omnibus Order became effective. Currently pending before the D.C. Circuit are cases challenging the Omnibus Order on a variety of grounds, including: (1) the FCC's inclusion in the definition of ATDS of any device that has the future, as opposed to present, "capacity" to dial random and sequential telephone numbers is arbitrary and capricious and unconstitutional; (2) the FCC's inclusion of predictive dialers in the definition of ATDS unlawfully expands the statutory definition of an ATDS; (3) the FCC's finding that calls to reassigned numbers lack the "prior express consent" of the current holder of the telephone number and therefore violate the TCPA is arbitrary and capricious and unconstitutional; (4) the FCC's treatment of text messages as "calls" for TCPA purposes is unlawful; and (5) the FCC's treatment of HIPAA-protected health care communications is unlawful.<sup>9</sup>

## Recent Developments Affecting the Conduct of TCPA Litigation

As the industry desperately waits for the D.C. Circuit to decide these appeals challenging the 2015 FCC Omnibus Order, other courts continue to rule on the many TCPA cases already before them, further developing TCPA jurisprudence, as is seen in the following recent precedents:

- ***Campbell-Ewald Co. v. Gomez*, 577 U.S. \_\_\_ (2016)**

*Held: A defendant's unaccepted offer to pay plaintiff's full statutory damages, including treble damages for a knowing violation of the TCPA, does not render moot the plaintiff's claim, and therefore the claims of the class s/he proposes to represent.*

This case involved defendant Campbell, a marketing agency that the U.S. Navy hired for Navy recruitment purposes. As part of defendant's marketing services, defendant engaged a subcontractor to transmit text message solicitations to prospective Navy recruits. Plaintiff, a recipient of a text, sued defendant under the TCPA seeking treble statutory damages and an injunction on behalf of a nationwide class. Before the deadline for plaintiff to file a motion for class certification, defendant proposed to settle plaintiff's individual claim for the full amount of his litigation costs, excluding attorneys' fees, and treble statutory damages of \$1,503 per message for the text message that formed the basis of the complaint, as well as any other text message plaintiff could demonstrate he had received. Plaintiff did not accept the offer, and defendant subsequently moved to dismiss the case pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. Among other things, defendant argued that its settlement offer satisfied the plaintiff's personal treble damages claim, thereby providing plaintiff complete relief. In addition, because plaintiff failed to move for class certification before his individual claim became moot, the putative class claims became moot as well.

The U.S. Supreme Court majority, however, held that defendant's settlement offer and offer of judgment, once rejected, had no continuing effect on plaintiff or the putative class of similarly situated individuals. With no operative settlement offer, the parties remained adverse as both retained the same stake in the litigation they had at the outset, and plaintiff's putative class claims under the TCPA survived.

<sup>8</sup> 2015 FCC Ruling, ¶¶ 125-139 (financial-related messages); *Id.*, ¶¶ 140-148 (health-care-related messages).

<sup>9</sup> *ACA Int'l v. FCC*, No. 15-1211, Amended Petition for Review, filed July 13, 2015, p. 3-4; *Consumer Bankers Assoc. v. FCC*, No. 15-1304, Petition for Review, p. 3-6 (D.C. Cir. filed Sept. 1, 2015); *Rite Aid Hdqtrs. Corp. v. FCC*, No. 15-1211, Petition for Review, p. 1-2.

- ***Baird v. Sabre, Inc.*, unpublished memorandum disposition, No. 14-55293 (February 3, 2016)**

*Held: Where a TCPA claim is filed as a private cause of action in district court, rather than in federal appellate court pursuant to the Hobbs Act (which provides appellate courts with exclusive jurisdiction to evaluate final orders of the FCC), the appellate court is limited to reviewing whether the district court properly applied the FCC's rulings, without evaluating whether the FCC's ruling itself is valid.*

In this unpublished memorandum disposition, the Ninth Circuit affirmed the decision of a district court tossing out a putative class action TCPA lawsuit. In dismissing the case, the district court relied on an FCC order to find that the named plaintiff had provided the defendant "prior express consent" sufficient to excuse any alleged TCPA violation. Specifically, the district court had found that, according to the FCC precedent, a called party's knowing release of his or her cellphone number without providing any "instructions to the contrary" indicating that she did not wish to be reached at that number constitutes express consent under the TCPA, and that the named plaintiff had consented to receipt of the text message in question when she knowingly released her cell phone number without restriction to an airline company while making a flight reservation. In reviewing the district court's holding, the Ninth Circuit concluded that, absent jurisdiction under the Hobbs Act which would permit it to consider whether the FCC order the district court had relied on was valid, it had to presume the FCC's order to be valid and limit its review to the question of whether the district court had properly applied it.

- ***Cincinnati Insurance Co. v. All Plumbing, Inc. Service, Parts, Installation, et al.*, No. 14-7140 consolidated with No. 14-7151, D. C. Cir.; 2016 U.S. App. LEXIS 1941**

*Held: Even if an insurer fails to reserve its rights to not defend an insured in TCPA litigation under the theory that the TCPA liability is not covered under a primary liability provision of an insurance contract, the insurer is not barred from invoking the insurance deductible, or asserting any coverage defenses under the excess liability provision of the insurance contract.*

This case arose when an insurer sought a declaratory judgment that it owes no duty to defend or indemnify claims brought against its insured, a company that had been sued for sending unsolicited faxed advertisements alleged to be in violation of the TCPA. The relevant insurance policy provided primary liability insurance coverage for "bodily injury" and "property damage" subject to a \$1,000 deductible, as well as for "personal and advertising injury." In the event the primary insurance coverage was exhausted, the policy provided for excess liability coverage.

The district court ruled that the insurer could not assert any of its defenses to coverage under the primary liability provision of the policy because it had failed to properly reserve its rights by alerting the insured at the outset of litigation that the policy did not cover the TCPA liability. Nevertheless, the insurer could assert defenses against coverage under the excess liability provision, although the district court did not actually rule on the validity of those defenses in its dispositive order.

The insurer appealed to the D.C. Circuit, again seeking a ruling that it had no duty to defend the insured under the primary or excess liability provisions, and the insured cross-appealed. The D.C. Circuit ultimately dismissed the appeal for lack of a final decision as to all requested relief because the district court had not ruled on the validity of the insurer's defenses. In the process, however, the D.C. Circuit held that the insurer should still be permitted to invoke the primary insurance

provision's deductible as well as to assert any coverage defenses under the excess liability provision, because any duty to defend under the excess liability provision does not arise until the limits of the primary liability provision are exhausted.

### How Should Companies Proceed?

In the absence of a more comprehensive review of the TCPA and its implementation, businesses (especially those that are consumer facing) must remain abreast of developments in ongoing TCPA litigation. Businesses should subject all new calling/texting programs to heightened scrutiny, but also continually review/audit existing consumer texting and phone practices, due to the piecemeal way in which the law in this area will continue to develop for the foreseeable future. For this reason, continued attention to best practices, including the audit/review process, as well as implementation of call-scrubbing procedures, and careful maintenance of do-not-call and reassigned number lists, remains paramount.

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