

Shake up in TCPA Regulations: Hot Topics in TCPA Compliance

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Here's a fact of modern life that most of us are familiar with: at least once a week, your cell phone lights up with an unknown number. Sometimes you let it go to voicemail, other times you are curious enough to answer. In either case, what you end up receiving is a pre-recorded message to refinance your mortgage, purchase identity theft prevention services, or claim a trip to the Bahamas. To curb these types of unwanted calls, in 1991, Congress enacted the Telephone Consumer Protection Act ("TCPA"). 47 U.S.C. § 227. In 2005, Congress expanded the TCPA to apply to unsolicited faxes as well. 47 U.S.C. § 227(b)(1)(C) & (a)(5); In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 Junk Fax Prevention Act of 2005, 21 F.C.C. Rcd. 3787, 3820–21 (2006).

What gives the statute its teeth is the private right of action that it affords: \$500 per violation, with the potential for treble damages if the action was willful. 47 U.S.C. 227(b)(3). As a result, the TCPA has become a hotbed for litigation in recent years, particularly ripe for class action suits by the plaintiffs' bar. In fact, between 2012 and 2016, the number of TCPA lawsuits in federal court alone has swelled from 1,000 to 5,000. Sara Randazzo, *There's Money in Faxes for Plaintiffs*, WALL STREET JOURNAL, March 24, 2017.

The question now is whether TCPA litigation will be tempered by the recent and anticipated shake ups in TCPA regulations promulgated by the Federal Communications Commission (FCC), the agency tasked with implementing the statute. Three recent events that may turn the tide of TCPA litigation are addressed below.

Yaakov v. FCC

In the recent decision of *Yaakov v. FCC*, No. 14-1234 (D.C. Cir. Mar. 31, 2017), the D.C. Circuit curtailed the FCC's interpretation of the TCPA as it applies to certain fax advertisements. By its express terms, the TCPA prohibits unsolicited fax advertisements, except in certain limited circumstances. 47 U.S.C. § 227(b)(1)(C)(i)-(iii). In particular, an unsolicited fax is permitted where, among other things, the "first page of the unsolicited advertisement" provides "clear and conspicuous" opt-out instructions. *Id.* § 227(b)(2)(D). In 2006, however, the FCC promulgated a new rule requiring senders of *solicited* fax advertisements – i.e., where the recipients had granted prior express invitation or permission to receive faxes from the sender – to also provide opt-out notices. 47 C.F.R. § 64.1200(a)(4)(iv). Consequently, several businesses challenged the validity of this rule after they were slapped with hefty class action suits not for lack of permission to send fax advertising, but for failure to provide opt-out notices. See *Yaakov*, at 6 (although plaintiffs gave permission to send fax advertisements to plaintiffs, they "nevertheless sought over \$150 million in damages from Anda because Anda's fax advertisements did not include opt-out notices").

On March 31, the D.C. Circuit ruled in favor of these businesses, finding that the FCC exceeded its rule-making authority when it crafted prohibitions on solicited faxes. More specifically, the court found that the plain terms of the TCPA "drew a line ... between unsolicited fax advertisements and

solicited fax advertisements,” *id.* at 9, and concluded that TCPA regulates only *unsolicited* faxes. Thus, the FCC violated “statutory boundaries” when it required opt-out notices on solicited faxes. *Id.* at 10.

This case marks a clear win for businesses, signaling judicial curtailment of the FCC’s regulatory reach. Whether the D.C. Circuit will stay this course, however, will be determined by *ACA International v. FCC*, No. 15-1211 (D.C. Cir.), a separate case still pending before the D.C. Circuit.

ACA International v. FCC

This highly anticipated decision will resolve some of the most controversial interpretations of the TCPA issued by the FCC. Specifically, the joint petitioners of the *ACA International* case challenge the FCC’s July 10, 2015 Omnibus Declaratory Ruling and Order (“2015 Order”), which, among other things, clarified the term “automatic telephone dialing system” (“ATDS”), set forth rules on calling reassigned numbers, and provided guidance on the revocation of consent by called parties. Oral argument was held in October 2016 and lasted for over two hours, with both sides fielding pointed questions from the panel. While it is unclear how the D.C. Circuit will rule, here is a breakdown of the thorny issues.

Automatic Telephone Dialing System

The TCPA prohibits calls “using any automatic telephone dialing system” to certain recipients. 42 U.S.C. § 227(b)(A). The statute defines ATDS as “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.” *Id.* § 227(a). In its 2015 Order, the FCC clarified that the term “capacity” means present or potential ability to autodial. The petitioners seized on the notion that a restricted device included ones with future ability to autodial, arguing that this definition was impermissibly vague, ambiguous, and overbroad. Pet. Br., pp. 21-39. They asserted that such a definition would sweep up smartphones – phones without the present ability to autodial, but could, hypothetically speaking, autodial in the future with the creation of a relevant app. *Id.* The FCC countered that its clarification of the term capacity was one that simply reinforced what courts had always understood the term to mean, and that, in any case, petitioners’ smartphone example was a red herring as there have not been any TCPA suits involving the use of smartphones to the FCC’s knowledge. Resp. Br., pp. 26-53.

Reassigned Numbers

The 2015 Order also addressed the reassignment of a telephone number from a previously consenting recipient to a non-consenting recipient. The FCC interpreted the statute’s term “consent of the called party” to mean the consent of the current subscriber of the number. Thus, if the reassigned subscriber of a telephone number never gave consent for telemarketing calls, a company may be in violation of the TCPA even if it had intended to reach the previously consenting subscriber. The petitioners contended that “called party” should instead mean the “expected recipient.” Pet. Br., pp. 41-46.

Moreover, the petitioners took issue with the FCC’s one-call safe harbor rule that permits callers a single call to discover the reassignment of telephone number before facing liability. *Id.* at pp. 50-53. They argued that this rule was arbitrary and capricious, especially in a day-and-age where most people do not respond to unknown numbers. *Id.* The FCC argued that drawing the line at one call was a reasonable and balanced approach given that the TCPA is meant to protect consumers.

Resp. Br., pp. 54-61. Therefore, the burden should fall on companies to perform more diligence before calling a reassigned number.

Revocation of Consent

Finally, the petitioners challenged the FCC's order that consent by a called party can be revoked by any means and at any time, i.e., that consumers need not adhere exclusively to a company's specific revocation procedure. Pet. Br., pp. 54-63. The petitioners argued that this was an unworkable rule, and sought a standardized method of revocation. *Id.*

It remains to be seen whether the panel was persuaded by any of petitioner's arguments. In any case, the impending decision will likely have ramifications on the flood of TCPA litigation.

FCC Leadership Change Up

The change in administration has also impacted the FCC leadership: Tom Wheeler stepped down as Chairman, and former FCC Commissioner Ajit Pai assumed his position. As a result, the FCC's leadership is now comprised of a two-to-one Republican majority. Moreover, Pai is known to be particularly pro-business. Dissenting Statement of Commissioner Pai, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 F.C.C. Rcd. 7961 (2015) ("The TCPA has strayed far from its original purpose. ... And the primary beneficiaries will be trial lawyers, not the American public.") Indeed, in their briefing, the *ACA International* petitioners relied heavily on Pai's dissent in the FCC's 2015 Order, repeatedly citing his counterpoints. This change in FCC leadership, with Pai at the helm in particular, signals a likely shift towards more business-friendly rule-making by the FCC, with resulting impacts likely in TCPA litigation. Thus, in addition to the judicial curtailment of the FCC's reach, the agency is positioned to do the same on its own volition.

Stay tuned. We will continue to monitor changes in TCPA compliance and report on the forthcoming *ACA International* decision.