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FEDERAL APPEALS COURT STRIKES DOWN KEY PARTS OF THE FCC'S TCPA ORDER

In a long-awaited ruling, the U.S. Court of Appeals for the District of Columbia Circuit rejected portions of a 2015 order issued by the Federal Communications Commission (FCC) which interpreted a number of provisions of the Telephone Consumer Protection Act of 1991 (TCPA), including those that apply to automated telephone calls and text messages to cell phones.

Under the TCPA, the penalty for a violation is \$500 per call or text, which can be trebled for willfulness. The court's decision addressed important elements of the TCPA that were challenged for what some viewed as being overly expansive, including the FCC's definition of "autodialer," definition of "called party," and methods to revoke consent. Although the decision currently leaves the TCPA in a state of uncertainty, as it did not replace these definitions with its own, companies that use telephone or text message interactions with customers should take note of how the rulings may impact the way they conduct business and marketing efforts going forward.

THE FCC'S 2015 ORDER

In its 2015 order, the FCC addressed a variety of issues under the TCPA, including:

- >> the definition and types of "autodialers" subject to the TCPA's restrictions on calls to wireless numbers;

THE BOTTOM LINE

The court's decision sends the FCC back to the drawing board, providing the marketing industry with an opportunity to offer input as the FCC reconsiders its interpretation of the TCPA. Indeed, a coalition led by the U.S. Chamber of Commerce has petitioned the FCC to craft a narrow definition of "autodialer" to replace the broad definition struck down by the court. Meanwhile, the TCPA remains the law, as do the portions of the FCC's 2015 order that the court let stand. In the wake of the court's ruling, marketers and their agencies should consult with counsel about the TCPA's application to their businesses before continuing with any telemarketing or text message campaigns.

- >> whether the TCPA's standard of required consent of a "called party" applies to reassigned numbers; and
- >> the methods for a consenting party to revoke consent.

These portions of the FCC's order were challenged in court, leading to the Federal Circuit's unanimous decision which partly rejected and partly upheld certain portions of the FCC's order.

AUTODIALERS

The TCPA generally prohibits the use of autodialers to call wireless telephone numbers without advance express consent. The FCC's order addressed specific points of this provision in the following manner:

- >> Specifically, the FCC addressed the "capacity" of autodialers to "store or produce telephone numbers to be called, using a random or sequential number generator," and "to dial such numbers." The FCC construed

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a device's "capacity" to encompass its "potential functionalities" with modifications, such as software changes.

- >> The FCC also reaffirmed prior orders, deciding that "predictive dialers" qualified as autodialers, but declined to rule that a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention.

In its ruling, the court determined that:

- >> the FCC's interpretation of "capacity" appeared to subject ordinary calls from any conventional smartphone to the TCPA's coverage; and
- >> if every smartphone qualifies as an autodialer, the TCPA's restrictions on autodialer calls would assume "an eye-popping sweep" that was an "unreasonably expansive interpretation" of the statute.

The court set aside the FCC's effort to clarify the types of calling equipment that fall within the TCPA's restrictions and the portion of the order describing the functions a device must perform to qualify as an autodialer, explaining that there was a "lack of clarity" about which functions qualify a device as an autodialer. However, the court left it to the FCC to further rule as to what qualifies as an "autodialer" going forward.

REASSIGNED NUMBERS AND "CALLED PARTY" CONSENT

The FCC's order also attempted to answer the question of whether a call violates the TCPA if the caller has obtained the party's consent, but, unbeknownst to the caller, the consenting party's wireless number has been reassigned to a different person who has not given consent. The FCC's order:

- >> Determined that the "called party," whose consent is needed under the TCPA, is not the intended recipient of a call but is the "current subscriber" (that is, the current, non-consenting holder of a reassigned number rather than the consenting party who previously held the number).
- >> Allowed one liability-free, post-reassignment call for callers who lack "knowledge of [the] reassignment" and who possess "a reasonable basis to believe that they have valid consent."

In its decision, the court:

- >> vacated the FCC's approach to calls made to a phone number previously assigned to a person who had given consent but that subsequently was reassigned to another (non-consenting) person; and
- >> decided that the FCC's one-call safe harbor, regardless of whether the caller has any awareness of the reassignment, was arbitrary and capricious, but did not replace the FCC's safe harbor with one of its own.

REVOKING CONSENT

Under the FCC's order, a consenting party may revoke consent, and:

- >> Callers may not unilaterally designate the acceptable means of revocation, concluding that a called party may revoke consent at any time and through any reasonable means, whether orally or in writing, that clearly expresses a desire not to receive further messages.

The court upheld the FCC's approach to revocation of consent, but importantly, also stated that nothing in the FCC's order precluded callers and consumers from contractually agreeing to revocation mechanisms.

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