

# D.C. Circuit's Long-Awaited Ruling Narrows FCC's 2015 TCPA Order

**Privacy Law Blog** on **March 27, 2018**

On March 16, 2018, the D.C. Circuit Court of Appeals released a long-awaited decision in *ACA International, et al. v. FCC*, unanimously ruling to narrow a [2015 Federal Communications Commission \(FCC\) order](#) (the “2015 Order”) that expanded the scope of the Telephone Consumer Protection Act (TCPA).

The TCPA is a federal law that governs marketing to telephones (including text messages) and fax machines, as well as the use of automatic telephone dialing systems (referred to as autodialers or ATDSs). The TCPA generally prohibits the use of an autodialer to call or text wireless telephone numbers without prior consent. The FCC is the federal agency charged with interpreting the TCPA and issuing rules implementing the TCPA. Since there is a private right of action under the TCPA and the potential amount of statutory damages is high (for example, as much as \$500-\$1,500 for each text per plaintiff), TCPA litigation continues to plague companies.

This ruling is significant because it will affect the many district court cases considering the issue of what constitutes an autodialer that were stayed in anticipation of the D.C. Circuit's ruling.

## The Court's Ruling

In its ruling, the D.C. Circuit addressed four issues:

1. Which sorts of automated dialing equipment are subject to the TCPA's restrictions on unconsented calls;
2. When a caller has obtained a party's consent, does a call nonetheless violate the TCPA if, unbeknownst to the caller, the consenting party's wireless number has been reassigned to a different person who has not given consent;
3. How a consenting party may revoke her consent; and
4. Whether the FCC too narrowly fashioned an exemption from the TCPA's consent requirement for certain healthcare-related calls.

With respect to the first issue, the D.C. Circuit struck down the 2015 Order's clarification of what constitutes an autodialer. The TCPA defines an autodialer as equipment that has the capacity (1) to store or produce telephone numbers to be called, using a random or sequential number generator, and (2) to dial such numbers. In the 2015 Order, the FCC stated that a device's "capacity" is not limited to its current configuration and includes "potential functionalities" such as modifications and the addition of software. The court rejected the FCC's broad construction, noting that such a construction "would appear to subject ordinary calls from any conventional smartphone to the [TCPA's] coverage, an unreasonably expansive interpretation of the statute." According to the court, under the FCC's rule, "any uninvited call or message from the device is a statutory violation," and thus conventional smartphone users could face a \$500 penalty for calling a person without first getting consent to contact them. The D.C. Circuit also examined whether a device qualifies as an autodialer only if it can generate random or sequential numbers to be dialed. The court explained that the 2015 Order gives no clear answer to this question, leaving affected parties "in a significant fog of uncertainty." Thus, the FCC's expansive interpretation in the 2015 Order of when a device has the "capacity" to perform the functions to qualify as an autodialer failed to satisfy the requirements of reasoned decisionmaking.

With respect to the second issue, the court vacated the FCC's approach to calls made to a phone number that, although previously assigned to a person who had given consent, has since been reassigned to another nonconsenting person. In the 2015 Order, the FCC concluded that such calls violate the TCPA but granted a one-call, post-reassignment safe harbor. The D.C. Circuit held that this one-call safe harbor is arbitrary and capricious because the FCC did not explain why it was no longer reasonable to rely on the prior express consent after just one call or message. (In fact, the FCC conceded that the first call may not give a caller notice of a reassignment.) Therefore, the court set aside the FCC's treatment of reassigned numbers as a whole.

With respect to the third issue: The 2015 Order allowed parties to revoke their consent through any "reasonable means" that clearly express a desire to receive no further messages from the caller. Petitioners challenged the FCC's refusal to implement standardized revocation procedures that would provide more certainty. The D.C. Circuit upheld this allowance, noting that the petitioners' concerns were overstated.

With respect to the fourth issue, the court sustained the scope of the FCC's exemption for non-telemarketing, time-sensitive, healthcare-related calls. Petitioners challenged this exemption on grounds that it restricts communications that were otherwise permissible under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and is arbitrary and capricious. The court rejected these arguments, reasoning that there is no obstacle to complying with both HIPAA and the TCPA. While HIPAA prohibits covered entities and their business associates from using or disclosing protected health information, they are generally permitted to use or disclose that information for treatment, payment or healthcare operations. Additionally, the court did not find the exemption to be arbitrary and capricious.

### **Significance and Impact of the Ruling**

Prior to the 2015 Order, the majority of federal courts adopted the "current capacity" test when considering the issue of whether "capacity" requires an actual, present capacity to function as an autodialer without modification. This test was rejected by the FCC in the 2015 Order. Petitioners' appeal to the D.C. Circuit challenged the FCC's interpretation in the 2015 Order. Because district courts are bound by the FCC's orders in TCPA cases, many district courts stayed cases considering the issue of what constitutes an ATDS, awaiting the D.C. Circuit's order in this case. With respect to the two issues for which the court set aside the FCC's interpretation (what constitutes an autodialer, and treatment of reassigned numbers), the court did not replace the FCC's interpretation with its own interpretation, leaving courts considering these issues with limited guidance. We will continue to watch TCPA cases and how they are affected by the D.C. Court's order.

[View original](#)