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Client Alert

March 30, 2018

A Call for Change: D.C. Circuit Dials Back FCC's 2015 TCPA Ruling

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Now that the U.S. Court of Appeals for the District of Columbia has issued its long-awaited decision in *ACA Int'l v. FCC*, courts and litigants must determine the implications of this watershed decision. Based on comments from two of its Commissioners, the reconfigured Federal Communications Commission (FCC) appears intent on taking a fresh approach to interpreting and enforcing the statute, based in some measure on the guidance provided by the Court of Appeals.

In the midst of that uncertainty, compliance-minded companies are now tasked with reviewing their existing protocols to assess best practices going forward, in anticipation that much of the July 2015 Declaratory Ruling will be reset by the FCC and by the courts. To assist our clients in these endeavors, we provide below an in-depth analysis of the D.C. Circuit's decision, including key takeaways on the central issues of autodialing, reassigned numbers, revocation of consent, and healthcare communications. We also preview likely litigation issues and further proceedings before the FCC.

The Definition of an ATDS

Perhaps nothing has altered the TCPA litigation landscape more than the FCC's expansive definition of "automatic telephone dialing system" (ATDS) in the Declaratory Ruling, which arguably swept every modern form of telecommunications technology into the statute's reach. As we noted on release of the Declaratory Ruling, the broad scope of the FCC's interpretation of the statutory definition clashed with the views of a number of courts and, we predicted, would be subject to a fierce challenge on judicial review. The petitioners presented just that, seeking review of "which sorts of automated dialing equipment are subject to the TCPA's restrictions on unconsented calls." The D.C. Circuit ruled in petitioners' favor on this issue, setting aside the FCC's ruling in its entirety and noting that the FCC's reading "would appear to subject ordinary calls from any conventional smartphone to the Act's coverage, an unreasonably expansive interpretation of the statute." Op. at 5. As the D.C. Circuit put it, "[i]t cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact." Op. at 17.

In its Declaratory Ruling, the FCC expanded the reach of the TCPA beyond the statutory language. The statute regulates equipment that "has the capacity" to "store or produce telephone numbers to be called, using a random or sequential number generator," and "to dial such numbers." 47 U.S.C. § 227(a)(1). The FCC strayed far from this plain language, finding that a broad definition of an ATDS would be consistent with Congress's intent in drafting the statute and would help "ensure that the restriction on autodialed calls not be circumvented." The Commission concluded that "the TCPA's use of 'capacity' does not exempt equipment that lacks the 'present ability' to dial randomly or sequentially," and that "the capacity of an autodialer is not limited to its current configuration but also includes its potential functionalities." The FCC suggested that this expansive and otherwise unsupported interpretation of ATDS had "outer limits" and would not "extend to every piece of malleable and modifiable dialing equipment," but the sole example it offered up of what would ***not*** constitute an ATDS was an old-fashioned rotary-dial phone. The FCC also brushed off petitioners' concerns that such a broad definition would include smartphones, the most ubiquitous communications tool on the planet, ignoring the substantive question and instead noting that lawsuits alleging TCPA violations through the use of smartphones had not yet been filed.

Now-Chairman of the FCC Ajit Pai vigorously dissented from this aspect of the Declaratory Ruling, which he said would "transform[] the TCPA from a statutory rifle-shot targeting specific companies that market their services through automated random or sequential dialing into an unpredictable shotgun blast covering virtually all communications devices." Commissioner O'Rielly noted in his dissent that the FCC had "refus[ed] to acknowledge" the other half of the statutory definition of ATDS: that the equipment not only dial but also "store or produce telephone numbers to be called, using a random or sequential number generator." He emphasized that "[c]alling off a list or from a database of customers . . . does not fit the definition." Commissioner O'Rielly scoffed at the FCC's approach to the term "capacity" and stated that "[i]f a company can provide evidence that the equipment was not functioning as an autodialer at the time a call was made, then that should end the matter."

The D.C. Circuit's ruling reflects a complete victory for petitioners on this issue; the Court "set aside the Commission's explanation of which devices qualify as an ATDS." Op. at 5. In doing so, the Court concluded that the FCC's approach of defining capacity as "potential functionalities" or "future

possibility" simply "cannot be sustained," based on its assumption "that a call made with a device having the capacity to function as an autodialer can violate the statute even if autodialer features are not used to make the call." Op. at 12. The Court acknowledged that, under the Declaratory Ruling, all smartphones would meet the statutory definition of an ATDS, which would be exceedingly broad and lead to an array of "anomalous outcomes" that would be grounded in an "unreasonable, and impermissible interpretation of the statute's reach." Op. at 15-17.

The Court also acknowledged the irrationality of the FCC's approach: "The TCPA cannot reasonably be read to render every smartphone an ATDS subject to the Act's restrictions, such that every smartphone user violates federal law whenever she makes a call or sends a text message without advance consent." Op. at 17. Moreover, the Court noted that it is "untenable" to interpret the term "capacity" in the way that the FCC had purported to do and found its ruling on that issue unreasonable, arbitrary and capricious. *Id*.

Over the FCC's objection, the Court also considered and rejected as arbitrary and capricious prior FCC rulings that had appeared to dispense with the statutory requirement that equipment, in order to qualify as an ATDS, must "store or produce" telephone numbers using a random or sequential number generator, and then dial them. The Court found that the Declaratory Ruling "appears to be of two minds" on this issue, and held that the FCC "cannot, consistent with reasoned decisionmaking, espouse . . . competing interpretations in the same order." Op. at 25-27. Reflecting the experience of companies trying to interpret the FCC's orders on this issue, the Court explained that "affected parties are left in a significant fog of uncertainty about how to determine if a device is an ATDS so as to bring into play the restrictions. . . ." Op. at 29. In addition to setting aside the FCC's rulings, the Court also noted another argument not briefed in this proceeding. Specifically, since the TCPA makes it unlawful "***to make any call*** . . . using an automatic telephone dialing system," 47 U.S.C. § 227(a)(1) (emphasis added), the statute's requirement that the call be ***made*** using an ATDS might require that the device function as an autodialer when the specific call was made. Op. at 29-31. The D.C. Circuit noted that the FCC could choose to address that issue in a future proceeding or order. Op. at 31.

The D.C. Circuit has essentially handed back the responsibility of defining an ATDS to Chairman Pai, who is on the record as having stated that "[W]e should read the TCPA to mean what it says: Equipment that cannot store, produce or dial a random or sequential telephone number does not qualify as an automatic telephone dialing system because it does not have the capacity to store, produce or dial a random or sequential telephone number." We will soon get clarity on whether dialing from lists of specified numbers falls outside the reach of the statute and where predictive dialers and text messaging platforms fit. In the meantime, there will be increased opportunities for defendants in TCPA litigation to move to dismiss claims based on plaintiffs' failure to allege the use of an ATDS, and to move to stay cases pending FCC clarity on the threshold issue of what even constitutes an autodialer.

Reassigned Numbers

Next, the D.C. Circuit turned to the issue of TCPA liability for calls to reassigned numbers, i.e., wireless numbers that—unbeknownst to the caller—have been reassigned from a consenting party to another, nonconsenting party. Under the TCPA, a key defense is consent, as the statute does not prohibit calls "made with the prior express consent of the ***called party***." 47 U.S.C. § 227(b)(1)(A) (emphasis added). In the context of reassigned numbers, a critical question is whether the "called party" is the actual or intended recipient of a call. Not surprisingly, that issue has generated divergent views among litigants.

The FCC's Declaratory Ruling had interpreted "called party" narrowly by excluding the "intended recipient" from the definition. Recognizing the severity of that ruling, however, the FCC also adopted a "one-call exemption" that shielded callers from TCPA liability for the first (and only the first) post-reassignment call, but held that after that one call, the caller would be deemed to have "constructive knowledge" of the reassignment, regardless of whether that call actually informed the caller of the reassignment.

The petitioners took issue with each of these rulings. In its decision, the D.C. Circuit initially upheld the FCC's interpretation of the statutory phrase "called party," but ultimately set aside the FCC's "treatment of reassigned numbers as a whole." Op. at 40. Central to its decision was its determination that a one-call safe harbor is "arbitrary and capricious." Op. at 5, 32.

"Called Party"

Petitioners argued for a broad definition of "called party" that included the "intended recipient," so that callers who had obtained consent from the "intended recipient" would not violate the statute in the event of a number reassignment. The D.C. Circuit declined to interpret "called party" in this manner. Relying on a 2012 Seventh Circuit decision (*Soppet v. Enhanced Recovery Co.*, 679 F.3d 637 (7th Cir. 2012)), the D.C. Circuit instead determined that the FCC had permissibly interpreted "called party" to mean only the current subscriber or user of the phone, rather than an "intended recipient." Op. at 35. As such, the D.C. Circuit adopted the FCC's view that consent from the "intended recipient" is not an absolute defense in reassigned number cases.

Safe Harbor

The D.C. Circuit next analyzed the FCC's one-call safe harbor, which it rejected as "arbitrary and capricious." Op. at 32. As petitioners had argued, the problem with a narrow interpretation of "called party" is that callers have no reliable means to determine whether a number has been reassigned. In an attempt to strike a balance between strict liability for calls to reassigned numbers and the notion that callers should be able to reasonably rely on the consent they obtain, the FCC had created a safe harbor that exempted callers from TCPA liability for the first (and only the first) call to a reassigned number.

As the D.C. Circuit observed, however, even the FCC had acknowledged that a single call would not necessarily inform callers of the reassignment. Op.

at 33. For instance, a call or text message could go unanswered, providing no information whatsoever to the caller that the number had been reassigned. Nevertheless, the FCC reasoned that a one-call safe harbor struck "an appropriate balance." Op. at 34.

The D.C. Circuit rejected this safe harbor on the ground that the FCC had failed to answer the question of why the safe harbor should "stop with a single call." Op. at 39. Indeed, if the overarching basis for the safe harbor was that callers should be able to ***reasonably*** rely on the consent they have obtained, then why would a single call—if it provides no knowledge of the reassignment—be enough? As the D.C. Circuit explained:

> The Commission, though, gave no explanation of why reasonable-reliance considerations would support limiting the safe harbor to just one call or message. That is, why does a caller's reasonable reliance on a previous subscriber's consent necessarily cease to be reasonable once there has been a single, post-reassignment call? The first call or text message, after all, might give the caller no indication whatsoever of a possible reassignment (if, for instance, there is no response to a text message, as would often be the case with or without a reassignment).

Op. at 36. Accordingly, the D.C. Circuit set aside not only the FCC's one-call safe harbor, "but also its treatment of reassigned numbers more generally." Op. at 39. The court determined that "no cognizable conception of 'reasonable reliance' supports the Commission's blanket, one-call-only allowance." Op. at 37. The court explained that "[h]aving … embraced an interpretation of the statutory phrase 'prior express consent' grounded in conceptions of reasonable reliance, the Commission needed to give some reasoned (and reasonable) explanation of why its safe harbor stopped at the seemingly arbitrary point of a single call or message." Op. at 38. Because the FCC had failed to do so, the D.C. Circuit rejected its "treatment of reassigned numbers as a whole." *Id*. at 40. It explained that it did not "leave in place the … interpretation that 'called party' refers to the new subscriber" because that "would mean that a caller is strictly liable for ***all*** calls made to the reassigned number," and it doubted that "the agency would have adopted that rule in the first instance." *Id*. at 39.

Looking Ahead

So where does the D.C. Circuit's opinion leave us? We expect the FCC will move with all deliberate speed to craft a workable rule that will withstand appellate scrutiny. And businesses should remain optimistic. As the D.C. Circuit observed, the FCC "is already on its way to designing a regime to avoid the problems of the 2015 ruling's one-call safe harbor." Op. at 40. Of note, the FCC is currently considering the possibility of "creating a comprehensive repository of information about reassigned wireless numbers," as well as a potential "safe harbor for callers that inadvertently reach reassigned numbers after consulting the most recently updated information." Op. at 40. In the D.C. Circuit's view, these proposals "have greater potential to give full effect to the Commission's principle of reasonable reliance." Op. at 40.

Until the FCC acts, however, courts will have to determine, on a case-by-case basis, whether a given caller can be liable for a given call to a reassigned number. Because a narrow reading of "called party" may prevail, and because at present there is no safe harbor, it would be prudent for defendants to seek stays pending further rulemaking from the FCC.

Revocation of Consent

The D.C. Circuit upheld the FCC's decision that consumers may revoke consent through any reasonable means. Because the TCPA does not address whether or how a consumer may revoke consent to automated communications, the FCC had been petitioned to clarify whether consumers have the ability to revoke consent and, alternatively, to allow callers to designate an exclusive method for doing so. In the Declaratory Ruling, the then-majority Commissioners concluded that consumers may revoke consent at any time through "any reasonable method" that, based on "the totality of the facts and circumstances," expresses "a desire not to receive further messages." 2015 Declaratory Ruling at ¶ 47; *id*. at ¶¶ 63, 64 n. 233. In his dissent from this particular aspect of the ruling, current chairman Ajit Pai asked woefully, "[H]ow could any retail business possibly comply with the provision that consumers can revoke consent orally?" and whether businesses would "have to record and review every single conversation between customers and employees?"

On appeal, the petitioners argued that the FCC's decision to "eschew[] the establishment of standardized revocation procedures in favor of an unduly uncertain, any-reasonable-means standard" was arbitrary and capricious. The petitioners argued that such an approach would require businesses to train every one of their employees who interact with customers in the "nuances of customer consent for TCPA purposes," since businesses cannot know in advance whether an employee's interaction would be construed as a reasonable method of revocation. Petitioners' Br. at 56-57.

In upholding the FCC's treatment of revocation, the D.C. Circuit found the petitioners' arguments and concerns to be both unpersuasive and overstated. It also found that the Declaratory Ruling "absolves callers of any responsibility to adopt systems that would entail 'undue burdens' or would be 'overly burdensome to implement,'" so that businesses would "have no need to train every retail employee on the finer points of revocation." Op. at 41-42. Instead, the court concluded, businesses are incentivized to develop and implement "clearly defined" and "easy-to-use" opt-out or revocation methods, so that "any effort to sidestep the available methods in favor of idiosyncratic or imaginative revocation requests might well be seen as unreasonable." Op. at 42. The Court's statements here bolster the recent district court rulings dismissing TCPA claims where plaintiffs, in order to set up a TCPA suit, enrolled in text messaging programs and then purportedly revoked consent in ways they knew would not be effective, which we previously discussed here. Unfortunately, these decisions do not insulate businesses from the expenses associated with investigating and defending such contrived claims.

Finally, the D.C. Circuit acknowledged that, although the Declaratory Ruling precludes businesses from ***unilaterally*** imposing revocation methods, it does not purport to prevent parties from ***bilaterally*** agreeing on revocation methods. Op. at 43 ("Nothing in the Commission's order … should be understood to speak to parties' ability to agree upon revocation procedures."). Indeed, the D.C. Circuit noted that the FCC had "correctly concede[d]" as much in its briefing. *Id*.

Though the Court did not offer an opinion on whether parties may contractually agree on revocation mechanisms, the Second Circuit recently addressed this issue. In *Reyes v. Lincoln Automotive Financial Services*, 861 F.3d 51 (2d Cir. 2017), which we previously discussed here, the Second Circuit held that a consumer cannot unilaterally revoke his or her consent when that consent is given, not gratuitously, but as bargained-for consideration in a bilateral contract. Because the D.C. Circuit did not purport to disturb that ruling, businesses should continue to consider including consent provisions in their customer-facing contracts.

Healthcare Communications

The D.C. Circuit also rejected a challenge by pharmacy chain Rite Aid to the narrow scope of the Declaratory Ruling's exemption of only certain types of "exigent" healthcare calls to cellphones from the TCPA's prior express consent requirement (the "2015 Healthcare Exemption"). Rite Aid argued that the FCC acted in an arbitrary and capricious manner because the 2015 Healthcare Exemption covers only a few specific types of healthcare calls. Rite Aid also argued that the exemption conflicts with the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §§ 1320, *et seq*., (HIPAA), by failing to exempt from the TCPA calls that are freely allowed under HIPAA. Finally, Rite Aid argued that the Commission improperly failed to consider whether Congress had already exempted all healthcare calls from any consent requirements by creating a statutory exception to the TCPA for "emergency purpose" calls. The D.C. Circuit rejected these arguments and sustained the scope of the 2015 Healthcare Exemption. Understanding the D.C. Circuit's ruling requires some background on the three distinct exemptions that may apply to healthcare calls.

The Statutory Emergency Purposes Exception

The express language of the TCPA specifically excludes calls "made for emergency purposes." 47 U.S.C. § 227(b)(1)(A) & (B). Such calls are free from any consent requirement, whether made to residential landlines or wireless phone numbers. The FCC defines calls made for an "emergency purpose" as "calls made necessary in any situation affecting the health and safety of consumers." 47 C.F.R. § 64.1200(f)(4).

The 2012 Healthcare Exemption

In a 2012 Declaratory Ruling, the FCC created an exemption to the TCPA for certain healthcare calls covered by HIPAA (the "2012 Healthcare Exemption"). Report & Order, FCC 12-21, 27 FCC Rcd 1830 (2012) at ¶¶ 57-65. The 2012 Healthcare Exemption covers calls that "deliver[] a 'health care' message made by, or on behalf of, a 'covered entity' or its 'business associate,' as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103." 47 C.F.R. § 64.1200(a)(2) & (a)(3)(v). The FCC justified the 2012 Healthcare Exemption based on its finding that HIPAA's "existing protections" "already safeguard consumer privacy," making application of the TCPA to such calls unnecessary. Report & Order, FCC 12-21 at ¶ 61. Importantly, however, the 2012 Healthcare Exemption treats calls delivering the same healthcare message differently based on whether the calls go to residential landlines or wireless phone numbers. Calls to residential landlines are free of any consent requirement. 47 C.F.R. § 64.1200(a)(3)(v). In contrast, calls to wireless phone numbers are exempted only from the requirement for ***written*** consent that applies to telemarketing calls; such calls still require the prior express consent of the called party. 47 C.F.R. § 64.1200(a)(2).

The 2015 Healthcare Exemption

In the Declaratory Ruling, the FCC used its authority under Section 227(b)(2)(C) of the TCPA (to exempt calls to cellphones that are "not charged to the called party") to establish the 2015 Healthcare Exemption. The Commission created a total exemption from the TCPA's consent requirement for certain specific categories of calls to wireless numbers "for which there is exigency and that have a healthcare treatment purpose," if the call is free to the end-user. Declaratory Ruling at ¶ 146.

The 2015 Healthcare Exemption is quite technical and restrictive. Unlike the 2012 Healthcare Exemption, which broadly applies to calls that "deliver a healthcare message," the 2015 Healthcare Exemption applies to only eight specific categories of healthcare calls.[1] The FCC explicitly excluded from the 2015 Healthcare Exemption calls "that include telemarketing, solicitation, or advertising content, or which include accounting, billing, debt-collection, or other financial content" because it "fail[ed] to see the same exigency and public interest in calls regarding account communications and payment notifications." *Id*. The exemption is also limited to calls by healthcare providers, unlike the 2012 Healthcare Exemption, which applies to all HIPAA "covered entities" and their "business associates." Finally, the FCC imposed various technical requirements to qualify for the exemption, none of which apply to the 2012 Healthcare Exemption.[2]

Given these apparently conflicting exemptions, Rite Aid expressed the frustration of many healthcare providers that instead of providing clarity, "the

1 The exemption covers (i) appointment and exam confirmations and reminders; (ii) wellness checkups; (iii) hospital pre-registration instructions; (iv) pre-operative instructions; (v) lab results; (vi) post-discharge follow-up intended to prevent readmission; (vii) prescription notifications; and (viii) home healthcare instructions. Declaratory Ruling ¶ 146.

2 These requirements are that the calls: (i) be free to the end user; (ii) be sent only to the telephone number provided by the patient; (iii) identify the name and contact information of the healthcare provider at the beginning of the call; (iv) be concise, "generally" one minute or less for voice calls; (v) be limited to one message per day, up to a maximum of three combined per week, from a specific provider; (vi) allow for "easy" opt-out, including an interactive automated opt-out option for answered calls, a toll-free number for voicemails, and instructions to use "STOP" for texts; and (vii) the healthcare provider must honor opt-out requests "immediately."

Commission adopted a patchwork of standards for healthcare communications that will sow confusion, fuel more litigation against providers, and chill communications uniformly recognized to improve clinical outcomes and public health." (Rite Aid opening brief, p.2).

The D.C. Circuit's Decision

Rite Aid unsuccessfully argued that the 2015 Healthcare Exemption: (i) conflicts with HIPAA, which, it contended, supersedes the TCPA with respect to healthcare calls; (ii) is arbitrary and capricious because it treats healthcare–related calls to residential landlines and wireless numbers differently; and (iii) improperly fails to recognize that all healthcare calls fall within the TCPA's statutory emergency purposes exception. The D.C. Circuit declared that "Rite Aid's arguments misunderstand the relevant statutory terrain" and "reject[ed] them." Op. at 44.

Specifically, the D.C. Circuit held that there is no conflict between HIPAA, which limits the use and disclosure of "protected health information," and the TCPA because "[t]he two statutes provide separate protections." *Id*. at 46 (citations omitted). The Court found that "[t]here is no obstacle to complying with both the TCPA and HIPAA." *Id*. By establishing the 2015 Healthcare Exemption, the Declaratory Ruling "did not restrict communications that HIPAA requires be permitted to flow freely." *Id*. at 47. Rather, the FCC "simply declined to make" certain types of calls using automated technology free from the TCPA's consent requirements. *Id*. The D.C. Circuit found "[n]othing in HIPAA [that] command[ed]" the result sought by Rite Aid—a blanket exemption for all calls related to the provision of healthcare—and "no basis to interpret [HIPAA] to frustrate the TCPA in that way." *Id*.

The D.C. Circuit missed the larger point here, perhaps because of the way that Rite Aid framed the argument as a direct conflict between the TCPA and HIPAA. The better argument might have been that the FCC switched its position on the adequacy and sufficiency of HIPAA's protections without any explanation. In 2012, the FCC viewed HIPAA's "existing protections" that "already safeguard consumer privacy" as sufficient, making application of the TCPA unnecessary for calls to landlines delivering a "healthcare message" subject to HIPAA. Report & Order, FCC 12-21 at ¶ 61. But in 2015, the FCC simply ignored HIPAA's protections in crafting a much narrower exemption for calls to cellphones. Whether or not HIPAA essentially preempts the TCPA, the FCC failed to explain its shift in position, which is the essence of arbitrary and capricious rulemaking.

The D.C. Circuit also rejected Rite Aid's argument that the Declaratory Ruling was arbitrary and capricious because the 2015 Healthcare Exemption established "a narrower exemption for healthcare-related calls made to ***wireless*** numbers" than the 2012 Healthcare Exemption had for calls to residential landlines. *Id*. at 49. The Court noted that "the TCPA itself presupposes . . . that calls to residential and wireless numbers warrant differential treatment." *Id*. Among other things, the TCPA "contemplates that calls to wireless numbers 'tread [more] heavily upon . . . consumer privacy interests'" and such concerns "directly informed the 2015 exemption's scope." *Id.* Finding "nothing inherently contradictory about easing restrictions on certain kinds of calls to landlines, but not to cellular phones," the D.C. Circuit "reject[ed] Rite Aid's first arbitrary-and-capricious challenge."

Finally, the D.C. Circuit rejected Rite Aid's argument that the FCC "acted arbitrarily by failing to recognize that all healthcare-related calls satisfy the TCPA's 'emergency purposes' exception to the consent requirement." Id. at 50. The court found it "implausible to conclude that calls concerning 'telemarking, solicitation, or advertising content, or which include accounting, billing, debt-collection, or other financial content' are made for 'emergency purposes.'" Id. Once again, the larger point may have been missed. Regardless of whether billing or debt-collection calls come within the emergency purposes exception (and it is indeed hard to argue that they do), many types of healthcare calls beyond the eight specific categories recognized by the 2015 Healthcare Exemption are surely "exigent" and "necessary in any situation affecting the health and safety of consumers." 47 C.F.R. § 64.1200(f)(4) (defining emergency purposes exception).

Key Takeaways

In rejecting Rite Aid's appeal, the D.C. Circuit Opinion leaves in place a complex and indeed "patchwork" set of regulations that treat calls delivering identical healthcare messages differently based on whether the patient relies on a cellphone or a landline. The D.C. Circuit also left in place the very restrictive and highly technical 2015 Healthcare Exemption that applies to only eight specific types of healthcare calls, with so many requirements to qualify for the exemption that for many healthcare providers it is simply a dead letter. The D.C. Circuit missed an opportunity to simplify and rationalize the TCPA's treatment of healthcare calls. But the larger picture is that healthcare providers may continue to rely on the 2012 Healthcare Exemption or the emergency purposes exception even when they cannot avail themselves of the 2015 Healthcare Exemption. Moreover, the D.C. Circuit (and the FCC in its briefing) confirmed that:

i. the 2012 Healthcare Exemption and the 2015 Healthcare Exemption are distinct exemptions and the latter did not replace or narrow the former; and

ii. the statutory "emergency purposes" exception is separate from the "exigent" circumstances required for the 2015 Healthcare Exemption. The FCC conceded in its briefing that parties may rely on the emergency purposes exception on a case-by-case basis regardless of whether the calls meet all of the various requirements to qualify for the 2015 Healthcare Exemption.

The Litigation Environment

The plaintiffs' bar found little to celebrate in the D.C. Circuit's Opinion striking down the FCC's expansive ATDS definition and ineffectual one-call safe harbor for reassigned numbers, and likely will find even less when the Commission takes up those issues on remand. Consequently, we expect the plaintiffs' bar to fight the D.C. Circuit's Opinion and attempt to delay action by the Commission using the same strategies they have used to fight the D.C. Circuit's decision in *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078 (D.C. Cir. 2017), which rejected the FCC's claim of statutory

authority to regulate solicited advertising faxes. Like the D.C. Circuit ruling here, the D.C. Circuit's ruling in *Bais Yaakov* threatened plaintiffs' ability to bring TCPA class actions, and plaintiffs' lawyers responded in multiple ways to protect their business interests.

First, we expect the plaintiffs' bar to seek *en banc* review, which they would have to do within 45 days of the court's decision. Upon receipt of a petition for rehearing *en banc*, if any member of the court wishes a response, the court will order a response to be filed. The briefing is then circulated to all members of the original panel and all active judges, any of whom may request a vote on the petition. The petition will only be granted if (i) a vote is requested and (ii) a majority of all active judges who are not recused vote in favor of rehearing. *En banc* review, however, is not favored and ordinarily will not be ordered except in cases of exceptional importance or where such review is necessary to ensure uniformity of the court's decisions. While neither exception appears to apply here, the filing of a petition for *en banc* review does extend the deadline for the plaintiffs' bar's likely second step—filing a petition for certiorari.

Second, upon the (anticipated) denial of the petition for *en banc* review, we expect the plaintiffs' bar to seek Supreme Court review as they did in *Bais Yaakov*, where a petition for certiorari was filed based on the argument that the decision supposedly created a circuit split in its application of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and the doctrine of *expressio unius est exclusion alterius*. That petition (which was denied) relied heavily on the dissent in *Bais Yaakov* authored by Judge Pillard (who also sat on this panel). Here, however, there is no dissent—the opinion was a unanimous decision and Judge Pillard joined in it. Consequently, we expect any petition for certiorari will be denied.

Third, we expect many plaintiffs to reverse course at the trial court level and argue that a stay should be granted while these issues play out, despite having previously argued that a stay should ***not*** be granted during the pendency of the D.C. Circuit appeal.

Further FCC Proceedings

Barring further appellate review, the ball is in the FCC's court to review the portions of the Declaratory Ruling that were vacated. The decision of how and when to proceed is ultimately left to the FCC Chairman. The FCC could decide to address the affected issues in a declaratory ruling or initiate a rulemaking proceeding leading to a new order setting forth its conclusions. While unlikely, the FCC also could opt to delay action until courts develop a body of jurisprudence that could inform the FCC's regulatory process.

Unlike the situation when the Declaratory Ruling was adopted, Republicans now have the majority of votes at the FCC. If the FCC addresses the vacated issues via a declaratory ruling, the agency should be able to move forward on an expedited basis, and could possibly be in a position to offer guidance on some matters within several weeks. The FCC might instead choose to initiate a rulemaking process. This path is the most likely one because it will generate a regulatory record, upon which the FCC can promulgate new rules with the benefit of stakeholder insight and participation.

Regardless of the route that the FCC ultimately takes, Chairman Pai has provided some indication of what the final rules might look like. After the D.C. Circuit issued its opinion, he released a statement emphasizing the rejection of the Declaratory Ruling's definition of autodialer, and saying that "[i]nstead of sweeping into a regulatory dragnet the hundreds of millions of American consumers who place calls or send text messages from smartphones, the FCC should be targeting bad actors who bombard Americans with unlawful robocalls." This echoed Chairman Pai's vigorous dissent from the Declaratory Ruling. Thus, barring an unlikely change in his views, Chairman Pai's focus would appear to be on revisiting and meaningfully narrowing the scope of the autodialer definition.

In the interim, the applicable rules in effect revert to the FCC's prior rules. In this case, the D.C. Circuit declined to remand the ATDS and one-call safe harbor rules without vacatur, which would have left the Declaratory Ruling in place while the FCC addressed the deficiencies identified by the court. Instead, these elements of the Declaratory Ruling have been vacated effective immediately and, as a result, the TCPA rules in place prior to the Declaratory Ruling in the meantime govern with respect to those issues. *United States v. Sunny Cove Citrus Ass'n*, 854 F. Supp. 669, 692 (E.D. Cal. 1994) (citing *Abington Memorial Hospital v. Heckler*, 750 F.2d 242, 244 (3d Cir. 1984)) ("Generally, unless the prior regulations are found invalid, vacating or rescinding invalidly promulgated regulations has the effect of reinstating the prior regulations."). Thus, TCPA jurisprudence that had been informed by the Declaratory Ruling is of limited value.

Chairman Pai's post-decision statement also expressly called attention to ongoing rulemakings with TCPA implications, including the FCC's exploration of a reassigned numbers database and proceedings intended to make it easier for consumers to leverage emerging technologies to block abusive robocallers. Indeed, a Further Notice of Proposed Rulemaking was adopted at the FCC open meeting on March 22. The FCC may use this and other proceedings to address portions of the rules invalidated by the D.C. Circuit's opinion. As a result, the FCC could, for example, try to use the reassigned numbers proceeding to tee up new rules on a potential broader safe harbor for calls to reassigned numbers.

Similar changes may find their way into robocall blocking proceedings as well. Moreover, at least one Republican commissioner, Michael O'Rielly, has suggested that the FCC should take this opportunity to review much of the TCPA regime, including rules that were not themselves vacated in the D.C. Circuit's opinion. Commissioner O'Rielly noted that unlike the D.C. Circuit, other courts have taken issue with the FCC's conclusion that consumers may revoke consent by any reasonable means. Thus, there is at least some support on the Commission for a broader overhaul of the TCPA regulatory structure.

To the extent that the statute is technologically stale and the FCC cannot reasonably shape its interpretation to address modern equipment, Congress may face increasing pressure to address any incongruities through legislation. In any event, it will be important for interested parties to be involved over the coming months to ensure that their interests are protected as the FCC—and potentially Congress—move forward in shaping a new approach.

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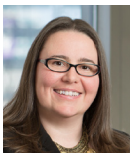

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