Expert Q&A: Far-reaching Declaratory Ruling on the TCPA

PRACTICAL LAW LITIGATION

An Expert Q&A with Drinker Biddle & Reath LLP's Telephone Consumer Protection Act (TCPA) team, discussing the Federal Communications Commission's (FCC) recent omnibus Declaratory Ruling and Order. This Expert Q&A focuses on the Declaratory Ruling's key holdings and important implications for companies facing potential exposure to the TCPA.

On July 10, 2015, the Federal Communications Commission (FCC) issued a Declaratory Ruling and Order (Declaratory Ruling) to address nearly two dozen pending petitions related to the agency's interpretation of several key Telephone Consumer Protection Act (TCPA) provisions (see *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, WC Docket No. 07-135, 2015 WL 4387780 (rel. July 10, 2015)*). The Declaratory Ruling potentially has far-reaching consequences for companies facing exposure to the TCPA.

Practical Law asked partners on the TCPA team at Drinker Biddle & Reath LLP, Seamus Duffy, Laura Phillips, Brad Andreozzi and Michael Stortz, to comment on the key provisions and implications of the Declaratory Ruling. Seamus, Laura, Brad, Mike and the TCPA team have a depth of experience representing leading companies in individual and putative class actions under the statute as well as in advising businesses on compliance efforts in light of the evolving regulatory landscape. The team maintains a dedicated TCPA blog at www.tcpablog.com.

For more related to the TCPA generally, see *Practice Note, TCPA Litigation: Key Issues and Considerations (http://us.practicallaw.com/4-613-7306).*

The FCC issued its Declaratory Ruling in response to close to two dozen pending petitions from companies seeking rulings clarifying certain portions of the TCPA. What are the broad implications of the Ruling for companies whose marketing and informational calling and texting activities fall within the TCPA's scope?

After a heated opening meeting on June 18th, a sharply divided FCC issued the Declaratory Ruling, which purports to set out a broad range of new statutory and policy pronouncements. The Declaratory Ruling has important implications for companies that communicate with consumers via phone and text message. With limited exceptions, the Declaratory Ruling significantly expanded the scope of the TCPA and also may make it more challenging for companies to comply with the statutory provisions. The key challenges posed by the Declaratory Ruling include:

- The FCC's expanded interpretation of an automatic telephone dialing system (ATDS), which potentially brings certain modern telecommunications equipment within the TCPA's scope. As a result, companies that previously satisfied their compliance obligations by avoiding the use of certain technology must now re-evaluate whether this strategy is still viable (as will companies that used vendors employing this strategy).
- The FCC's approach to revocation of consent, which can now be done in "any reasonable manner." This may require companies to revisit their internal do-not-call policies and customer agreements to help ensure compliance. In addition, companies should also consider implementing broad training of customer-facing personnel and establishing a centralized and easily accessible procedure for updating a customer's communications preferences.
- The FCC's approach to recycled numbers and the "one call" exemption. The FCC determined that, although perfect compliance is impossible, one call is deemed to be sufficient to determine whether a number has been reassigned. Moreover, companies should consider steps to minimize the likelihood of calling a recycled number.

While future suits are nearly unavoidable, companies can and should minimize the potential exposure by reevaluating their policies, practices and agreements in place with customers, vendors and business partners in light of the Declaratory Ruling. Because appeals have already been filed (as a well as motions to intervene) challenging the Declaratory Ruling, companies should ensure that any policies are sufficiently flexible to account for the possibility of significant further changes.

How did the FCC break new ground with respect to clarifying the definition of an ATDS and what is the significance for companies using new technologies to engage in marketing activity?

Except under limited circumstances, the TCPA prohibits the use of an ATDS or an "artificial or prerecorded voice" when calling a cell phone. Although the use of an "artificial or prerecorded voice" is rarely in

question, the use of an ATDS is another matter entirely. As defined by the statute, an "ATDS" is equipment that has the "capacity" to both:

- "[S]tore or produce telephone numbers to be called, using a random or sequential number generator. "
- "[D]ial such numbers."

(*47 U.S.C. § 227(a)(1)*; see also *47 C.F.R. § 64.1200(f)(2)*).

Before the Declaratory Ruling, there was disagreement and confusion in the courts over whether "capacity" means just present capacity (what equipment **can** do at **present** as-is), or whether "capacity" could be read more expansively to include functionality that would require modifications (what equipment **could** do in the **future** if modified). There also was division in the courts over whether the phrase "using a random or sequential number generator" limits the definition of ATDS, with a few courts ruling that the definition of ATDS is truly limited to those technologies that either randomly or sequentially dial numbers.

Addressing the word "capacity," the majority of the Commission concluded that "the TCPA's use of 'capacity' does not exempt equipment that lacks the 'present ability' to dial randomly or sequentially." Rather, "the capacity of an autodialer ... includes its potential functionalities." The majority reasoned that this broad definition is consistent with both Congressional intent and prior FCC decisions. The Commission acknowledged that this new interpretation of capacity means that "little or no modern dialing equipment" falls outside of this autodialer definition. However, the majority declined to comment on whether there is **any** "modern dialing equipment" that now does **not** fit within the statutory definition of an ATDS, noting only that a rotary phone would not fit within the definition and acknowledging that both "human intervention" and the ability to "dial thousands of numbers in a short period of time" would otherwise impact the analysis. As a result, it concluded that the determination of whether technology fits within the definition of an ATDS may therefore be a "case-by-case determination." (*Declaratory Ruling, ¶¶ 14-20, 2015 WL 4387780, at *7-9.*) This is not a particularly clear ruling for those seeking guidance for compliance purposes.

As for whether the phrase "using a random or sequential number generator" limits the definition in any meaningful way, the majority simply reaffirmed the FCC's prior position regarding predictive dialers (those dialers that initiate calls from a list of numbers based on technology that "predicts" the likely availability of a call center operator to handle the call if answered). The FCC found that predictive dialers qualify as ATDSs even though they neither "store" nor "produce" numbers using "a random or sequential number generator" as required by the plain language of the statute. Indeed, the majority implicitly acknowledged that predictive dialers are only "**like** dialers that utilize random or sequential numbers instead of a list of numbers," but found that they nonetheless should be considered ATDSs simply because they "retain the capacity to dial thousands of numbers in a short period of time ..., a result the TCPA was intended to prevent." (*Declaratory Ruling ¶¶ 11, 14 & nn.39-40, 2015 WL 4387780, at * 6, 7* (emphasis added).) This outcome runs contrary to some cases where the courts interpreted the TCPA's plain language to require random or sequential number generation as necessary to an ATDS.

The majority's interpretation of the statutory definition of ATDS was a primary target of the two dissenting Commissioners (as discussed below) and was immediately challenged by the three petitions for review filed in the days following the issuance of the Declaratory Ruling.

The Declaratory Ruling permits consumers to revoke consent to being contacted through any "reasonable means." Did the FCC explain "reasonable means" and do you expect this to result in increased litigation regarding whether consent was given in certain circumstances?

As with its approach to defining ATDS, the FCC tackled the issue of revocation of consent by purporting to expand the scope of the TCPA without providing any hard-and-fast guidance on how to comply with the expanded reading.

The TCPA is silent on whether consent, once provided, can be revoked. Courts were previously split on the significance of that silence, with some ruling that the statute's silence meant that consent could not be revoked, while others ruled to the contrary. Several petitioners asked the FCC to confirm that the TCPA's silence on the issue meant that consent could not be revoked, or in the alternative, that companies could designate the means by which customers could revoke consent. The FCC declined both invitations.

Finding that the "consumer-protection goals" of the statute would be subverted by ruling that individuals could not revoke consent to receive automated or pre-recorded calls, the FCC stated that the "most reasonable" interpretation of the statute was to allow revocation of consent (*Declaratory Ruling ¶ 56, 2015 WL 4387780, at *21*).

The FCC declined to allow companies to designate the exclusive manner or means by which a consumer can communicate or record his revocation. Instead, it found that since revocation is a "right" that is not to be "abridge[d]," individuals should be able to communicate their revocation by "any reasonable method." In assessing whether a means of revocation is reasonable, the FCC will look to whether:

- A consumer had a "reasonable expectation" that he could effectively communicate the request to the caller in a particular circumstance.
- The caller can implement a revocation mechanism without incurring "undue burdens."
- Systems or operations make revocation confusing or very difficult and undermine the "reasonable means" directive.

The FCC explained by way of example that "any reasonable method" would include, "among other possibilities":

- Consumer-initiated calls.
- Requests made in response to a caller's call.
- Oral requests at an in-store bill payment location.

(*Declaratory Ruling ¶ 64 & n.233, 2015 WL 4387780, at *23.*)

The FCC disagreed with petitioners who argued that oral revocation was fraught with problems and pitfalls, stating that "the well-established evidentiary value of business records means that callers have reasonable ways to carry their burden of proving consent" (*Declaratory Ruling ¶¶ 64-70, 2015 WL 4387780, at *23-25*).

The broad "reasonable method" approach to revocation of consent does not provide businesses with any practical tools beyond the admonition that they should maintain their business records - records that tend to be implicated only when a caller is defending itself against a claim of improper calling. The ruling also is likely to increase litigation regarding whether consent was provided, whether it was revoked, and whether a particular call was within the scope of consent provided (which would appear to be a highly subjective inquiry).

The FCC addressed telemarking calls to wireless phone numbers that companies previously had consent to contact but which have been reassigned to a new user, and included a one call "safe harbor." What is the burden faced by companies trying to determine whether a phone number has been reassigned and what types of safeguards can businesses implement to meet the new standard?

The reassigned number scenario is one of the most frustrating issues that companies face with respect to the TCPA. Reassigned or "recycled" wireless phone numbers are phone numbers that are deactivated or terminated by one user (generally either by choice or based on payments defaults) and then "reassigned" to a new user. Complications for TCPA compliance can also arise where a single user "ports" his or her landline number to a wireless service (where the TCPA rules differ).

For many years, the FCC has required wireless carriers to support wireless phone number portability based on the public interest in allowing people to be able to port their phone numbers if they switch service providers. Some numbers are not ported, however, and become available for reassignment to new wireless service subscribers. But as the FCC acknowledged, there is no single directory or database that catalogues every disposition, so people with reassigned numbers are likely to be called mistakenly. Thus, companies can face liability for calling a phone number even though they obtained consent to call that number from the previous holder and were not notified that the phone number had changed hands.

The FCC has determined that the burden of discovering a reassigned number should be entirely with the caller. Because of the difficulty of discovering whether a phone number has been reassigned, however, the FCC created a one call "safe harbor." This safe harbor applies where the caller had a reasonable basis to believe that it had prior consent for that one call and did not have either actual or constructive knowledge of the number reassignment. The FCC reasoned that a single call should suffice to give a caller notice of a whether a number has been reassigned. Following one call to a reassigned number, the caller is deemed to have constructive knowledge of the reassignment. (*Declaratory Ruling ¶ 72 & n.261, 2015 WL 4387780, at *26.*)

In practice, a single call is rarely sufficient to determine whether a number has been abandoned or reassigned because calls go unanswered, are picked up by a generic voicemail box, or are answered and then immediately terminated by the called party.

The FCC proposed one other relatively impractical solution to the recycled number problem - indemnification agreements with customers. In this scenario, companies could contractually obligate their customers to notify them immediately of any contact information change (such as the abandonment of a telephone number). A company could then sue its customers for reimbursement or indemnity if their failure to notify resulted in the filing of TCPA suits. (See *Declaratory Ruling ¶ 86, 2015 WL 4387780, at *31.*) Companies that are concerned about the public relations implications of these hypothesized suits are unlikely to adopt this approach. Rather, as with the revocation of consent issue, most companies will (and should) focus on implementing practices to avoid contacting customers via telephone unless the consumer has recently verified the number or the companies have used a number scrubbing technology to identify reassigned numbers before making calls to older phone numbers. As the FCC itself acknowledged, there is no fail safe technology solution to this problem. But callers are well advised to take all available precautions to limit, if not avoid, this TCPA exposure.

The Declaratory Ruling also addressed a number of issues that specifically affect text messaging under the TCPA. What were the most significant rulings with respect to marketing via text?

First, the FCC reaffirmed its position that SMS text messages are subject to the same consumer protections under the TCPA as voice calls. In doing so, the FCC rejected the argument made by some petitioners that SMS text messages should not be subject to the TCPA because they are more similar to instant messages or e-mails than to voice calls. (*Declaratory Ruling ¶ 107, 2015 WL 4387780, at *37.*)

Second, the FCC addressed Internet-to-phone text messages. Internet-to-phone text messages are different from SMS messages in that they originate as e-mails (as opposed to SMS text messages) and are sent to an e-mail address in the form of the recipient's wireless telephone number and the carrier's domain name. The FCC clarified that Internet-to-phone text messages are the functional equivalent of SMS text messages and require consent per the TCPA, a significant clarification given that these messages appeared to have been subject to the CAN-SPAM Act, not the TCPA. The FCC also found that the equipment used to send these messages is an ATDS for purposes of the TCPA. In so doing, the FCC defined the term "dial" to include the act of sending these messages and held that the technology stores numbers and "dials" them using random or sequential number generators within the meaning of the TCPA. (*Declaratory Ruling ¶¶ 108-122, 2015 WL 4387780, at *37-41.*)

Third, the FCC provided helpful guidance regarding the status under the TCPA of one-time messages sent in response to a consumer's specific request for information or a "call-to-action." Companies often use such calls to action in advertising, inviting interested consumers to text a particular short code for product information. It is now clear that one-time messages sent in response to such texts do not violate the TCPA, as long as they are sent to the consumer immediately in response to a specific request and contain only the requested information without any other marketing or advertising information. (*Declaratory Ruling ¶¶ 103-106, 2015 WL 4387780, at *36-37.*)

How did the Declaratory Ruling clear the way for innovative ways to block unwanted telephone calls?

A number of state attorneys general had sought clarification from the FCC on potential legal or regulatory prohibitions for carriers and Voice Over Internet Protocol providers who implement call blocking technologies. While declining to analyze particular call blocking technologies, the FCC nevertheless clarified that there is no legal barrier to service providers offering consumers the ability to block unwanted robocalls using an "informed opt-in process."

The Commission assured service provider groups, which expressed concern that individual consumers would find any blocking technology to be either over- or under-inclusive, that accurate opt-in disclosures to consumers should suffice to allay potential concerns. The Declaratory Ruling also noted that consumers are free to drop these services. In addition, providers are encouraged to offer technologies that allow solicited mass calling, such as a municipal or school alerts, to not be blocked, as well as to develop protocols to ensure public safety calls or other emergency calls are not blocked. (*Declaratory Ruling ¶¶ 154-163, 2015 WL 4387780, at *52-55.*)

Shortly after the FCC released the Declaratory Ruling, the National Association of Attorneys General sent a letter to the Chief Executives of AT&T, CenturyLink, Sprint, T-Mobile, and Verizon urging them to take immediate action to implement call blocking technology as the Declaratory Ruling should have "removed any doubt" about their legal authority to provide call-blocking technology.

The Declaratory Ruling contains some dissenting opinions. What were the most significant points of divergence among the Commissioners? Do the dissents reveal weaknesses in, or uncertainties resulting from, the Order?

There were two notable dissents to the Declaratory Ruling, by Commissioners Pai and O'Rielly, who both expressed disappointment with the majority opinion. In the weeks between the contentious open meeting on June 18th and the public release of the Declaratory Ruling on July 10th, Commissioners Pai and O'Rielly drafted blistering dissenting statements. Commissioner O'Rielly in particular pulled no punches, describing the Declaratory Ruling as "maddening," "unfathomable," "unworkable," "incredible," "ludicrous," "preposterous," and "a farce," among other colorful descriptions. (*2015 WL 4387780, at *89-99.*)

Commissioners Pai and O'Rielly took issue with some of the key rulings explained above, for example:

- The use of the word "capacity" to include a technology's "potential capabilities." Commissioner Pai lamented that the majority's interpretation "transforms 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." He also noted that the majority was wrong to take comfort in the fact that smartphone owners have yet to be sued, as that is "sure to follow... Having opened the door wide, the agency cannot then stipulate restraint among those who would have a financial incentive to walk through it." (*2015 WL 4387780, at *82-83.*)
- The expanded definition of ATDS to include technology that neither "stores" nor "produces" numbers "using a random or sequential number generator." Commissioner Pai explained that "we 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." He noted that, "if the FCC wishes to take action against newer technologies beyond the TCPA's bailiwick, it must get express authorization from Congress - not make up the law as it goes along." (*2015 WL 4387780, at *83.*)
- The revocation of consent through any reasonable means. Commissioner O'Rielly noted that "Congress did not address" this issue in the TCPA and "the FCC should not presume to act in its stead." (*2015 WL 4387780, at *97.*)
- Commissioner Pai accepted that consumers may revoke consent but noted that the majority's approach would "shift the burden of compliance away from telemarketers and onto legitimate businesses, sometimes in absurd ways.... Would a harried cashier at McDonald's have to be trained in the nuances of customer consent for TCPA purposes? What exactly would constitute revocation in such circumstances? Could a customer simply walk up to a McDonald's counter, provide his contact information and a summary 'I'm not lovin' it,' and put the onus on the company? The prospects make one grimace." (*2015 WL 4387780, at *88.*)
- The majority's approach to recycled numbers and the one call safe harbor. Commissioner O'Rielly explained that businesses had been offered "fake relief" because the "one free pass" rule charges them with constructive knowledge that a number has been recycled, which "assumes that the recipient picks up the phone or responds to the text" and "expects callers to divine from mere silence the current status of a telephone number." Worse yet, he explained, that rule enables "consumers acting in bad faith to entrap legitimate companies. A person could take a call, never let on that it's the wrong person, and receive subsequent calls solely to trip the liability trap." (*2015 WL 4387780, at *93-94.*)

Both Commissioners articulated arguments that were quickly picked up by those who are challenging the Declaratory Ruling on appeal. The dissents highlight the uncertainties in this Ruling and possibly its vulnerability on appeal.

What are some practical strategies for defending TCPA putative class actions going forward?

The Supreme Court is considering a few cases in the coming term that may provide some protection from TCPA class action exposure where members of the purported class are not injured. The *Spokeo, Inc. v. Robins (135 S. Ct. 1892 (2015))* case promises the possibility of broad protection from claims for federal "statutory damages," and *Tyson Foods, Inc. v. Bouaphakeo (135 S.Ct. 2806 (2015))* holds out the promise of limiting certification of classes under Federal Rule of Civil Procedure 23. Both decisions are worth watching for those facing potential TCPA exposure.

For more related to class action exposure under the TCPA, see *Practice Note, TCPA Litigation: Key Issues and Considerations (http://us.practicallaw.com/4-613-7306).* For more on class actions generally, see *Class Actions: Overview (http://us.practicallaw.com/2-529-7368).*

Beyond these possibilities, the Declaratory Ruling leaves callers significantly vulnerable to class action and individual case exposures under the TCPA. While it does not provide the clarity most FCC petitioners hoped for, it does provide some guidance on the key issues addressed, which should be carefully heeded until and unless modified on appeal. Companies are well advised, for example, to be proactive in assuring that they are taking advantage of all available means and technologies for identifying and preventing calls to reassigned numbers. The fact that no perfect solution exists is not reason to ignore those partial solutions that do.

Companies should also consider reviewing their compliance program broadly in light of the Declaratory Ruling, to ensure that their practices are in line with the FCC's stated expectations. Revocations of consent should be managed and documented carefully and in line with the FCC's stated requirements. And, with respect to the ATDS question, the concepts of human intervention and overall call volumes are important and should be considered carefully in assessing the risk that a particular solution will fall outside the statutory definition.

In short, the FCC's Declaratory Ruling provides little by way of predictability and safe harbors, but it does provide some meaningful guidance. Regulated companies can limit their TCPA exposure with genuine efforts to follow that guidance.

08-15