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## FEDERAL COURT VACATES PART OF THE FCC'S 2015 TCPA ORDER

On March 16th, the U.S. Court of Appeals for the District of Columbia issued a much-anticipated opinion assessing four aspects of the Federal Communications Commission's ("FCC") 2015 Telephone Consumer Protection Act (TCPA) order. *ACA International, et al., v. FCC*, No. 15-1211 (D.C. Mar. 16, 2018); see also our ALERT of July 17, 2015 summarizing the 2015 TCPA order.

The court set aside (i) the FCC's interpretation on the types of equipment that fall within the TCPA's definition of automatic telephone dialing systems ("ATDS") and (ii) the FCC's approach to calls made to a wireless phone number that was reassigned to a nonconsenting person, including (iii) the FCC's one-call safe harbor for reassigned numbers. However, (iv) the court upheld the FCC's approach order to revocation of a party's consent and exemption for time-sensitive healthcare calls.

### ADTS

The court analyzed the FCC's interpretation of "capacity" under the TCPA's definition of ATDS. The FCC ruled that to qualify as an ATDS, equipment need only have the "potential capacity" to store or produce and dial random or sequential telephone numbers. According to the FCC, equipment's "functional capacity" includes features that can be added through software changes or updates. A smartphone could constitute an ATDS under the FCC's interpretation. The court commented that "it is untenable to construe the term 'capacity' ... in a manner that brings within the definition [of ATDS] the most ubiquitous type of phone equipment known, used countless times each day for routine communications by the vast majority of people in the country." Thus, the court found the FCC's interpretation of the TCPA to be unreasonably and impermissibly expansive and vacated the FCC's interpretation.

The court also took issue with how the FCC addressed the precise functions that a device must have the capacity to perform to be considered at ATDS. According to the court, the 2015 TCPA order contains competing statements. For example, the FCC indicated that the "basic function" of an ATDS is to dial numbers without human intervention, but a device might still qualify as an ATDS even if it cannot dial numbers without human intervention. The court commented that "those side-by-side propositions are

difficult to square." Because the FCC's comments fail to provide clarity on the functions a device must perform to qualify as an ATDS and to satisfy the requirement of reasoned decisionmaking, the court vacated the FCC's ruling.

### Reassigned Numbers:

The court addressed the FCC's treatment of circumstances in which a consenting party's cell phone number has been reassigned to another (non-consenting) person and the caller has no notice of the reassignment. Refusing to interpret the TCPA to create strict liability for a caller that places a call to a reassigned cell phone number without proper consent, the FCC established a safe harbor that allows callers to place one call to reassigned number without incurring liability. The FCC justified the one-call safe harbor by reading the TCPA to permit a caller to reasonably rely on the prior express consent of a called party. The court noted that the FCC did not provide support as to why a caller's reliance on a previous subscriber's consent becomes unreasonable after one call to a reassigned number. The first call or text message might not provide any indication of the possible reassignment. Ultimately, the court characterized the one-call safe harbor as arbitrary and capricious. The court set aside not only the one-call safe harbor, but also the FCC's treatment of reassigned numbers as a whole because excising only the one-call safe harbor from the 2015 TCPA order would impose strict liability on callers for calls to reassigned numbers, a result that the FCC expressly refused to accept.

Separately, the FCC has begun to address the problem of reassigned numbers. In 2017, the FCC sought public comment on creating a comprehensive resource of reassigned numbers that businesses can use to avoid accidentally calling reassigned numbers.

Following the court's ruling, uncertainty remains on what devices actually qualify as an ATDS under the TCPA as the court simply found that the FCC's "potential capacity" interpretation unreasonably expansive and its comments on autodialer functions contradictory. While the court's ruling resolves some concerns, others remain. We will continue to monitor and report on developments as they occur. □

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