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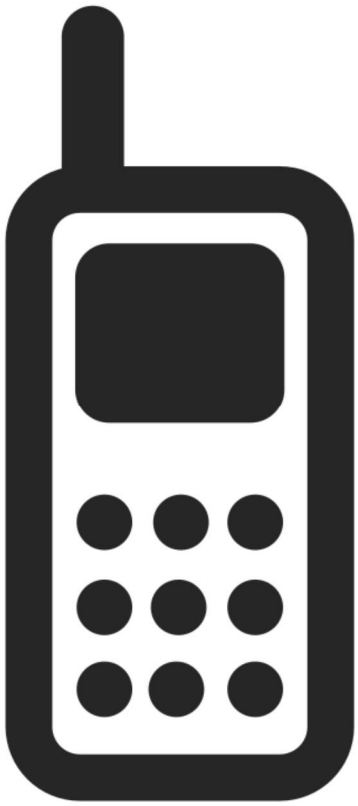
The FisherBroyles TCPA *Update*



Courts Put a Halt to Some TCPA Class Actions Pending a Ruling of the D.C. Circuit

A significant case under Telephone Consumer Protection Act of 1991 ("TCPA") is pending before the United States District Court for the D.C. Circuit. Trial courts, including courts in the United States District Court for the Northern District of Illinois, a hotbed of TCPA class action litigation, have stayed cases pending the D.C. Circuit's ruling in this important case.

In June 2015, the Federal Communications Commission issued a comprehensive declaratory ruling and order on several thorny issues under the TCPA, including what constitutes an "automatic telephone dialing system" subject to the TCPA, who is the maker of a call under the TCPA, procedures for consent and revocation of consent to receive calls and texts, and the related issue of "reassigned" numbers (*i.e.* when an individual who consents to receive calls on a phone number and later releases that number, which is then reassigned to another individual). 30 F.C.C.R. 7961 (July 10, 2015). Nine companies appealed the ruling and order to the United States Court of Appeals for the D.C. Circuit. *ACA Int'l v. FCC,* No. 15-1211. The court held oral argument in December 2016 but has not yet issued a decision.

The FCC's ruling has caught the attention of companies in several industries because of its breadth and scope.

For example, the FCC broadly interpreted the TCPA by finding that an "automatic telephone dialing system" — an "autodialer" in TCPA jargon — includes every dialing system that has the capacity to store or produce and dial random or sequential phone numbers. By this definition, every modern cell phone is an autodialer subject to TCPA restrictions.

The FCC also ruled that a caller cannot restrict in a contract with the consumer (or otherwise) the manner in which the consumer could revoke her or his consent to receive calls. Under the FCC's ruling, a consumer may revoke consent by any reasonable means.

Furthermore, the FCC ruled that a caller must receive consent of the current

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The **Telephone Consumer Protection Act of 1991** imposes significant obligations on all businesses that contact consumers by mobile phone, text or fax.

In this issue:

For more information, contact a Co-Chair of the **FisherBroyles TCPA Practice Group**:

William J. Akins (Dallas)
214.924.9504
william.akins@fisherbroyles.com

Mark E. Wilson (Chicago)
312.498.8078
mark.wilson@fisherbroyles.com

www.fisherbroyles.com

Courts Put a Halt to TCPA Class Actions Pending a Ruling of the D.C. Circuit (cont.)

owner of a cell phone number before making multiple calls to that number, even if the number had been re-assigned from an earlier owner who had given consent. The FCC ruled that "there are solutions in the marketplace" to inform callers when numbers have been reassigned.

Defendants in TCPA cases around the country have been asking trial courts to stay class action litigation pending the D.C. Circuit's ruling. On November 30, 2017 in *Kotylar v. University of Chicago Medical Center* (N.D. Ill.), Chief Judge Rubén Castillo issued a stay of this suit against a hospital by a class action plaintiff who claims that the hospital repeatedly robocalled her to try to collect a debt that she did not owe. Similarly, on November 8, 2017 in *Burnett v. Ocwen Loan Servicing, LLC,* a consolidated proceeding of seven separate class actions also pending in the Northern District of Illinois, the plaintiffs claim that the defendant loan servicer made automated calls to the class members without consent. The court stayed the proceeding pending a ruling in *ACA International.*

We will report on the decision in *ACA International* as soon as the court rules.

***The Point*: The D.C. Circuit should rule soon on an important TCPA case. Courts are reluctant to make dispositive rulings in TCPA cases until the D.C. Circuit rules.**

Revocation Presents a Question of Fact — Good Decision for Credit Card Issuer

The Central District of California issued a notable decision favoring defendants on the issue of revocation of consent in a December 4, 2017 ruling.

In *Herrara v. First National Bank of Omaha, N.A.,* a putative class plaintiff got behind on her credit card payments. The card issuer's automated dialing system placed a collection call to the plaintiff's cell phone and then transferred the call to an agent. On a recorded line, the plaintiff told the agent "Stop calling me." The agent noted the "do not call" instruction in the notes of the issuer's collection system, but the issuer still placed forty-two additional robocalls to the plaintiff's cell phone.

The plaintiff filed a motion for summary judgment, forcefully arguing that this recording eliminated any possible issue of fact that she had revoked her consent to be called. The court still denied summary judgment. There was some evidence that a minor first answered the call, so it was at least possible that the plaintiff herself did not issue the do-not-call directive. Furthermore, the court found it significant that the plaintiff did not answer any of the other forty-two robocalls.

***The Point*: Courts are reluctant to grant a plaintiff summary judgment on central issues of liability, such as revocation of consent, even when the evidence is strong.**