REDIAL: 2016 TCPA YEAR IN REVIEW

Telephone Consumer Protection Act:
Analysis of Critical Issues and Trends

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INTRODUCTION

Sutherland is pleased to present REDIAL, our annual in-depth analysis of key Telephone Consumer Protection Act (TCPA) issues and trends. REDIAL reports on issues affecting the industries that face TCPA class action liability.

DID YOU KNOW?

2ND

For the fourth consecutive year, TCPA cases are the **second most filed** type of case in federal courts nationwide.

100,000

The FCC has reported that as many as 100,000 cell phone numbers are reassigned **EVERY DAY.**

3X

The TCPA imposes liability of $500 per call, text or fax, **trebled to $1,500** if the sender's conduct is deemed willful.

SUTHERLAND INDUSTRY KNOWLEDGE AND FOCUS

Few industries are immune from TCPA liability. In 2016, the insurance, financial services, energy and health sectors were uniquely affected by TCPA litigation. REDIAL analyzes key legal issues affecting these industries.

Sutherland tracks daily all TCPA cases filed across the country. This allows us to spot trends and keep our clients informed. We understand the law and our clients' businesses, allowing us to design compliance and risk management programs uniquely suited to our clients' specific needs and to spot issues before they result in litigation. When litigation is filed, Sutherland's TCPA team has the depth of experience necessary to zealously defend its clients' interests in court.

WHY SUTHERLAND?

STRENGTH in representing the country's and the world's leading companies

STRENGTH in knowing our clients' businesses

STRENGTH in advising and counseling our clients on TCPA compliance

STRENGTH as trial lawyers in efficiently and zealously representing our clients in class actions filed in state and federal courts across the country

THE TCPA TRAFFIC LIGHT

	LANDLINE		CELL PHONE	
	MARKETING	NON-MARKETING	MARKETING	NON-MARKETING
AUTODIALED CALLS/TEXTS	DO NOT CALL LIST+		PRIOR EXPRESS WRITTEN CONSENT[1] *	PRIOR EXPRESS CONSENT[2]
PRERECORDED VOICE	PRIOR EXPRESS WRITTEN CONSENT *		PRIOR EXPRESS WRITTEN CONSENT *	PRIOR EXPRESS CONSENT
MANUALLY DIALED	DO NOT CALL LIST		DO NOT CALL LIST	
FAX	PRIOR EXPRESS PERMISSION OR ESTABLISHED BUSINESS RELATIONSHIP *			

[1] "Prior express written consent" requires a written agreement, signed by the consumer, that includes, among other things, the telephone number that specifically authorizes telemarketing by automatic dialing/texting or prerecorded voice, and that is not required as a condition of purchase. 47 C.F.R. § 64.1200(f)(8).

[2] For non-marketing purposes, providing a cell number in connection with a transaction generally constitutes prior express consent to be contacted at that number with information related to the transaction. 7 F.C.C.R. 8752 ¶ 31 (1992).

+ Do Not Call List restrictions apply broadly to telemarketing to both cell phones and landlines, but can be overridden by written consent from the consumer.

* Opt-out notice and mechanism must be provided. Specific requirements vary.

This chart does not constitute legal advice. ***The chart provides only a general overview of TCPA rules and does not reflect all details needed for compliance.***

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CAMPBELL-EWALD CO. V. GOMEZ: MONEY FOR NOTHING: OFFER OF COMPLETE RELIEF TO NAMED PLAINTIFF DOES NOT MOOT CLASS ACTION, SUPREME COURT HOLDS IN 6-3 DECISION

An unaccepted Rule 68 offer of judgment that would fully satisfy a named plaintiff's individual claim does not moot individual or class claims opined the U.S. Supreme Court, resolving a split in the circuits. *Campbell-Ewald Co. v. Gomez*, No. 14-857 (January 20, 2016). The Court also held that the petitioner's status as a government contractor does not entitle it to the protection of derivative sovereign immunity. The *Campbell-Ewald* case was brought under the Telephone Consumer Protection Act (TCPA), but the ruling applies to all class actions where the defendant has made (or could make) a Rule 68 offer of judgment. Left unresolved by the Court is the question of whether actual payment in some form, rather than merely offering to pay a settlement or judgment, would lead to the same result.

In the underlying case, the plaintiff received a single, unsolicited recruitment text from the defendant, a marketing consultant hired by the United States Navy. The plaintiff responded by filing a putative class action against the marketing consultant, alleging a violation of the TCPA. Before the plaintiff moved for class certification, the defendant marketing consultant made a Rule 68 offer of judgment to the plaintiff for $1,503—$3 more than the maximum amount of treble statutory damages the plaintiff could recover for a single violation of the TCPA. The plaintiff declined the offer. Thereafter, the defendant moved to dismiss the plaintiff's claim, arguing that the claim was moot because it had already offered the plaintiff full and complete relief under the TCPA. The district court denied the motion.

On appeal, the U.S. Court of Appeals for the Ninth Circuit held that an unaccepted Rule 68 offer does not moot a plaintiff's individual claims or putative class claims.[1] Although the mootness ruling was consistent with Ninth Circuit precedent, several other federal circuit courts of appeals had held otherwise.

On review of the mootness issue, the Supreme Court held that an unaccepted offer of judgment does not moot a plaintiff's individual claim or the claims of a putative class, embracing the reasoning of Justice Elena Kagan's dissent in *Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013).[2]

BUSINESSES THAT FIND THEMSELVES DEFENDING AGAINST CLASS ACTIONS WILL NO LONGER HAVE THE OPTION OF RESOLVING THE CASE BY OFFERING JUDGMENT TO THE NAMED PLAINTIFF. THE SUPREME COURT HELD IN *CAMPBELL-EWALD CO. V. GOMEZ* THAT AN OFFER OF JUDGMENT UNDER RULE 68 DOES NOT MOOT A TCPA CLASS ACTION CLAIM.

In that dissent, Justice Kagan, and now the majority of the Court in *Campbell-Ewald*, characterized the unaccepted offer as a "legal nullity, with no operative effect." The rejection of a Rule 68 offer of judgment leaves the case as a live controversy in the same position as it would have been had the defendant never made the offer. In deciding only the specific issue before the Court, Justice Ruth Bader Ginsburg, writing for the majority, declined to opine on the hypothetical situation in which "a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." Justice Clarence Thomas concurred with the judgment on that basis, agreeing that a mere offer does not end the case; he suggested, however, that his analysis may have been different had there been actual tender of the funds.

Chief Justice John Roberts, writing in dissent, advocated for a rule that a complete offer made pursuant to Rule 68 moots the action. According to Justice Roberts, "[w]hen a plaintiff files suit seeking redress for an alleged injury, and the defendant agrees to fully redress that injury, there is no longer a case or controversy for purposes of Article III." In such circumstances, "the plaintiff cannot demonstrate an injury in need of redress by the court."

SUTHERLAND PRACTICE POINT

THE DECISION LIMITS THE CLASS ACTION DEFENSE STRATEGY OF PICKING OFF THE NAMED PLAINTIFF BY OFFERING COMPLETE RELIEF ON AN INDIVIDUAL BASIS. THIS RULING WILL HAVE A PARTICULAR IMPACT IN CASES WHERE THE NAMED PLAINTIFF'S DAMAGES ARE LIMITED AND WELL-DEFINED, SUCH AS IN TCPA CASES, BECAUSE DEFENDANTS WILL NO LONGER BE ABLE TO MOOT CLASS CLAIMS SIMPLY BY MAKING AN OFFER OF INDIVIDUAL RELIEF.

Finally, on the question of derivative sovereign immunity for federal contractors under the TCPA, the Supreme Court concluded that a contractor cannot claim this shield when the contractor's actions are alleged to have violated both federal law and the government's explicit instructions. According to the Court, the Navy relied on the contractor's representation that the list of recipients for text message solicitations included only individuals who had opted in to receive them. The Court embraced the Ninth Circuit's vicarious liability determination on claims against the contractor, and rejected the sovereign immunity defense.

[1] 768 F.3d 871 (9th Cir. 2014).

[2] In 2013, the Supreme Court had an opportunity to determine the effect of a Rule 68 offer of judgment in the context of a collective action under the Fair Labor Standards Act. See *Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013). The Court's majority declined to address the mootness question, explaining that the issue was not properly before the Court.

SPOKEO, INC. V. ROBINS: SUPREME COURT EXPLORES INJURY REQUIREMENT FOR FEDERAL STATUTORY STANDING

In a 6-2 opinion, the U.S. Supreme Court vacated a U.S. Court of Appeals for the Ninth Circuit holding that a plaintiff who alleges that his own federal statutory rights have been violated has alleged enough to establish Article III standing to sue. The Court remanded the long-pending Fair Credit Reporting Act case, *Spokeo, Inc. v. Robins*, No. 13-1339, for consideration of whether the plaintiff has otherwise alleged in his complaint a sufficiently concrete injury for standing purposes. *Spokeo*'s limited yet potentially significant holding leaves many questions unanswered.

THE COMPLAINT'S ALLEGATIONS

Spokeo, Inc. runs a people search engine that provides information on individuals. The plaintiff alleged that Spokeo provided inaccurate information about him. The misinformation included that he was married, had children, was in his 50s, had a job, was relatively affluent, and held a graduate degree. None of this information was correct, according to the complaint. According to the Ninth Circuit's opinion, the plaintiff alleged that the misinformation caused actual harm to his employment prospects and caused him anxiety and stress. 724 F.3d at 411. The plaintiff filed a class action complaint alleging several Fair Credit Reporting Act violations. The district court ultimately dismissed the complaint for lack of standing.

THE NINTH CIRCUIT'S RULING

On appeal, the Ninth Circuit reversed. The court held that the plaintiff had standing to sue for two reasons: first, because he alleged that Spokeo violated his statutory rights, not the rights of others; and, second, that the statutory rights at issue were sufficiently concrete and particularized that Congress could elevate them to the status of legally cognizable injuries. *Id.* at 413. The court did not address how the plaintiff's somewhat more specific allegations of injury might figure into the analysis.

SUPREME COURT RULING

The Supreme Court reversed the Ninth Circuit, in an opinion by Justice Samuel Alito. The Court held that the Ninth Circuit's analysis was incomplete. The focus was on Article III's standing requirement, specifically the "injury-in-fact" component. Not only must an injury-in-fact be particularized, i.e., affecting the plaintiff in a personal and individual way, the Court explained, but the injury must also be concrete. A concrete injury, however, need not necessarily be tangible. The Court noted that in determining whether an intangible harm constitutes an injury-in-fact "both history and the judgment of Congress play important roles." (Slip op. at 9.) An intangible harm that has a close relationship to a harm that has traditionally provided the basis for a lawsuit in English or American courts is a stronger candidate for recognition. (*Id.*) And Congress may elevate, to the status of legally cognizable, "concrete, de facto injuries that were previously inadequate in law." (*Id.*) But Congress' role "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." (*Id.*) Accordingly, the plaintiff cannot allege a "bare procedural violation" of FCRA and satisfy the injury-in-fact requirement. Noting that not all consumer reporting inaccuracies cause harm or present any material risk of it, the Court cited the example of an incorrect zip code: "It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm." (Id. at 11.)

Because the Ninth Circuit did not address the question framed by the Court's discussion, "whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement," the Court remanded the case and expressly took no position on the ultimate outcome.

Justice Clarence Thomas concurred fully in the opinion but offered his separate views on when standing may exist to vindicate public rights. Justice Ruth Bader Ginsburg, joined by Justice Sonia Sotomayor, dissented on the necessity for remand in view of the plaintiff's allegations of harm to his employment prospects.

BECAUSE THE NINTH CIRCUIT DID NOT ADDRESS THE QUESTION FRAMED BY THE COURT'S DISCUSSION, "WHETHER THE PARTICULAR PROCEDURAL VIOLATIONS ALLEGED IN THIS CASE ENTAIL A DEGREE OF RISK SUFFICIENT TO MEET THE CONCRETENESS REQUIREMENT," THE COURT REMANDED THE CASE AND EXPRESSLY TOOK NO POSITION ON THE ULTIMATE OUTCOME.

IMPLICATIONS OF DECISION

While limited in scope because of its level of abstraction, *Spokeo* still might prove to be a significant decision. On remand, the Ninth Circuit's most likely choices seem to be to probe deeper into the plaintiff's allegations and find a sufficiently concrete injury or to remand to district court for a hearing on standing. The case is likely to be closely monitored for further developments which will influence the long-term impact of this decision. The zip code example is likely to resurface frequently in future opinions that discuss *Spokeo*.

The decision by the Court also does not address its implications for the putative class that the plaintiff seeks to represent. In a class action, the objective is often a recovery of statutory damages for each class member which, like many other federal consumer protection statutes, the Fair Credit Reporting Act authorizes for certain violations. (Proof of actual damages is usually regarded as too individualized to permit class action treatment.) *Spokeo* implies that each class member would have to establish concrete injury to have standing to participate as an unnamed class member.

DIAL "C" FOR CONFUSION: COURTS SPLIT ON TCPA DEFINITION OF AUTODIALER

Notwithstanding so-called "guidance" from the Federal Communications Commission (FCC) in its July 2015 Order, the definition of "automatic telephone dialing system" (ATDS or autodialer) continues to be a disputed issue. This issue perpetuates the uncertainty over the scope of the Telephone Consumer Protection Act (TCPA) and creates confusion for businesses that are working in good faith to operate within the parameters of the statute. The FCC's Omnibus Order issued on July 10, 2015—resolving more than half a dozen petitions on the autodialer question—failed to provide clarity and is being challenged in an appeal pending before a federal appellate court in Washington, DC. Even before the FCC issued its Order, the courts were split on the meaning of the term, and more recent decisions show that courts are continuing to struggle to apply a workable definition. The uncertainty over the definition of ATDS affects the scope of the TCPA and makes it difficult for businesses using automated communications to ensure compliance and manage litigation risk.

RECENT FCC GUIDANCE

The TCPA restricts the use of autodialers, which are defined by the statute as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."[1] In 2012, the FCC stated that the definition "covers any equipment that has the specified capacity to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists." *In re Soundbite Communications, Inc. Declaratory Ruling*, CG Docket No. 02-278 (Nov. 29, 2012). This definition includes "hardware, when paired with certain software, [that] has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers." *Id.* Also included within the FCC's definition of autodialers are predictive dialers, defined as "equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls."

In its July 10, 2015 Order, the FCC stated that the mere capacity or capability alone to store or produce, and dial random or sequential numbers, without any showing that such functionality had been utilized or even could have been utilized at the time the calls were made, would define whether equipment constitutes an autodialer, thus giving rise to potential TCPA liability for the use of such equipment, regardless of whether the autodialer functionality was actually used and even if the equipment was used only to dial numbers from customer telephone lists. This FCC guidance is counter to several court decisions that had applied a more common sense standard by recognizing that an equipment's capacity alone, without some showing that the functionality in question had been utilized, should not be sufficient to establish liability under the TCPA. *Gragg v. Orange Cab Co., Inc.*, 995 F. Supp. 2d 1189, 1196 (W.D. Wash. 2014). *See also Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1291-1292 (S.D. Cal. Oct. 23, 2014); *Glauser v. GroupMe*, Inc., 2015 WL 475111 *3-4 (N.D. Cal. Feb. 4, 2015).

Not only did the FCC's July 10, 2015 Order suggest a broad definition of autodialer, but the Order also failed to provide meaningful guidance on the

type of equipment that would not qualify as an autodialer under the FCC's definition. Instead, the FCC's Order offers only an unhelpful truism—that a rotary dial phone is not an autodialer. The FCC stated that while "it might be theoretically possible to modify a rotary-dial phone to such an extreme that it would satisfy the definition of 'autodialer,' … such a possibility is too attenuated for us to find that a rotary-dial phone has the requisite 'capacity' and therefore is an autodialer." By resorting to comparisons with rotary phones as an example of what is not an autodialer, the FCC's Order is effectively devoid of any meaningful or practical guidance. Even a federal appellate court has noted that the ruling is "hardly a model of clarity." *Dominguez v. Yahoo, Inc.*, No. 14-1751 (3d. Cir. Oct. 23, 2015).

COURTS AND BUSINESSES SEEKING TO COMPLY WITH THE TCPA HAVE STRUGGLED WITH WHAT CONSTITUTES AN AUTODIALER UNDER THE FEDERAL COMMUNICATION COMMISSION'S JULY 2015 ORDER. THE FCC'S DEFINITION OF AN AUTODIALER AS DEVICES HAVING THE MERE CAPACITY TO STORE OR PRODUCE, AND DIAL RANDOM OR SEQUENTIAL NUMBERS, RUNS COUNTER TO SEVERAL COURT DECISIONS APPLYING A MORE COMMON SENSE DEFINITION AND CREATES CONFUSION FOR BUSINESSES TRYING TO ENSURE COMPLIANCE AND MANAGE LITIGATION RISK.

RECENT COURT DECISIONS

Notwithstanding the uncertainty created by the FCC's July 2015 Order, a number of courts have issued decisions on the definition of autodialer since the FCC's Order. Several courts have applied a practical standard and continued to use the element of human intervention as the touchstone, so that a calling system requiring human intervention has not been held to be an autodialer. These courts have not expansively interpreted the FCC's suggestion that equipment that presently requires human intervention can constitute an autodialer if its capacity could hypothetically be upgraded or modified to place automated calls. Other courts, however, may be taking a broader view of the FCC's Order, though the cases are necessarily fact-specific and varying outcomes can often be explained by differences in the specific facts.

Several lower courts have focused on the element of human intervention and dismissed cases where the communications to the plaintiff were initiated through some type of human intervention, regardless of the equipment's theoretical capacity. In *Luna v. Shac, LLC*, No. 14-cv-00607, 2015 WL 4941781 (N.D. Cal. Aug. 19, 2015), the court held that a web-based text messaging platform was not an autodialer. The court adopted a test based on human intervention and did not decide the issue based on theoretical capacity. Similarly, in *Derby v. AOL, Inc.*, 2015 WL 5316403, at *4-6 (N.D .Cal., 2015), another text message case, the court dismissed TCPA claims and found that a system that never operates without human intervention is not an autodialer under the TCPA. In *Freyja v. Dun & Bradstreet, Inc.*, No. 2:14-cv-07831 (C.D. Cal Oct 14, 2015), the court granted summary judgment for the defendant where a call was manually dialed and therefore human intervention was used; the fact that the phone was connected to a desktop computer did not transform it into an autodialer. And in *Gaza v. LTD Fin. Servs., L.P.*, No. 8:14-CV-1012, 2015 WL 5009741, at *1 (M.D. Fla. Aug. 24, 2015), the court held that a point-and-click calling system constituted manual dialing and was not an autodialer. Specifically, the agent pulled up the subject account from a database and then used a mouse to manually click on the phone number associated with the account to launch the call. The court held that calls made by this equipment required human intervention, and the equipment was therefore not an autodialer.

Other courts have gone in a different direction, at least in part. The U.S. Court of Appeals for the Third Circuit reversed a favorable defense decision on the autodialer issue and remanded the case for further proceedings in light of the FCC's July 2015 Order. *Dominguez v. Yahoo, Inc.*, No. 14-1751 (3d. Cir. Oct. 23, 2015). The case involved text message notifications sent each time an email was sent to the user's Yahoo email account. The district court held that the texts were not sent by an autodialer because the equipment used to send the texts did not use a "random or sequential number generator" but rather dialed from a compiled list. The appellate court reversed and remanded to the lower court to consider whether

the calling system had the "latent capacity" to constitute an autodialer under the standard set by the FCC's July 2015 Order.

In another case involving welcome messages sent as part of a mobile message service, a federal court in California held that the autodialer issue should be submitted to the jury at trial. *Sherman v. Yahoo!, Inc.*, 3:13-cv-041 (S.D. Cal. Dec. 14, 2015). The plaintiff received a welcome text message on his cell phone at the time he received an individualized message from another user of the platform. The defendant argued on summary judgment that human intervention by the other user triggered the welcome text, and therefore the text platform could not be considered an autodialer. The court disagreed. In the court's view, the FCC's 2015 Order "backed away from the 'human intervention' element." On that basis, the court distinguished cases decided before the FCC's July 2015 Order.

CONCLUSION

The lingering uncertainty over the meaning of ATDS, and with it the broader issue of the scope of the TCPA, creates uncertainty and compliance burdens on companies that wish to communicate with their customers. The pending appellate challenge to the FCC's Order opens a new chapter in this fundamental question affecting the scope of the TCPA.

[1] 47 U.S.C. § 227(a)(1).

SUTHERLAND WINS DISMISSAL OF TCPA FAX CASE: APPLYING *SPOKEO*, COURT FINDS PLAINTIFF INCURRED NO ACTUAL HARM

On July 5, in *Sartin v. EKF Diagnostics, Inc.*, No. 16-1816, 2016 WL 3598297 (E.D. La. July 5, 2016), the U.S. District Court for the Eastern District of Louisiana granted Defendant's Rule 12(b)(1) motion to dismiss because the putative class action plaintiff failed to allege that he had incurred actual or concrete damage as a consequence of his receipt of a fax. This ruling is the first dismissal of a Telephone Consumer Protection Act (TCPA) case for failure to allege a "concrete" injury based on the U.S. Supreme Court's opinion in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). In *Spokeo*, the Supreme Court held that "Article III standing requires a concrete injury even in the context of a statutory violation" such as the TCPA. *Id.* at 1549. The Eastern District of Louisiana relied on that holding in dismissing the plaintiff's complaint, where the plaintiff failed to allege anything more than a naked statutory injury.

The allegations in *Sartin* are straightforward. The plaintiff alleged that the defendants violated the TCPA by sending him a single unsolicited fax advertisement. The putative class action complaint was based on a theory that the single fax was part of a larger "junk fax campaign." The plaintiff alleged that the defendants violated the TCPA by sending the fax, and that the defendants "caus[ed] Plaintiff and Plaintiff Class to sustain statutory damages, in addition to actual damages, including but not limited to those contemplated by Congress" and the Federal Communications Commission. 2016 WL 3598297 at *3.

The defendants moved to dismiss pursuant to Rule 12(b)(1) for lack of Article III standing based on plaintiff's failure to show actual damage or, in the alternative, to strike the class allegations pursuant to Rule 12(f) for failure to allege an ascertainable class. In support of their Rule 12(b)(1) motion, the defendants pointed out that the plaintiff failed to plead any actual, concrete harm he had suffered as a result of receiving the defendants' fax. That failure to comply with long-standing Supreme Court jurisprudence, including the recent *Spokeo* opinion, was ultimately fatal to the plaintiff's complaint. The court found that the plaintiff "provides no factual material from which the Court can reasonably infer what specific injury, if any, Dr. Sartin sustained through defendants' alleged statutory violations. Absent supporting factual allegations, Dr. Sartin's bare assurance that an unspecified injury exists is insufficient to establish Article III standing." *Id.*

The plaintiff argued, in his opposition to the motion to dismiss, that he sustained concrete injuries in the form of "wasted valuable time in reviewing the fax," but the court noted that an opposition to a motion is not the proper time to amend a complaint. The court dismissed the complaint, without prejudice, and held that the defendants' motion to strike was moot.

The defendants, EKF Diagnostics, Inc. and Stanbio Laboratory, L.P., are represented in this action by Lewis Wiener, Wilson Barmeyer and Frank Nolan of Sutherland Asbill & Brennan LLP.

IN *SARTIN V. EKF DIAGNOSTICS, INC.*, THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA APPLIED *SPOKEO* TO GRANT SUTHERLAND'S MOTION TO DISMISS, FINDING THAT IN ORDER TO ESTABLISH STANDING UNDER ARTICLE III, PLAINTIFFS IN TCPA FAX CASES NEED TO ALLEGE MORE THAN THE MERE RECEIPT OF AN UNSOLICITED FAX TO SHOW CONCRETE INJURY.

HEADS I WIN, TAILS YOU LOSE: TCPA DEFENDANTS FINDING SUCCESS IN STRIKING "FAIL-SAFE" CLASS ALLEGATIONS

The 1964 cold war era movie, "Fail-Safe," centered on the plight of a U.S. military jet pilot who received an errant instruction to drop a nuclear bomb on Moscow.

***SUTHERLAND OBSERVATION:* Unlike the movie, where Henry Fonda, as the fictional President of the United States, could not stop the U.S. bomber from passing the fail-safe point and unloading its nuclear arsenal, defendants in Telephone Consumer Protection Act (TCPA) cases facing so-called fail-safe classes are not defenseless and can shield themselves against such attacks.**

A proposed class is considered fail-safe if the class definition incorporates disputed merits issues such if the class is certified, but liability is ultimately not established, no one is bound by the judgment. This situation can arise, for example, when the proposed class definition tracks the language from the statute that forms the basis of the complaint. For years, defendants in class actions have argued, with mixed success, that proposed class allegations should be stricken—or class certification denied outright—if the proposed class is a "fail-safe" class.

The U.S. Court of Appeals for the Seventh Circuit has held that if an individual's membership in a class depends on the validity of the underlying claims in a case, the proposed definition is "improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Messner v. Northshore Univ. Health System*, 669 F.3d 802, 825 (7th Cir. 2012). Courts have the power to redefine the class allegations, or can give plaintiffs an opportunity to redefine the class to avoid the fail-safe pitfall.

***SUTHERLAND OBSERVATION:* A defendant may challenge a fail-safe class at various stages of litigation. Two recent district court decisions highlight that the arguments in opposition to fail-safe classes can be particularly effective in defeating class certification in putative class actions brought under TCPA.**

Many TCPA claims are based on the theory that the defendant used a phone, a fax or a text to contact the plaintiff without first obtaining requisite consent. For example, 47 U.S.C. § 227(b)(1)(A) prohibits the use of an auto-dialer to call someone unless the call is "made for emergency purposes or made with the prior express consent of the called party." It is fairly common to see proposed class definitions in TCPA class actions track the language of the statute, as was the case in *Lanteri v. Credit Protection Association, L.P.*, 2016 WL 4394139 (S.D. Ind. Aug. 17, 2016), where the plaintiff asserted violations of the TCPA based on the defendants' alleged use of an auto-dialer without express consent or invitation.

COURTS HAVE BECOME INCREASINGLY AWARE OF AND ARE DECLINING TO CERTIFY SO-CALLED "FAIL-SAFE" CLASSES WHERE THE CLASS IS DEFINED IN SUCH A WAY THAT IF LIABILITY IS NOT FOUND, THE PLAINTIFF IS DEFINED OUT OF THE CLASS AND THEREFORE IS NOT BOUND BY THE JUDGMENT. THIS IS GOOD NEWS FOR DEFENDANTS SEEKING TOOLS TO CHALLENGE THIS POPULAR CLASS ACTION STRATEGY.

SUTHERLAND OBSERVATION:** The* **Lanteri** ***court found that the proposed class constituted a fail-safe class because it improperly "defined a class member as someone as to which the Defendants violated the statute." The court denied the plaintiff's motion for certification, albeit with leave to file a new motion with an amended definition.

In *Dixon v. Monterey Financial Services, Inc.*, 2016 WL 3456680 (N.D. Ca. June 24, 2016), the court considered a fail-safe argument in connection with the defendant's consolidated motion for summary judgment and motion to strike the class allegations. As in *Lanteri*, the proposed definition in *Dixon* hinged on whether the class member received a call from an auto-dialer without first providing consent. The *Dixon* court, citing Ninth Circuit precedent, rejected the class definitions where "the class itself is defined in a way that precludes membership unless the liability of the defendant is established." The plaintiff was given an opportunity to propose an amended class definition, but only "if she can."

While defendants in TCPA class actions should consider how case law regarding fail-safe classes has developed in their respective jurisdictions, as well as the procedural posture of the case before raising the fail-safe issue, this argument is relevant to many TCPA and other statutory class action claims. The more carefully plaintiffs define—and the courts scrutinize—class definitions, the better.

REVERSE THE CHARGES: CHALLENGERS PUSH FORWARD IN APPEAL OF 2015 TCPA ORDER

The following article appeared in Law360.

In July 2015, the Federal Communications Commission (FCC) issued a much-anticipated Declaratory Ruling and Order aimed at clarifying certain aspects of the Telephone Consumer Protection Act (TCPA). As previously reported, more than a dozen parties filed appeals to the Order, claiming that it did nothing to clarify the TCPA and only served to further complicate compliance with the legal landscape. The appeals were consolidated under the name *ACA International v. FCC*, No. 15-1211, in the U.S. Court of Appeals for the D.C. Circuit. Oral argument held October 19, 2016.

The appeals focus on four core areas of dispute:

1. The FCC's lack of meaningful guidance on dealing with the growing problem of reassigned cell phone numbers;
2. The FCC's overbroad and inconsistent definition of autodialer;
3. The agency's vague and overly broad standards for consent, including revocation; and
4. Issues unique to financial institutions and healthcare providers.

KEY ISSUES IN THE APPEAL

Reassigned Cell Phone Numbers. The FCC's July 2015 Order reported that as many as 100,000 cell numbers are reassigned every day. Despite the difficulty of tracking reassigned wireless numbers, the FCC Order places the onus on businesses to avoid calling reassigned wireless numbers lest they face liability under the TCPA, even if such calls were made in good faith without knowing the cell number had been reassigned. The FCC's answer to the problem was to create a one-call exemption. The petitioners have decried the one-call exemption, allowing companies to call a reassigned number once without liability, whether or not the recipient of the call answers the phone, as arbitrary and capricious since it ascribes constructive knowledge to the caller when it places the second call regardless of whether the first call "yield[s] actual knowledge of reassignment." Petitioners have also taken issue with the Order defining "called party" as the current subscriber rather than the intended or expected recipient, which they say violates the First Amendment by deterring lawful communications.

Autodialers. The petitioners have objected to the FCC's expansion of the definition of autodialer to include: (1) equipment that has the capacity to store or produce, and dial random or sequential numbers—without any showing that the particular functionality had been used for the call; and (2) equipment that lacks the present capacity but theoretically could be modified to become an autodialer under the TCPA's definition. The petitioners claim the expanded definition is impermissibly vague and imposes liability that goes beyond Congress' original intent in passing the TCPA.

Consent. Some of the petitioners contend that the standard set by the FCC's Order allowing consent to be revoked at any time and by any means is arbitrary and capricious because it allows revocations to be delivered in ways that do not reasonably inform companies of the called party's preferences. Other petitioners have asserted that this standard is also inconsistent with prior FCC statements and puts an undue and excessive burden on callers to review responses to determine which ones are revocations.

Special Rules for Certain Financial and Healthcare-Related Calls. Members of both the financial services industry and healthcare industry have challenged industry-specific provisions in the Order. For the financial services industry, the National Association of Federal Credit Unions (NAFCU) has objected to the Order's interpretation of the "free-to-end-user" call exemption, which exempts from the TCPA calls regarding fraudulent account activity, risks to consumer personal data including steps the consumer can take to protect that data,

and money transfer notifications. NAFCU claims that financial institutions have no way of knowing what kind of wireless plan a given customer has and consequently, whether that customer will be charged for the communication. On healthcare issues, Rite Aid challenges: (1) the distinction between Health Insurance Portability and Accountability Act (HIPAA) calls made to land lines (no TCPA liability) and wireless numbers (TCPA liability); and (2) the exclusion of some calls permitted under HIPAA from the Order's exemption from the TCPA calls "for which there is exigency and that have a healthcare treatment purpose."

WL 2930696 (C.D. Cal. May 18, 2016). Cases that have been stayed often involve the very issues that are the subject of the appeal—reassigned cell phone numbers, autodialers, consent, and certain finance and healthcare exemptions.

There are also indications from dissenting commissioners that portions of the FCC Order, specifically the expansive definition of autodialer, could be overturned given that the focus on "capacity" arguably contradicts the plain language of the statute. For example, Commissioner Michael O'Rielly observed that, with regard to the focus on capacity, the concern seems to be that companies could claim that a particular piece of equipment is not being used as an autodialer and then secretly activate the autodialer functionality. Commissioner O'Rielly explained 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." Commissioner Ajit Pai stated in his dissent from the Order that the FCC's interpretation of the autodialer definition "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." A number of courts have also recognized the possibility that the 2015 Order may be struck down. *See Fontes v. Time Warner Cable Inc.*, 2015 WL 9272790, at *4 (C.D. Cal. Dec. 17, 2015) ("[I]n light of the close divide amongst the FCC commissioners and the fact that at least one commissioner believes the FCC's ruling is 'flatly inconsistent with the TCPA,' there is a legitimate possibility that the Court of Appeals may overturn that ruling.").

IN HIS DISSENT TO THE FCC'S JULY 2015 ORDER, COMMISSIONER AJIT PAI STATED THAT THE FCC'S INTERPRETATION OF THE AUTODIALER DEFINITION "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."

DEVELOPMENTS SINCE THE 2015 ORDER

Since the 2015 Order was issued, courts have grappled with its application in pending cases. For example, the TCPA restricts the use of autodialers, defined as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." Prior to July 2015, a number of courts had recognized that a piece of equipment's capacity alone, without some showing that the functionality in question had been used, would not be sufficient to establish liability under the TCPA. Some courts have continued to apply this common sense approach. *See McKenna v. WhisperText et al.*, 2015 WL 428728 (N.D. Cal. Sept. 9, 2015) (applying classic interpretation of "autodialer" to dismiss a TCPA claim, finding that the system used to send an unsolicited text required human intervention and thus did not qualify as an autodialer). Other courts, however, have struggled to apply the arguably broader standard from the 2015 FCC Order. *See, e.g., Dominguez v. Yahoo, Inc.*, 2015 WL 6405811, at *2 (3d Cir. Oct. 23, 2015) (remanding for further proceedings in light of 2015 Order).

Courts in some jurisdictions have opted to stay cases in anticipation of a final appeal ruling. *See, e.g., Coatney v. Synchrony Bank*, 2016 WL 4506315 (M.D. Fla. Aug. 2, 2016); *Rose v. Wells Fargo Advisors, LLC*, 2016 WL 3369283 (N.D. Ga. June 14, 2016); and *Errington v. Time Warner Cable Inc.*, 2016

Oral argument was held October 19, 2016, and the ruling will have a significant impact on the TCPA rules going forward. Businesses, legal practitioners and others interested in the TCPA hope the ruling will clarify the confusion that has followed the FCC's order. It remains to be seen whether that means a return to previous interpretations of the statute or an increased compliance burden for parties affected by the TCPA.

DIAL OR PUSH-BUTTON: ORAL ARGUMENT IN APPEAL OF FCC ORDER

The following article appeared in Law360.

Oral argument in ACA International's appeal of a Federal Communications Commission (FCC) July 2015 order was scheduled for 20 minutes. Reflecting the importance of the issues, oral argument lasted almost three hours.

On October 19, 2016, the U.S. Court of Appeals for the D.C. Circuit heard oral argument in *ACA International v. FCC*, No. 15-1211. The three-judge panel, which included judges Cornelia T.L. Pillard, Sri Srinivasan and Harry Edwards, considered several arguments raised by an appeal of the FCC's 2015 Order interpreting the Telephone Consumer Protection Act (TCPA). Issues included:

- The overbroad definition of ATDS (Automatic Telephone Dialing System, or autodialer);
- The FCC's "one call" exemption for dealing with reassigned cell phone numbers; and
- The FCC's unrestricted revocation of consent rule.

Given the tenor of the argument and the critical nature of the questions directed to the FCC's counsel, the three-judge panel appears to be leaning in favor of vacating at least parts of the 2015 Order, which will hopefully add some much-needed clarity and rationality to the TCPA rules.

AUTODIALERS

The issue: A major focus of discussion in both the parties' briefing and at oral argument was the commission's interpretation of what constitutes an autodialer. In its 2015 Order, the FCC expanded the definition of autodialer to encompass equipment that has the capacity or capability to produce, store and dial numbers randomly or sequentially without human intervention. The judges expressed concern that such a broad definition could yield absurd results, especially since any smartphone equipped with the correctly configured mobile application could potentially be transformed into an autodialer under the FCC's interpretation.

What the court focused on: Pillard attempted to see both sides of the argument asking at one point why a smartphone used for telemarketing purposes wouldn't fall under the statute and at another point asking whether a simple call made to her mother using her smartphone would expose her to potential liability under the statute. Edwards, instead of focusing solely on the capabilities or capacity of the equipment, asked pointedly: "What does the statute say?" He explained that the TCPA was aimed at preventing excessive telemarketing calls using an autodialer, not at the equipment itself. More generally, the judges acknowledged the difficulty of applying a 25-year-old statute to modern methods of communication that fall within the scope of the TCPA. To that point, Pillard queried whether the statute is a "victim of its own success" in encompassing forms of communication that were not envisioned when the statute was first enacted—forms of communication that are raising new questions about the appropriate scope of the TCPA.

GIVEN THE TENOR OF THE ARGUMENT AND THE CRITICAL NATURE OF QUESTIONS DIRECTED TO FCC'S COUNSEL, THE THREE-JUDGE PANEL APPEARS TO BE LEANING IN FAVOR OF VACATING AT LEAST PARTS OF THE JULY 2015 ORDER INTERPRETING THE TCPA, WHICH WILL HOPEFULLY ADD SOME MUCH-NEEDED CLARITY AND RATIONALITY TO THE TCPA RULES.

The FCC's response: The FCC argued in response that a standard narrower than the one adopted in the July 2015 Order would be impractical and would set a difficult pleading standard for potential plaintiffs since they would have to prove that not only was a call placed using equipment with autodialing functionality but also that the functionality was specifically used for the call. Edwards rejected this argument, noting that requiring the plaintiffs to meet the standard

was not unreasonable given that they would merely have to allege the use of an autodialer, the standard provided for in the statute.

REASSIGNED CELL PHONE NUMBERS

The issue: The FCC's July 2015 Order reported that as many as 100,000 cell phone numbers are reassigned every day. The order also provides a "one-call" exemption where a caller will not face liability for a single call made to a cell phone number to determine whether the current subscriber of that phone is the same person who provided consent to be called. According to the FCC's order, the caller is deemed to have actual or constructive knowledge regarding the identity of the cell phone's current subscriber whether or not the subscriber (or anyone else) actually answers the phone. The discussion of reassigned cell phone numbers focused on the impracticality of this one-call exemption.

What the court focused on: Srinivasan asked whether there is sufficient constructive knowledge of reassignment when a call is made to a reassigned number and the call goes to voicemail with no identifying information or ability of the caller to identify the current cell phone subscriber. In this situation, there is no way for a caller to know that the wrong party has been reached. Srinivasan noted that text messaging is similar since there is no automatic response and only if a texted party sends a return text will the sender know of any reassignment. When Edwards asked what solution would help businesses but also protect consumers, counsel for petitioners proposed that "called party" be redefined to "expected recipient."

The court then asked whether it would be sufficient for the petitioners to follow the methods provided in the FCC order to gain actual or constructive notice of a reassigned cell phone number. Some of the methods proposed in the order include maintaining a database that can help callers determine whether a number has been reassigned or asking consumers to notify callers when they switch from a number for which they have given prior consent.

Petitioner's response: Counsel for petitioner responded that the measures are not fully effective and place a burden on callers to track reassigned numbers—to the tune of 37 million reassigned numbers per year. Edwards agreed, saying that if a business person were consulted on the issue, the likely response would be that the measures are unrealistic and untenable. He noted that while the TCPA is aimed at protecting customers from repetitive, intrusive calls, Congress' intent in passing the statute must be balanced against legitimate business concerns.

CONSENT AND REVOCATION

The issue: The FCC's order prohibits callers from conditioning or limiting the manner in which a consumer may revoke consent and requires only that the revocation be "reasonable." For example, if a customer were to walk into a bank and inform a teller that she wished to revoke her consent to be contacted by the bank, this would be considered a reasonable method of revocation under the FCC's current guidance. The reality, however, is that the teller may lack the means to ensure that the revocation of consent is properly communicated to the appropriate parties within the organization to ensure and effectuate revocation.

What the court focused on: The judges vigorously questioned the standard articulated by the July 2015 Order by which called parties may revoke consent. According to the petitioners, the FCC's order creates an undue burden on callers to keep track of all the various modes by which consumers might try to revoke consent. Srinivasan considered whether such a task had a chilling effect on businesses making protected communications to customers who wanted to receive the communications. One option for a business looking to manage customer revocation would be to include language in customer agreements providing for an exclusive means of revocation, which the FCC's order specifically rejects.

The FCC's response: Counsel for the FCC noted that including more revocation language in contracts of adhesion (which encompass the majority of affected customer contracts), as the court suggests, places a burden on the called party to revoke consent in a specific manner. Edwards disagreed with the FCC, asking why businesses, as a contractual matter, could not present specific requirements for revocation to the customer as a condition to a contract. The customer would then have the option to simply not sign the contract if the customer did not agree to the specific method of revocation.

CONCLUSION AND IMPLICATIONS

In issuing its 2015 order, the FCC essentially abdicated its role in interpreting the TCPA to provide meaningful guidance and instead left the courts and businesses to decipher the statute on their own. A decision by the D.C. Circuit is expected in the coming months, and one hopes the decision will set a new course that curbs the FCC's overbroad interpretation and offers the business community much-needed clarity on the scope of the TCPA.

WHO'S CALLING? STANDARDS FOR THIRD-PARTY LIABILITY DIVERGE UNDER TCPA

The following article appeared in Law360.

Several recent court decisions have highlighted a growing rift between the legal standards for third-party liability under the Telephone Consumer Protection Act (TCPA). Under the TCPA, it is unlawful "to initiate" certain telephone calls (including text messages) and "to send" unsolicited fax advertisements. This small difference in the language of the TCPA has led some courts to apply different legal standards for third-party liability for telephone calls and faxes, and has resulted in a split among circuit courts on the standard for third-party liability under the TCPA. For telephone calls and texts, courts apply a vicarious liability standard based generally on common law agency principles. For faxes, however, courts have disagreed about whether to apply a traditional agency standard or a different standard for third-party liability.

THIRD-PARTY LIABILITY FOR CALLS AND TEXTS

The 2012 FCC declaratory ruling, *In re Dish Network*, 28 FCC Rcd. 6574 (2012), has been interpreted to establish that a person that does not physically initiate a telephone call, but rather relies on a third party to do so, may be held liable under the TCPA under the common law of agency (actual approval, apparent authority and ratification). Subsequent cases have applied the vicarious liability standard articulated in *In re Dish Network* to assess third-party liability under the TCPA. In *Thomas v. Taco Bell*, 12-56458, 2014 WL 2959160 (9th Cir. July 2, 2014), the U.S. Court of Appeals for the Ninth Circuit applied the vicarious liability standard to uphold dismissal of an action brought against Taco Bell alleging liability under the TCPA for unsolicited text messages sent by its franchisees. The court found that Taco Bell was not vicariously liable because the plaintiff failed to establish that Taco Bell actually approved the text messages or that it ratified the messages.

In *Gomez v. Campbell-Ewald*, No. 13-55486, 2014 WL 4654478 (9th Cir. Sept. 19, 2014), another Ninth Circuit case decided shortly after Taco Bell, the court considered whether a marketing consultant was liable under the TCPA for text messages sent by a third-party vendor. The defendant/consultant advocated a narrow interpretation of the vicarious liability standard, arguing that vicarious liability did not apply because it was not a merchant whose goods or services were being promoted in the text messages. The Ninth Circuit disagreed, finding that the TCPA imposes liability not only on a merchant, but also on "any person" that uses an automatic dialing machine or sends a prerecorded message call to a telephone. The court's holding applied a vicarious liability standard for TCPA violations that potentially encompasses all individuals in the marketing chain if the plaintiff can prove common law agency.

WHILE COURTS CONTINUE TO APPLY A COMMON LAW AGENCY ANALYSIS TO DETERMINE THIRD-PARTY LIABILITY UNDER THE TCPA FOR CALLS AND TEXTS, THERE IS A GROWING RIFT AMONG CIRCUIT COURTS CONCERNING THE STANDARD THAT SHOULD BE APPLIED WHERE THE PROHIBITED CONTACT IS MADE BY FAX. THE CIRCUIT SPLIT GENERATES AMBIGUITY CONCERNING THE STANDARD THAT WILL BE APPLIED TO THE ACTS OF THIRD PARTIES.

THIRD-PARTY LIABILITY FOR FAX ADVERTISEMENTS

While vicarious liability is the accepted standard for assessing TCPA liability for telephone calls and text messages, the proper standard for assessing third-party liability for faxes is less settled. Two recent cases decided by the Sixth and Seventh Circuits, respectively, illustrate a potential split among the circuits regarding third-party fax liability, and the potential disparity between the legal standards applied to telephone calls and faxes.

BRIDGEVIEW HEALTH CARE CTR. LTD. V. CLARK

On March 21, 2016, the U.S. Court of Appeals for the Seventh Circuit affirmed a lower court's ruling that a small business was not liable under the TCPA for unsolicited fax advertisements sent outside the scope of the business owner's express authorization. *Bridgeview Health Care Ctr. Ltd. v. Clark*, No. 14-3728, 2016 WL 1085233 (7th Cir. Mar. 21, 2016). In *Bridgeview*, a small business authorized a marketing company to send faxes advertising its services within a 20-mile radius of its location. Despite this specific limitation, the marketing company sent more than 5,000 faxes across three states. The district court granted summary judgment to the defendant on the claims of all class members located outside of the 20-mile approved radius. On appeal, the Seventh Circuit applied an agency analysis to determine whether the faxes sent outside the 20-mile radius were sent "on behalf of" the small business. The Seventh Circuit examined the three types of common law agency—express actual authority, implied actual authority and apparent authority—and, finding no theory of agency applied, affirmed the lower court's ruling limiting the small company's liability only to the faxes sent within the authorized 20-mile radius. The court's holding articulated a common sense approach to assessing third-party fax liability under the TCPA, in line with vicarious liability standards used for telephone calls and texts.

SIDING AND INSULATION CO. V. ALCO VENDING, INC.

On May 9, 2016, less than two months after the Seventh Circuit's ruling in *Bridgeview*, the U.S. Court of Appeals for the Sixth Circuit issued a ruling declining to apply common law agency principles for assessing third-party liability, instead articulating a different standard for "on behalf of" liability. In *Siding and Insulation Co. v. Alco Vending, Inc.*, the Sixth Circuit reversed a lower court's ruling that a vending business had no liability under the TCPA for unsolicited fax advertisements sent by a third-party marketing company. *Siding and Insulation Co., v. Alco Vending, Inc.*, No. 15-3551, 2016 WL 2620507 (6th Cir. May 9, 2016). The district court had applied a traditional agency standard and granted summary judgment in favor of the defendant after finding that the faxes were sent without the defendant's express authority.

On appeal, the Sixth Circuit held that pre-2006 liability under the TCPA was governed by a 1995 order issued by the FCC defining liable parties as those "on whose behalf facsimiles are transmitted." 10 FCC Rcd. 12391, 12407 (1995). The court determined that under the 1995 order the correct legal standard for assessing Alco's liability was the "on whose behalf" standard. The standard involved a hybrid analysis blending "(1) federal common-law agency principles, such as whether and to what extent one entity controlled the other, and (2) policy considerations designed to address which entity was most culpable in causing a TCPA violation, such as whether and to what extent each entity investigated the lawfulness of the fax broadcasts at issue." The court noted several relevant factors under the "on whose behalf" standard including, but not limited to, the degree of input and control the entity exercised over the preparation and content of the faxes, awareness of the circumstances of the broadcast (including facsimile list and transmission information), and measures taken to ensure compliance with the TCPA. Applying these non-exhaustive factors, the court found facts that weighed both for and against Alco's liability before remanding the case to the district court to reconsider the case under the new legal standard.

The Sixth Circuit also suggested, in dicta, that faxes sent after 2006 might be viewed under a third standard. In 2006, the current definition of "sender" under the TCPA was codified in 47 C.F.R. § 64.1200(f)(10) as the person on whose behalf the advertisement is sent or the person whose services are shown in the advertisement. The Sixth Circuit commented that this language might result in a strict liability standard for faxes sent under current law for the person whose services are being advertised.

PRACTICAL IMPLICATIONS

The circuit split created by the *Bridgeview* and *Siding and Insulation* decisions generates ambiguity concerning the standard that will be applied to acts of third parties, but some practical lessons can be learned. Regardless of the standard, placing a limit on the scope of authorization provided to third parties to distribute marketing materials will likely be helpful in limiting potential TCPA exposure. Courts will consider whether there was a defined scope of authority for the content of the

materials, the method and scope of transmission, the number of communications, and the intended recipients. Companies that use third parties to conduct marketing and sales should commit to writing specific directions on the scope and limits of marketing to be performed by the third parties so that TCPA issues can be proactively managed and hopefully avoided.

CONCLUSION

The Sixth Circuit's "on whose behalf" standard in *Siding and Insulation* is a departure from the common sense agency standard articulated by the Seventh Circuit in *Bridgeview*, and a further step away from the vicarious liability standards applied to telephone and texts under the TCPA. While the Sixth Circuit's holding can be narrowly read to apply only to faxes sent before 2006, the dicta in the opinion hints that future decisions from the court may move even further away from vicarious liability principles in assessing third-party fax liability. Regardless of the standard, however, companies will need to be aware of the manner in which marketing materials are sent on their behalf to manage potential TCPA risk.

CRUISE SHIPS MISS THE BOAT ON TCPA COMPLIANCE TO THE TUNE OF UP TO $76 MILLION

With a trial looming like storm clouds on the horizon, several cruise ship companies and their affiliated travel agencies settled a "robocall" Telephone Consumer Protection Act (TCPA) class action up to $76 million. The settlement, announced on September 8, 2016, was reached just weeks after the trial court rejected the defendants' attempts to decertify the class based on recent U.S. Supreme Court case law. Once the trial court determined that a violation of the plaintiffs' right to maintain their "solitude" and be free from unwanted calls constituted an actual and concrete injury, the defendants were effectively sunk. The settlement of this four-year-old case once again demonstrates the "titanic" risk that companies face for failure to comply with the TCPA.

The putative class action TCPA lawsuit was filed in the U.S. District Court for the Northern District of Illinois, a well-known hotbed of TCPA class actions. The class claims arose from robocalls made by Caribbean Cruise Lines, Inc., two of its marketing subsidiaries and a third-party entity, to approximately one million individuals. In 2014, the court certified two subclasses, one for cell phone call recipients, and another for landline call recipients. In mid-2016, the defendants moved to decertify those classes, arguing that the plaintiffs did not have Article III standing because they did not suffer any actual, concrete harm from the calls and had alleged nothing more than a naked statutory violation of the TCPA.

The defendants' argument was based on the U.S. Supreme Court's May 2016 opinion in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), where a majority held that a naked statutory violation—without a corresponding, independent concrete harm to a plaintiff—is not enough to create standing to pursue litigation. The Northern District of Illinois rejected this argument by Caribbean Cruise Lines and the other defendants, holding that the plaintiffs' alleged invasion of their right to privacy constituted sufficient injury to satisfy the *Spokeo* standard necessary to maintain the action. Although the defendants did not seek interlocutory appeal of the district court's decision, courts across the country are not in agreement on whether a right to privacy in this context is sufficient to confer standing.

The specifics of the Caribbean Cruise Lines litigation and settlement aside, the case is another reminder for companies that utilize phone, text and fax for marketing purposes that failing to strictly comply with the TCPA can be very costly. Companies must remember, among other things:

- The TCPA does not prohibit calls, texts or faxes, provided that the recipients have provided some form of consent.
- Consent runs with the individual, not the number, and there is no good faith exception for a misdialed call or a call made to a reassigned number.
- Requests to stop calling, texting or faxing must always be honored.
- Companies may not condition or restrict the manner in which opt-outs are made.
- Adherence to national, state and company-specific "Do Not Call" lists is imperative.
- Consider using email.
- Stay abreast of the orders and guidance issued by the Federal Communications Commission, such as the July 2015 Order which significantly broadens the definition of autodialer.

While not an exhaustive list to ensure smooth sailing, these are some of the many steps that must be taken to avoid facing TCPA class actions and potential multi-million-dollar liability.

TCPA LITIGATION AND THE INSURANCE INDUSTRY

The following article is from National Underwriter's latest online resource, FC&S Legal: The Insurance Coverage Law Information Center.

As the number of class action case filings under the Telephone Consumer Protection Act (TCPA) continues to grow, insurance companies are increasingly being drawn into these lawsuits either as defendants or as coverage carriers. Any insurance company that communicates with its insureds, potential customers, job applicants, and others by phone or text using an automated telephone dialing system—or that has independent or semi-independent agents engaging in such automated communications—faces potential litigation risk under the TCPA. More than three dozen insurers have been sued under the TCPA over the past several years. Other insurers may face TCPA risk under liability policies if their insureds are dragged into TCPA litigation. This article discusses recent TCPA cases involving insurers and analyzes some of the key issues facing the insurance industry under the TCPA.

INSURANCE AGENT MARKETING AND VICARIOUS LIABILITY ISSUES

In cases where insurance companies have been sued for alleged violation of the TCPA, one of the most significant issues has been the scope of the insurer's liability for the acts of its agents. Insurers may market their products through the use of independent and semi-independent sales forces. Where an agent or agency has allegedly violated the TCPA, the insurer may also be drawn into the litigation on a theory of vicarious liability.

This risk was evidenced in a 2014 decision in which an Illinois federal court found that a vicarious liability claim could be raised against an insurance company for the actions of its agents and the agents' third-party marketer. The plaintiffs sued three property and casualty insurers, alleging that they received prerecorded, unsolicited calls regarding car insurance policies on behalf of the respective companies. The calls were allegedly made by a third-party telemarketing company through the use of an automated dialing system. If a person answered the call, the telemarketing company would then join the call, take the individual's information, and pass it along to the insurance company's local agent. If the call was not answered, then the telemarketing company left a prerecorded voice message. The complaint acknowledged that the agents, and not the insurance companies, were the ones who had contracted directly with the marketing company.

In its decision, the district court first addressed the question of whether the insurance companies could be held directly and/or vicariously liable for the calls placed by the marketing company and the agents. Although the court determined that the insurance companies could not be found directly liable since they did not physically place the calls, the court concluded that one of the companies might be subject to vicarious liability for the actions of the agents. Specifically, the court held that nothing in the TCPA directly prohibits the application of principles of common law vicarious liability. Noting Congressional intent to protect individuals from receiving certain calls without providing prior consent, the court opined that the actual sellers—i.e., the insurers—were in the best position to monitor and police third-party telemarketers' compliance with the TCPA. Otherwise, in the court's view, there would be a disincentive to monitor telemarketers, and consumers would not have an effective remedy under the TCPA. Applying this rationale to the complaint, the court dismissed the complaints against several insurers, but found that the plaintiffs had alleged sufficient facts to support a basis for holding at least one of the insurance companies liable for the marketing

company's actions under a subagency theory, where the plaintiffs alleged that the insurance agents who hired the marketing company were legally agents of the insurance company.

Vicarious liability has also been asserted where a third-party contractor is making the calls. In 2013, a federal district court in California granted class certification to plaintiffs who allegedly received unsolicited text messages on their cell phones on behalf of a life insurance company in violation of the TCPA. In that case, the plaintiffs alleged that the defendant insurance company entered into a marketing agreement with a third-party marketing group to promote its life insurance products. The plaintiffs alleged that they received text messages sent by the marketing group encouraging them to call a toll-free phone number to claim a gift card voucher, which, according to the plaintiffs, did not exist. Rather, the plaintiffs alleged that the number connected callers to a call center operated by the marketing group that pitched the insurance company's products and services, as well as the products and services of the marketing group's other clients. Of particular importance to the issue of third-party liability, the insurance company specifically argued that neither it nor the marketing company had actually caused the text messages to be sent, but rather that third-party contractors actually carried out the operation. The court expressed its skepticism of that defense, stating that it was unlikely to be viable, and certified the plaintiff class. The case was later settled on a class basis. Note, however, that more recent case law in the U.S. Court of Appeals for the Ninth Circuit may provide additional support for a defense against vicarious liability where a third party has initiated the communications.[1]

COURTS MAY IMPOSE VICARIOUS LIABILITY ON INSURERS FOR CALLS PLACED BY THEIR AGENTS AND EVEN THIRD-PARTY MARKETING COMPANIES THAT CONTRACT WITH INSURERS AND CONTACT CONSUMERS VIA AUTOMATED CALLS, TEXT MESSAGES AND SO-CALLED "JUNK FAX ADVERTISEMENTS."

INSURER COMMUNICATIONS AND CONSUMER CONSENT

Cases against insurers and their affiliates often also involve the issue of whether the insurer obtained the proper consent prior to sending the communication. "Prior express consent" may be a defense to claims under the TCPA. Since October 2013, "prior express written consent" from the called party is required for marketing communications to cell phones or using prerecorded messages.

Several insurers have been sued in TCPA litigation as a result of so-called junk fax advertisements allegedly sent by the company's agents. The issue of consent is often central to these cases. In one case against a life insurer alleging that a third-party agent sent unsolicited fax advertisements for low-cost life insurance, a federal district court granted the plaintiff's motion for class certification. The plaintiff alleged that the faxes lacked the required language that would allow recipients to opt out of receiving future faxes. In arguing against class certification, the insurer asserted that determining whether each recipient consented to receipt of the fax was an individual issue that precluded certification. The court rejected that defense, stating that "no individual inquiry is necessary and [the] established relationship or voluntary consent defenses are unavailable where, as here, the opt-out requirement [of the TCPA] is alleged to have been violated." The case was settled on a class basis for $23 million.

Perhaps no issue has caused more problems and has given rise to more liability under the TCPA than the issue of consent for calls made to reassigned cell phone numbers. According to the Federal Communications Commission (FCC), approximately 100,000 cell phone numbers are reassigned to new users each day. There is no systematic means by which a business can track or even know when a subscriber has relinquished his or her cell phone number and whether that number has been reassigned to another user. Numerous companies have been sued under the TCPA for making calls to numbers that have been reassigned, even though the company received consent from the prior subscriber.

In a July 10, 2015 Declaratory Ruling and Order,[2] the FCC explicitly declined to create a good faith exception to the TCPA's strict liability standard. The FCC declined to exempt from liability calls made in good faith to the number last provided by the intended call recipient where the number has been reassigned to a new user without the caller's knowledge. That standard could be satisfied when the original cell subscriber notifies the caller that it has relinquished his or her cell number or when the party to whom the

number has been reassigned notifies the company about the reassignment. Instead, the FCC's Order only offered a modest safeguard that callers who make calls without knowledge of reassignment and have a reasonable basis to believe that they have valid consent from the prior subscriber may make one call after reassignment to determine whether the phone has been reassigned, whether or not the called party answers the phone and alerts the caller that the number has been reassigned. Without providing any practical guidance, the FCC cautioned businesses to institute new and better safeguards to avoid calling reassigned wireless numbers that may give rise to TCPA liability.

TCPA INSURANCE COVERAGE ISSUES

As the number of TCPA class action filings continues to rise, so too has the number of disputes with commercial liability insurers over coverage for their insureds' alleged TCPA violations. Whether TCPA defendants may seek coverage from liability insurers to defend and indemnify them for TCPA-related exposure often depends on the specific language of the policy at issue, including the policy's stated coverage exclusions. Commercial liability insurers may file declaratory judgment actions against their insureds seeking a declaration that there is no coverage for underlying TCPA claims. In other situations, plaintiffs have pursued claims against commercial liability insurers after agreeing to settlements that were to be satisfied exclusively from the proceeds of a defendant's insurance policies. Increasingly, commercial liability policies may contain a specific exclusion for TCPA claims.[3] Other commercial liability policies may have more general exclusions that can preclude coverage for TCPA claims, such as an exclusion for any loss resulting from a violation of a "statute, ordinance or regulation of any federal, state, or local government."[4]

Other coverage beyond commercial liability may be implicated by TCPA litigation, such as coverage for errors and omissions. In one recent favorable case, an Illinois appeals court ruled that a professional liability insurer has no duty to defend or indemnify an insurance agent in a class action alleging that the agent sent thousands of prerecorded telephone messages advertising the agent's services for selling life, accident, and health insurance. The court affirmed the lower court's decision that telephone solicitations did not constitute negligent acts, errors, or omissions for "rendering services for others," as required for coverage under the policy.[5] In other cases, however, the courts have found that professional and/or commercial liability policies may provide coverage for TCPA claims against the insured.[6]

CONCLUSION

The trend of high-dollar class action settlements has spurred a large increase in TCPA filings over the past few years, including an increase in complaints filed against the insurance industry. The issues facing insurers in these cases are similar to the issues facing companies in other industry segments: consent and the scope of that consent, vicarious liability issues arising from the acts of agents and third-party marketers, and large potential exposure due to TCPA statutory damages. Insurers will need to continue to stay on top of TCPA issues relating to marketing, compliance, and potential litigation exposure.

[1] *Thomas v. Taco Bell Corp.*, No. 12-56458 (9th Cir. July 2, 2014).

[2] In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278 (FCC July 10, 2015).

[3] See *James River Ins. Co. v. Med Waste Mgmt.*, No. 1:13-cv-23608, 2014 WL 4749551 (S.D. Fla., Sept. 22, 2014) (denying coverage based on a TCPA exclusion).

[4] See *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Papa John's Int'l*, No. 3:12-cv-00677, 2014 WL 2993825 (W.D. Ky., July 3, 2014).

[5] *Margulis v. BCS Insurance Co.*, No. 1-14-0286 (Ill. App. Nov. 26, 2014).

[6] *Landmark American Insurance Co. v. NIP Group, Inc.*, 2011 Ill. App (1st) 101155 (2011); *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352 (2006).

TCPA ISSUES FOR HEALTHCARE PROVIDERS: ARE YOU COVERED?

Healthcare-related companies are being affected by the Telephone Consumer Protection Act (TCPA) which regulates and restricts the manner in which a business may advertise its products and services to consumers by phone (cell and residential lines) as well as by text message and fax. Recently, RiteAid and other healthcare-related companies sought clarification from the Federal Communications Commission (FCC) about the TCPA's limitations on communications with patients.

In some of its most comprehensive guidance published in years, on July 10, 2015, the FCC released a 138-page Declaratory Ruling and Order resolving a long backlog of pending petitions for clarification of the TCPA rules. The Order resolved some questions but left many other issues unresolved.

TCPA BACKGROUND

Enacted in 1991 to protect consumers from unsolicited telemarketing calls and faxes (and more recently text messages), the TCPA specifically prohibits the use of an "automated telephone dialing system" or an "artificial or prerecorded voice" to make calls to cell phones without obtaining the recipient's prior consent. This rule applies to both telemarketing and non-telemarketing calls, including debt collection or informational calls. Following a change in FCC regulations in October 2013, the TCPA now also requires prior written consent for most automated telemarketing communications, particularly those made to cell phones.

Class action litigation risk under the TCPA can be considerable. Because the TCPA is a strict liability statute with statutory damages of $500 per violation (and up to $1,500 if the violation is deemed willful or knowing) with no maximum cap on liability, potential exposure in a TCPA class action can quickly escalate. To put this in context, the top four TCPA settlements in 2014 totaled more than $175 million. The healthcare industry is no stranger to class action litigation risk under the TCPA. In a recent filing with the U.S. Court of Appeals for the D.C. Circuit, RiteAid asserted that its and other pharmacies' communications to their patients have become a target for TCPA class actions threatening "staggering statutory damages."[1]

Companies in the healthcare sector are being sued under the TCPA not only for their own actions (and omissions) but also for the actions (and omissions) of third parties contacting patients on their behalf. These lawsuits arise out of all aspects of communications ranging from the method (call, text or fax) to the type of phone line called (residential or wireless) to the specific content of the communications and beyond. With the swelling trend of class action lawsuits premised on TCPA violations, healthcare providers need to ask themselves several questions when it comes to communicating with their patients and customers:

- What type of communication are you engaging in? Is it marketing or non-marketing?
- Do you know what type of consent (express or written) is required to engage in marketing versus non-marketing communication?
- Have you obtained the necessary consent?
- Are third parties communicating on your behalf?
- If so, have you limited their authority in any way? Are they abiding by those limits?
- Do you know whether the phone numbers being called by you or your third-party vendor are wireless or residential numbers?
- Are you giving your patients the proper opportunity to opt out of further communications?
- If you are sending advertisements by fax, have you included the proper opt-out notice?

HEALTHCARE PROVIDER CONCERNS ABOUT THE FCC'S JULY 2015 ORDER

In an effort to lessen the impact of the TCPA on healthcare-related companies, RiteAid, along with several other business entities, filed a petition in the D.C. Circuit appealing the recent provisions handed down by the FCC which relate to healthcare communications. The petition articulates concerns expressed by a number of healthcare providers. RiteAid argues that its communications with its patients are regulated under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and HIPAA's implementing regulations.

This third exemption is limited to the following types of calls:

- Appointment and exam confirmations and reminders
- Wellness checkups
- Hospital pre-registration instructions
- Pre-operative instructions
- Lab results
- Post-discharge follow-up intended to prevent readmission
- Prescription notifications
- Home healthcare instructions

THE D.C. CIRCUIT WILL ULTIMATELY HAVE TO DECIDE WHETHER THE FCC OVERSTEPPED ITS AUTHORITY IN ITS JULY 2015 ORDER REGARDING HIPAA-PROTECTED CALLS. IF THE COURT AGREES WITH THE FCC, BUSINESSES WILL NEED TO CONSIDER UNDERTAKING A COMPREHENSIVE REVIEW OF THEIR COMMUNICATIONS POLICIES AND PROCEDURES TO ENSURE COMPLIANCE WITH THE TCPA. EVEN IF THE COURT OVERTURNS THE FCC'S INTERPRETATIONS OF THE TCPA AS IT RELATES TO HEALTHCARE COMPANIES, THE FCC WILL GO BACK TO THE PROVERBIAL DRAWING BOARD TO CREATE NEW RULES AND REGULATIONS.

According to RiteAid and others, these regulations strike the appropriate balance between allowing the flow of necessary health information to patients while protecting the privacy of that information. RiteAid accuses the FCC of changing its position on these HIPAA-regulated healthcare messages without proper explanation or justification. It claims that the FCC previously exempted calls from a covered entity or its business associate delivering a healthcare message from the TCPA's consent requirements. But in its recent Order, the FCC has improperly expanded the TCPA's reach to regulate these communications, according to RiteAid. RiteAid identifies the following three separate regulations for HIPAA-protected communications which unnecessarily expose it and other healthcare providers to the expense of class action litigation:

- No consent required for HIPAA-protected calls to residential phone lines;
- Prior express consent required for HIPAA-protected calls to cell phones; but
- Calls to wireless numbers that have an "exigent ... healthcare treatment purpose"[2] are exempt from consent requirements if they are not charged to the called party.

Notably, however, this exemption for calls and texts to cell phones applies only if the call or text is not charged to the recipient, including not being counted against any plan limits that apply to the recipient (e.g., number of voice minutes, number of text messages). Any call or text must also meet seven specific conditions: (1) it may be sent only to the number provided by the patient; (2) it must state the name and contact information of the provider; (3) it must be limited to the purposes listed above; (4) it must be less than one minute or 160 characters; (5) a caller cannot initiate more than one message per day or three per week; (6) the call or text must offer an opt-out; and (7) any opt-outs must be honored immediately. Notably, the exemption does not apply to marketing calls or to healthcare communications which include accounting, billing, debt collection or other financial content.

RiteAid further faults the FCC for the regulations on calls to wireless numbers because the exemption's requirement for "exigency" conflicts with HIPAA's definition of "health care," which includes all calls concerning "care, services or supplies related to the health of an individual." RiteAid contends that the FCC generally has an obligation to interpret the TCPA consistently with HIPAA, not in conflict with it.

The FCC argues in response that its prior exemption of HIPAA-protected calls related only to calls to residential lines and did not include calls to cell phones. The FCC further asserts that while HIPAA treats calls to residential and wireless numbers in the same way, the TCPA is not required to do the same. The FCC maintains that differentiating between calls to residential lines versus cell phones is reasonable because calls to cell phones "can be more costly and intrusive than calls to residential numbers."[3]

The D.C. Circuit will ultimately have to decide whether the FCC overstepped its authority in its July 2015 Order regarding HIPAA-protected calls. If the court agrees with the FCC, then businesses need to consider undertaking a comprehensive review of their communications policies and procedures to ensure compliance with the TCPA. Even if the court overturns the FCC's interpretations of the TCPA as it relates to healthcare companies, the FCC will go back to the proverbial drawing board to create new rules and regulations. Regardless of the result, healthcare providers should consider implementing communications policies that will help them avoid exposure under the TCPA. These policies should focus on the questions raised above regarding the method and content of communications, along with issues involving consent, revocation of consent and the involvement of third parties.

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[1] Final Brief for Petitioner RiteAid Hdqtrs. Corp. at 1-2, *ACA International v. FCC* (No. 15-1211), United States Court of Appeals for the District of Columbia Circuit.

[2] *Id.* at 9.

[3] Brief of Respondent Federal Communications Commission at 70, *ACA International v. FCC* (No. 15-1211), United States Court of Appeals for the District of Columbia Circuit.

POWER OUTAGE: ENERGY UTILITIES COME AWAY WITH LITTLE UNDER FCC'S TCPA ROBOCALL AND TEXT RULING

The following article appeared in Intelligent Utility.

On August 4, 2016, the Federal Communications Commission (FCC) issued a long-anticipated declaratory order, ruling that utility companies may make robocalls and send automated texts to their customers concerning matters closely related to the utility service, without violating the Telephone Consumer Protection Act (TCPA). The FCC's order reasoned that such communications, including those relating to service outages and warnings about potential service interruptions due to severe weather conditions, do not violate the TCPA because utility customers are deemed to have provided consent to receive these calls and texts when they gave their phone numbers to the utility company. Although utilities benefit from the FCC's guidance, the victory is a hollow one, at best, because the FCC still requires prior express consent for all automated calls and texts to cell phones.

The TCPA was enacted in 1991 to address certain calling practices that are alleged to invade consumer privacy. Generally, the TCPA prohibits: (1) making telemarketing calls, using an artificial or prerecorded voice, to residential telephones without prior express consent; and (2) making any non-emergency call, using an automatic telephone dialing system (autodialer) or an artificial or prerecorded voice, to a wireless telephone number without prior express consent. If the call includes advertising or constitutes telemarketing, consent must be in writing. If an autodialed or prerecorded call to a wireless number is not for such purposes, consent may be oral or written. The FCC has explained that consent must come from the number's subscriber.

In its August 4 order, the FCC ruled that energy utility companies may make autodialed calls and send automated texts to their customers concerning matters closely related to the utility service, under the TCPA's prior express consent rules, meaning that the utility may call the customer as long as the customer has provided his or her phone number to the utility and has not given do-not-call instructions. The protected communications include those that:

- Warn about planned or unplanned service outages;
- Provide updates about service outages or service restoration;
- Ask for confirmation of service restoration or information about lack of service;
- Provide notification of meter work, tree trimming or other field work that directly affects the customer's utility service;
- Notify consumers that they may be eligible for subsidized or low-cost services due to certain qualifiers such as age, low income or disability; and
- Provide information about potential brown-outs due to heavy energy usage.

According to the FCC, "consumers who provide their wireless telephone number to a utility company when they initially sign up to receive utility service, subsequently supply the wireless telephone number, or later update their contact information, have given prior express consent to be contacted by their utility company at that number with messages that are closely related to the utility service so long as the consumer has not provided instructions to the contrary." Significantly, the FCC's order declined to extend the TCPA's emergency purpose exception to all categories of utility calls despite the FCC's acknowledgment that "speeding the dissemination of information regarding service interruptions or other potential public safety hazards can be critically important."

The FCC recognized further that "[s]ervice outages and interruptions in the supply of water, gas or electricity could in many instances pose significant risks to public health and safety, and the use of prerecorded message calls could speed the dissemination of information regarding service interruptions or other potentially hazardous conditions to the public."

Approving utilities' communications under the TCPA prior express consent rules and not under the TCPA's emergency exception is significant, and largely undercuts the benefit of the FCC's ruling because emergency calls are exempt from TCPA liability. By contrast, utilities that contact their customers under the prior express consent rules must be able to demonstrate that their customers provided consent and must maintain records that show the utilities obtained the necessary consent. Utilities also remain liable in the event a number is misdialed or if a call is made to a reassigned cell phone number now owned by a user who did not provide consent.

The same FCC order that approved utilities' use of robocalls and texts under the prior express consent rules affords school callers relief from the TCPA under the emergency purpose exception. The order holds that schools may make autodialed calls and send automated texts to student family wireless phones without consent for emergencies including weather closures, fire, health risks, threats and unexcused absences. The following hypothetical highlights the inconsistency in the FCC's position:

A storm knocks out power forcing schools to close. The schools contact students' families to let them know that the schools will be closed. Of the cell phone numbers called or to which texts were sent, 10 are misdialed (because the numbers were entered in the schools' database incorrectly) and 10 were placed to cell phones whose owners relinquished those numbers which were subsequently reassigned to other users. For the 20 calls that did not reach the intended recipients, the schools face no liability under the TCPA because calls made under the TCPA's emergency exception are exempt from TCPA liability. At the same time as the schools were calling and texting, the local utility company reaches out to its customers to let them know about the power outage. Unlike the calls/texts sent by the school, the utility company's calls/texts are authorized under the TCPA's prior express consent rules, but not under the emergency exception. The 20 calls placed to the wrong cell numbers or to cell numbers that were reassigned expose the utility to potential liability under the TCPA because misdialed numbers and calls to reassigned cell numbers are not exempt from liability under the prior express consent rules. This example shows the same power outage and the same intent of the calls, but two diametrically opposed results.

ALTHOUGH UTILITIES BENEFIT FROM THE FCC'S GUIDANCE, THE VICTORY IS A HOLLOW ONE, AT BEST, BECAUSE THE FCC STILL REQUIRES PRIOR EXPRESS CONSENT FOR ALL AUTOMATED CALLS AND TEXTS TO CELL PHONES.

Utilities can gain some measure of comfort in the FCC's August 4 ruling. However, utilities must remain vigilant in maintaining proper records, if needed, to prove customer consent and in maintaining current, up-to-date records of customer contact information, especially cell phone numbers.

OFF THE GRID: TCPA CLASS ACTION SETTLEMENTS FOR ENERGY UTILITY COMPANIES

Utility companies continue to face ongoing litigation under the Telephone Consumer Protection Act (TCPA) that can arise from the use of automated communications with customers for purposes of marketing, customer servicing and collections. Recently, a New York federal court granted preliminary approval of a $1.1 million class action settlement involving a gas and electric utility that was alleged to have made more than 450,000 automated telemarketing calls to cellular telephone numbers. Sutherland represented the utility company through protracted litigation and negotiated the class settlement. More generally, utility companies are continuing to face litigation and compliance challenges under the TCPA.

ABRAMSON V. ALPHA GAS & ELECTRIC

Alpha Gas is one of many energy utility companies that has faced litigation under the TCPA over the past several years. Similar to dozens of other cases, the plaintiff alleged that the company violated the TCPA by making telemarketing calls using an autodialer. The plaintiff alleged in the complaint that he heard a click upon answering his phone, after which the call was transferred to a live operator. The plaintiff, through an expert, alleged that the company made more than 450,000 autodialed calls to more than 250,000 unique cellular telephone numbers.

After more than a year of litigation, during which the company raised defenses based on standing and mootness, the case was settled for $1.1 million. The United States District Court for the Southern District of New York granted preliminary approval of the proposed settlement on November 10, 2016, with a final approval hearing set for early 2017. The settlement includes a common fund from which payments will be made to all class members who submit valid claims.

THE TCPA CONTINUES TO IMPACT THE ENERGY/UTILITY INDUSTRY

The TCPA continues to raise litigation and compliance challenges across the energy industry, with dozens of new TCPA lawsuits being filed against the industry each year. The allegations in these cases frequently relate to the efforts of companies to communicate with customers and potential customers by telephone and text message.

Recent litigation has challenged both marketing calls and non-marketing calls, such as servicing and collection calls. For example, in one case, a federal district court considered allegations that a company placed marketing calls regarding its solar power installation services. *Waterbury v. A1 Solar Power Inc.*, No. 15CV2374, 2016 WL 3166910, at *4 (S.D. Cal. June 7, 2016). The court granted in part and denied in part a motion to dismiss, finding that one plaintiff had failed to adequately allege use of an autodialer to make the calls, whereas the other plaintiff sufficiently stated a claim that the call was made with an autodialer for marketing purposes.

In another recent decision, a federal district court dismissed claims against a gas and electric utility arising out of more than 200 collection calls allegedly made to the plaintiff. The energy company was dismissed from the case on summary judgment, with the court holding that the calls had been made by a third party and not on behalf of the company. *Klein v. Just Energy Grp., Inc.*, No. CV 14-1050, 2016 WL 3539137, at *4 (W.D. Pa. June 29, 2016). Both of these cases illustrate the types of litigation being filed against the industry under the TCPA.

An order from the Federal Communications Commission (FCC) earlier this year is unlikely to halt the flow of new cases.

On August 4, 2016, the FCC ruled in a declaratory order that utility companies may make robocalls and send automated texts to their customers concerning matters closely related to the utility service, without violating the TCPA, if the calls are made to the number provided by the customer. The FCC reasoned that such communications, including those relating to planned or unplanned service outages, do not violate the TCPA because utility customers are deemed to have provided consent to receive these calls and texts when they gave their phone numbers to the utility company. Although utilities benefit from having certainty in rules, the victory is a hollow one because the FCC still requires prior express consent for all automated calls and texts to cell phones. Utilities can gain some measure of comfort in the FCC's ruling but must remain vigilant in maintaining proper records, if needed, to prove customer consent and must maintain current, up–to-date records of customer contact information, especially cell phone numbers.

As with virtually all consumer-facing industries, the TCPA challenges of the energy/utility industry are expected to continue as companies seek to protect themselves from a continuing wave of litigation.

THE ENERGY UTILITY INDUSTRY INCREASINGLY FINDS ITSELF IN THE CROSSHAIRS OF TCPA LITIGATION AS COMPANIES ATTEMPT TO COMMUNICATE WITH CUSTOMERS AND POTENTIAL CUSTOMERS BY TELEPHONE AND TEXT MESSAGE. THE SETTLEMENT REACHED IN *ABRAMSON V. ALPHA GAS & ELECTRIC* EXEMPLIFIES THE TYPES OF ISSUES NORMALLY INVOLVED IN THESE CASES AND THE LEVEL OF LIABILITY COMPANIES IN THE INDUSTRY FACE.

TCPA HAZARDS ABOUND FOLLOWING BUSY MONTH FOR THE FCC

On November 16, 2016, the Federal Communications Commission (FCC) issued a final rule regarding the treatment of debt servicing and collection calls made by or on behalf of the federal government under the Telephone Consumer Protection Act (TCPA). The rule, a result of the Bipartisan Budget Act of 2015, provides exceptions to the TCPA's general requirement that companies may not make autodialed and prerecorded calls without prior express consent from the call recipient. According to the FCC, the rule is intended to "help consumers avoid debt troubles while preserving consumers' ultimate right to determine what calls they wish to receive." While this rule applies to autodialed calls, it applies equally to autodialed texts, sometimes referred to as "robotexts," as confirmed by an FCC Enforcement Advisory released on November 18, 2016. Although it is a lengthy 28 pages, single-spaced, the rule is narrow in scope.

WHO CAN BE CALLED?

- The rule is limited to calls made to individuals who owe debts held in whole or in part by the federal government. Calls cannot be made regarding debts that have been sold in full to third parties.
- Only individuals who are legally responsible for the subject debt may be called (as opposed to other individuals listed on loan applications, for example).
- Calls may be made regarding delinquent debts.
- Calls may also be made on those debts facing imminent risk of delinquency or a change of status of the debt. "Imminent risk" is defined as occurring 30 days prior to a scheduled event "affecting the amount or timing of the payment due." This includes deferment, forbearance, rehabilitation, and enrollment or reenrollment in repayment programs.
- Consumers may revoke the consent this rule grants to federal debt servicers and their contractors.

WHAT ARE THE LIMITS ON CALLS?

- No more than three calls may be made to the same wireless number within a 30-day time period.
- Attempted calls are covered under this rule, regardless of whether they are completed.
- The content of the calls must be exclusively related to the collection or servicing of a debt. Calls that include any form of marketing are prohibited.
- Calls may be made between 8:00 a.m. and 9:00 p.m.

POTENTIAL PITFALLS

Two aspects of the rule may prove difficult to manage in practice. First, the rule limits calls to three types of numbers:

(1) a wireless number provided by the debtor at the time the debt was incurred; (2) a wireless number provided by the debtor after the debt was incurred; and (3) a wireless number the caller obtained from an independent source, "provided that the number actually is the debtor's telephone number." Problematically, the rule does not provide guidance on how a caller can verify that a number belongs to an individual debtor without calling the number and speaking to the person who answers.

Second, calls to reassigned wireless numbers are subject to the one-call rule more fully outlined in the FCC's July 2015 Order. If a call is made to a reassigned number that no longer belongs to a debtor, the caller may only dial the number once without violating the TCPA. Any additional calls are subject to TCPA liability, even if the recipient does not answer the first call or does not tell the caller that the debtor no longer subscribes to the dialed number. Compounding these potential pitfalls is the FCC's continued refusal to put in place "safe harbor" provisions that would exempt from liability callers that make good faith efforts to conform to the FCC's guidance.

RESPONDING TO THE BIPARTISAN BUDGET ACT OF 2015, THE FCC ISSUED A RULE CARVING OUT SPECIAL TREATMENT UNDER THE TCPA FOR CERTAIN DEBT SERVICING AND COLLECTION CALLS MADE BY OR ON BEHALF OF THE FEDERAL GOVERNMENT.

The rule will go into effect after the Office of Management and Budget approves the rule, and it is published in the Federal Register.

Separately, on November 18, 2016, the FCC's Enforcement Bureau issued an Advisory confirming that prohibitions that apply to autodialed calls apply equally to autodialed texts. Specifically, neither autodialed calls nor autodialed texts may be sent without the express written permission of the recipient unless the message is made for an emergency purpose or specific exemptions apply, such as those outlined above. The Advisory was issued for the purpose of "promot[ing] understanding of the clear limits on the use of autodialed text messages, known as 'robotexts.'"

VOICE OVER INTERNET PROTOCOL AND THE TCPA: THE HIDDEN POTHOLE ON THE INFORMATION SUPER HIGHWAY

Since the enactment of the Telephone Consumer Protection Act (TCPA) in 1991, technological advances in the way people communicate have often outpaced the ability of the courts and the Federal Communications Commission (FCC) to reconcile those advances with the TCPA. The proliferation of cell phones and other devices and the omnipresence of the Internet, unimaginable 25 years ago, have resulted in an avalanche of TCPA class actions. One emerging development in this realm is "Voice Over Internet Protocol" (VoIP) technology. Only a few courts have addressed issues relating to VoIP and the TCPA, and so far the FCC has remained silent on the issue.

VoIP is a technology that allows a user to make phone calls over the Internet. One way is by routing calls to a cell phone, either directly through the Internet, or through an adapter connected to a traditional landline. Generally, VoIP technology can be used to route calls to different numbers or to a single cell phone number.

The language of the TCPA does not specifically address VoIP technology because VoIP technology did not exist in 1991 when the TCPA was enacted. What the TCPA does state, however, is that a party may not use an automatic telephone dialing system (ATDS) to call: (1) any cell phone; or (2) any other phone "for which the called party is charged for the call." 47 U.S.C. § 227(b)(1)(A)(iii). The obvious question is: What happens when an ATDS is used to call a VoIP number?

The FCC has not yet addressed the TCPA/VoIP issue, but federal district courts are beginning to weigh in, but with inconsistent results. The District of Maryland was the first to address this issue. In *Lynn v. Monarch Recovery Mgmt.*, 953 F. Supp. 2d 612 (D. Md. 2013), the plaintiff used VoIP technology to connect his residential line to his cell phone and was charged for all calls rerouted through the VoIP. The court did not look at whether the defendant was aware that the plaintiff was charged for the calls, and held that under a plain reading of the "unambiguous ... prohibition of the call charged provision," the defendant was liable under the TCPA.

Two years later, in *Karle v. Southwest Credit Sys.*, 2015 WL 5025449 (D. Mass. June 22, 2015), the plaintiff was not charged for calls made to her VoIP line, for which she paid a flat, monthly fee. The court found that the plaintiff had not submitted evidence showing that the VoIP line transmitted to her cell phone, and the court granted summary judgment to the defendant.

SUTHERLAND OBSERVATION: AS A WAY TO MITIGATE POTENTIAL PITFALLS, COMPANIES SHOULD CONSIDER ASKING CUSTOMERS AND PROSPECTIVE CUSTOMERS IF THEY USE VOIP TECHNOLOGY.

Then, in *Ghawi v. Law Offices of Howard Lee Schiff, P.C.*, 2015 WL 6958010 (D. Conn. Nov. 10, 2015), calls from the defendant to the plaintiff's landline were transmitted to the plaintiff's cell phone through VoIP technology. The court acknowledged the sparse case law on the issue of VoIP and the TCPA, but ultimately held that "there is no apparent conceivable reason" to exempt the defendant caller from TCPA liability "at least where, as here, the caller informs the debt collector that the number connects to a cell phone."

Most recently, the Western District of Pennsylvania briefly addressed the issue in *Klein v. Just Energy Group, Inc.*, 2016 WL 3539137 (June 29, 2016). In this decision, the district court granted summary judgment on other grounds and left open the question of whether the defendants could be liable for calls placed to the plaintiff's VoIP service, which the court noted did not charge the plaintiff on a per-call basis.

SUTHERLAND OBSERVATION: WHILE THERE IS NO PERFECT WAY TO WEED OUT PROSPECTIVE COMPLAINTS INVOLVING VOIP TECHNOLOGY, THERE ARE NUMEROUS FLAWS IN THESE THEORIES, PARTICULARLY IF PLED AS CLASS ACTIONS. SUTHERLAND'S ATTORNEYS WILL CONTINUE TO MONITOR THE LEGAL LANDSCAPE AS IT DEVELOPS.

These cases leave open the question of whether a caller can be held liable under the TCPA for using an ATDS that transmits a call through VoIP to a cell phone, but the receiving party is not charged for the call, and the caller does not know that its call is being routed to a cell phone. This scenario and other issues will likely come to the forefront of TCPA law as VoIP technology becomes increasingly common and traditional landlines are used less and less frequently.

TCPA RIP?

The outcome of the 2016 presidential election has left many prognosticators scrambling to figure out the policy implications of the incoming Republican change in administration. Among countless other things, companies affected by the Telephone Consumer Protection Act (TCPA) should consider whether the upcoming shift in political power signals a possible death knell for the statute, perhaps a body blow, or perhaps neither. Although reading the political tea leaves in 2016 has proven to be a fool's errand, there are two ways in which the TCPA may be impacted in the near future.

SHIFT IN POWER AT THE FEDERAL COMMUNICATIONS COMMISSION

The five-member Federal Communications Commission (FCC) must by statute consist of at least two members of each political party. Currently, there are three Democratic commissioners and two Republican commissioners, each appointed to a five-year term. On April 10, 2017, Democratic Commissioner Jessica Rosenworcel's term will expire, allowing President-elect Donald Trump to select a Republican commissioner, thus changing the FCC's balance of power.

The potential significance of the upcoming shift at the FCC is perhaps most evident in the Republican Commissioners' dissents to the FCC's Omnibus Order of July 2015. In the wide-ranging Order, the FCC made several findings about which Commissioner Michael O'Rielly, in particular, vehemently disagreed. The issues that could be revisited by a Republican-controlled FCC include:

- Whether the TCPA covers text messages, which did not exist when the TCPA was enacted in 1991.
- The current broad definition of auto-dialer, which now includes equipment that merely has the "capacity" to dial from a list of numbers, instead of equipment that was actually used to dial numbers automatically.
- Limiting companies to one call to a reassigned number before allowing the subscriber to that number to file a TCPA complaint. Under the current rule, the subscriber to the number has no obligation to alert the caller that the intended recipient is no longer the subscriber, and callers often have no way to know that the dialed number no longer belongs to the original subscriber they were trying to reach.
- The absence of a safe harbor for companies that have attempted in good faith to validate that they are calling the correct numbers.
- The FCC's current refusal to define the "called party" as the "intended recipient."

Many of these points were raised in a consolidated appeal of the July 2015 Order filed by several companies and the U.S. Chamber of Commerce to the U.S. Court of Appeals for the D.C. Circuit. Oral argument in *ACA International v. FCC* was heard on October 19, 2016. The D.C. Circuit could vacate much of the July 2015 Order and/or remand to the FCC for revisions. If the FCC were to reverse course on only a few of the key holdings in the July 2015 Order, the change in the law and its impact would be dramatic.

Given the April 2017 expiration of Commissioner Rosenworcel's term, the best hope for companies seeking changes to the TCPA lies with the FCC, but Congressional amendments to the TCPA are also within the realm of possibility.

CONGRESSIONAL AMENDMENTS TO THE TCPA

The TCPA is generally considered a popular, pro-consumer statute, and even its critics agree that it deters and prevents unwanted calls, texts and faxes. It is, therefore, unlikely that the TCPA, which was enacted 25 years ago, will be entirely overturned by Congress. That being said, calls to amend the TCPA to reflect changing technology and increasingly enormous class action settlements have been growing.

On September 22, 2016, the House Energy and Commerce Committee's Subcommittee on Communications and Technology held a hearing titled "Modernizing the Telephone Consumer Protection Act." The hearing was applauded by the Democratic Ranking Member of the Subcommittee, indicating bipartisan support for amending the TCPA on some level. As Subcommittee Chairman Rep. Greg Walden (R-OR) noted: "We all share the goal of preventing harmful phone calls, but it is increasingly clear that the law is outdated and in many cases, counterproductive. The attempts to strengthen the TCPA rules have actually resulted in a decline in legitimate, informational calls that consumers want and need."

THERE IS MUCH UNCERTAINTY ABOUT WHAT WILL HAPPEN TO THE TCPA UNDER THE NEW ADMINISTRATION. WHILE THE INTERPRETATION OF THE STATUTE WILL LIKELY BECOME MORE BUSINESS FRIENDLY, IT IS UNLIKELY THAT IT WILL BE COMPLETELY OVERTURNED.

Although the September 22 hearing has not yet resulted in any concrete next steps for amending the TCPA, the possible ways in which a Republican Congress could amend the law include a limit on statutory damages similar to the Truth in Lending Act's statutory cap of $500,000, or an updated version of the law to reflect the seismic changes in technology since 1991.

Whether the FCC or Congress (or both) takes action, it is increasingly likely that the TCPA will undergo some type of transformation in the upcoming presidential term. The scope and nature of that change, like so much else relating to the new administration, remains to be seen.

SUTHERLAND ATTORNEYS SPEAKING ON TCPA

September 16 *Law360* – Three Factors to Weight in Deciding to Fight or Settle TCPA Suits

In discussing the impact of the United States Supreme Court's May 2016 *Spokeo* decision, Sutherland partner Lewis Wiener commented, *"We're seeing more courts dismissing these actions and really holding plaintiffs and their counsel's feet to the fire to show that there is any evidence of actual harm, which is a question that wasn't being asked six to 12 months ago."*

July 29 *Law360* – FCC Seeks Industry Help Over Enforcement to Limit Robocalls

Sutherland attorney Wilson Barmeyer was quoted on the topic of private sector help by stating, *"Another benefit from the emerging public-private partnership is that it might help companies that are concerned about their litigation risk and exposure under TCPA. For them it's 'not unwelcome' if it limits the litigation pursued by consumers legitimately trying to escape calls."*

May 4 *Law360* – 8th Circuit Boosts TCPA Class Action Certifications

Sutherland partner Lewis Wiener commented on class action certification following the 8th circuit's May ruling by saying, *"The market for TCPA actions is already saturated, and the plaintiffs' bar is already seeking class certification in a large number of cases. This ruling gives plaintiffs more ammunition to be able to go to the court and say, 'This court has ruled in favor of class ascertainability and has articulated a standard that should be applied across the board.'"*

Jan 31 *Business Insurance* – Ruling Maps Out Class Action Defense Plan

In discussing the United States Supreme Court's *Campbell-Ewald v. Gomez* decision, Sutherland partner Lewis Wiener commented, *"If actual payment makes a difference, that could significantly impact plaintiffs' counsel because they're going to have to worry, 'Who's my second, third, fourth plaintiff,' and how it will proceed. It's going to shift the balance between the defense and the plaintiffs, and require the plaintiffs' counsel to do more work upfront."*

Jan 28 *Modern Healthcare* – Hospital Company Sued After FCC Tightens Medical Debt Collection Rules

While discussing the challenges posed by an FCC interpretive ruling, Sutherland partner Lewis Wiener stated, *"The problem is (the FCC) left no room for the situation—and this is increasingly common—where the person doesn't answer the phone. You've put them in an impossible situation."* With as many as 100,000 cellphone numbers reassigned every day, *"it's impossible for companies to keep up with that level of risk factor. There's really no way to confirm whether the person you're calling is the right number. It's a gotcha."*

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ABOUT SUTHERLAND

Sutherland is an international legal service provider helping the world's largest companies, industry leaders, sector innovators and business entrepreneurs solve their biggest challenges and reach their business goals. More than 400 lawyers across seven major practice areas—corporate, energy and environmental, financial services, intellectual property, litigation, real estate and tax—provide the framework for an extensive range of focus areas. Sutherland is composed of associated legal practices that are separate entities, doing business in the United States as Sutherland Asbill & Brennan LLP, and as Sutherland (Europe) LLP in London and Geneva.

For more information about Sutherland's TCPA experience, please visit **www.sutherland.com/tcpa.**