KEY TCPA REGULATIONS (47 CFR 64.1200)

- (c) No person or entity **shall initiate any telephone solicitation** to:
  (1) Any residential telephone subscriber **before the hour of 8 a.m. or after 9 p.m.** (local time at the called party's location), or
  (2) A **residential** telephone subscriber **who has registered his or her telephone number on the national do-not-call registry**... [BUT] **[[a]ny person or entity** making telephone solicitations (or on whose behalf telephone solicitations are made) **will not be liable for violating this requirement if**:
    (ii) It has obtained the **subscriber's prior express invitation or permission**. **Such permission must be evidenced by _a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller_** and includes the telephone number to which the calls may be placed...

  (15) The **term telephone solicitation** means the initiation of a telephone call or **message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services**, which is transmitted to any person, but such term does not include a call or message:
    (i) To any person with that **person's prior express invitation or permission;**
    (ii) To any person with whom the **caller has an established business relationship**; or
    (iii) By or on behalf of a tax-exempt nonprofit organization.

  (10) The **term seller means the person or entity on whose behalf** a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

LOPER BRIGHT VS. HOBBS ACT

U.S. Supreme Court set aside *Chevron* deference finding that the Administrative Procedure Act (APA) requires Courts to decide matters of law—including the definition of statutes—when rulings are challenged. This means courts no longer have to defer to agency interpretations regarding the meaning of statutes.

But FCC rules are subject to different protections– the Hobbs Act (Administrative Orders Review Act).

Hobbs Act states:

28 U.S. Code § 2342 - Jurisdiction of court of appeals.

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) **has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of**—

(1)all final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47
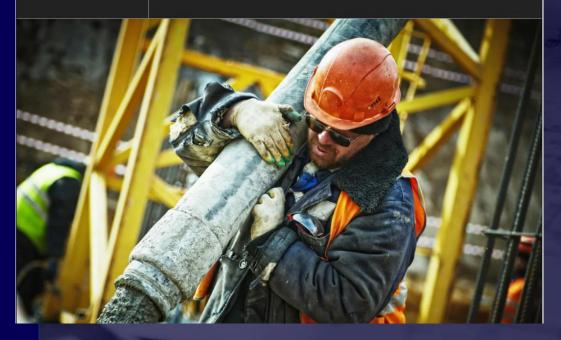
FUN FACT: TCPA CASE FIRST OF LOPER ERA

GRINDING: Court Rejects "Sweeping Practical Consequences" to Follow FCC Lead After Chevron Deference Struck Down— But EVERYBODY Has A Lot More Work to Do Now

5 JUL 2024

2 COMMENTS

First case in the nation declining to follow an agency definitional ruling post *Loper Bright* was a TCPA decision!

In *Cacho v. McCarthy & Kelly* 2024 WL 3293628 (S.D.N.Y. July 3, 2024) the court considered whether cellular phones are "residential" lines for purposes of DNC rules. Rejected FCC's interpretation and applied its own analysis and came to the same conclusion.

Parties did not address the Hobbs Act! But since court agreed with the FCC it decided it did not need to address Hobbs Act

PDR NETWORK, LLC AND THE HOBBS ACT

U.S. Supreme Court case of *PDR Network v. Carlton & Harris,* 139 S. Crt. 2051 (2019) was *almost* the case that destroyed *Chevron* deference.

Court held whether FCC order binds court turns on whether:
1. Is the ruling a "legislative rule" issued by an agency "pursuant to statutory authority" that has the "force and effect of law?" (Or merely an "interpretive rule" that advises the public of the agency's construction of the statute?)
2. Did the party impacted by the ruling have a "prior" and "adequate" opportunity to seek judicial review.

On remand Fourth Circuit Court of Appeals references need to follow "formal notice and comment procedures to issue legislative rules." Seems to imply only formal rules will receive Hobbs Act deference.

There are generally three types of FCC rulings: 1) Report and Orders that the Commission issues without notice; 2) Declaratory Rulings that it issues following a Notice and Comment period, but without an NPRM; and 3) formal agency "Rules" that follow an NPRM and result (usually) in a change to the CFR.

It seems like 1) is NOT entitled to deference; 3) likely IS entitled to deference; and 2) may or may not be.

This is CRITICAL because many FCC rulings—like the Omnibus—did NOT have a proposed rule. It is a type "2" ruling– and its lasting impact is unclear.

KEY TCPA SUBSTANTIVE ISSUES

- **For 227(b) Claims:**
  - **What is regulated technology?**
  - **Whose consent is needed?**
  - **What level of consent is needed?**
  - **What is express written consent and how can it be captured properly?**
  - **How can consent be revoked and how must revocation be honored?**
- **For 227 (c) Claims:**
  - **Is the call a telephone solicitation?**
  - **Is the phone being called residential?**
  - **What is prior express invitation or permission?**
  - **What is an Established Business Relationship?**
  - **How can consent be revoked and how must revocation be honored?**

What is REGULATED TECHNOLOGY?

Good question!

- AUTOMATIC TELEPHONE DIALING SYSTEMS (ATDS); or

- ARTIFICAL OR PRERECORDED VOICE CALLS

- Could write a book on ATDS law. Maybe I will.
  - Statute specifically defines what an ATDS is. But as we're about to see, it's not so simple– even with the Supreme Court's help
  - Calls include TEXT MESSAGES (let's just get that out of the way)

- Prerecorded/artificial voice calls include: i) **AI VOICE!!!!;** ii) IVR; iii) Ringless Voicemail; iv) Voicemail; v) Soundboard/Avatar; vi) Wait queue messages; vii) Abandoned message recordings... more

FIRST COMMANDMENT (CONT.):
What TCPA ATDS Definition Says

What the TCPA Actually Says

(1) The term "automatic telephone dialing system" means 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.

ATDS SUPREME COURT VIEW

Facebook **TCPA ATDS Interpretation**

(1) The term "automatic telephone dialing system" means equipment which has the capacity—

(A) to store telephone numbers using a random or sequential number generator; or

(B) to produce telephone numbers to be called, using a random or sequential number generator; and

(C) to dial such numbers.

FACEBOOK FOOTNOTE 7

Facebook DOES NOT limit TCPA to random-fire calls!

"For instance an autodialer might use a random number generator to **determine the order** in which to pick phone numbers from a preproduced list."

RUN!!!–FOOTNOTE 7 LIVES!: Colorado District Court Holds Directly That Using an ROSNG To Determine Calling Order Triggers TCPA!

24 JUL 2023

ADD A COMMENT

Scherrer v. FPT, 2023 WL 4660089 (D. Colo. July 20, 2023)(Footnote 7 means a system that uses an ROSNG to determine sequence in which numbers are dialed is an ATDS).

NINTH AND SECON CIRCUIT'S TAKE

Borden Approach

(1) The term "automatic telephone dialing system" means equipment which has the capacity—

(A) to store or produce telephone numbers to be called, using a random or sequential telephone number generator; and
(B) to dial such numbers.

Facebook Approach

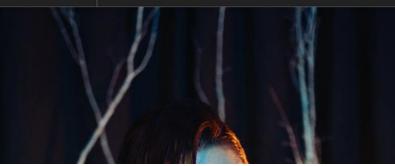(1) The term "automatic telephone dialing system" means equipment which has the capacity—

(A) to store telephone numbers using a random or sequential number generator;
(B) or produce telephone numbers to be called, using a random or sequential number generator; and
(C) to dial such numbers.

18 NOV 2022 **TCPAWORLD AFTER DARK: Why the Ninth Circuit's Borden Ruling Might be the BIGGEST TCPA TRAP Of All Time**

1 COMMENT

19 JUN 2023 **"OVERSTATEMENT": Court Throws Shade on Ninth Circuit's Big ATDS Ruling—But Follows It Anyway in Massive TCPA Case Against Porch**

ADD A COMMENT

And You Now Must
Know Thy Source Code!


```
730      if (!this.recordList.isEmpty()) {
731          this.recordNumber++;
732          final String comment = sb == null ? null : sb.toString();
733                          result   =   new   CSVRecord(this,
this.recordList.toArray(Constants.EMPTY_STRING_ARRAY),
comment,
734              this.recordNumber, startCharPosition);
735      }
736      return result;
737    }
```

PRECORDED CALLS
ALWAYS TRIGGER THE
STATUTE

Remember under either enactment prerecorded calls AUTOMATICALLY trigger the need for express written consent

FCC has held that **AI voice** is prerecorded call

Voicemails are prerecorded calls

Ringless voicemail are prerecorded calls

Wait queue messages are prerecorded calls

BEWARE ABANDONED CALLS!

KEY TCPA SUBSTANTIVE ISSUES

- For 227(b) Claims:
  - What is regulated technology?
  - Whose consent is needed?
  - What level of consent is needed?
  - What is express written consent and how can it be captured properly?
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- For 227 (c) Claims:
  - Is the call a telephone solicitation?
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  - How can consent be revoked and how must revocation be honored?