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## Waiting Game: Taking Stock of the TCPA One-Year Removed from ACA Int'l

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I find myself at a hotel in Georgetown reflecting on the last time I stayed at this particular establishment- October, 2016 to attend the oral argument in [ACA International v. FCC, 885 F.3d 687 \(D.C. Cir. 2018\)](#).

At the time of oral argument here in D.C. there was a sense of momentousness to the occasion. A sense of finality. A sense that a Circuit Court of Appeal would finally be empowered to take a hard look at all the little tricky components of the TCPA and help make sense of it. Surely, the FCC's disastrous TCPA Omnibus Ruling from 2015 would be set aside in certain respects- that seemed a foregone conclusion even before Chief Judge Edwards began reigning thunder on the FCC's counsel at the hearing- but more importantly, the D.C. Circuit Court of Appeal would give TCPAworld much needed clarity on the parameters of the TCPA's ATDS definition, the meaning of the phrase "called party" and the contours of reasonable revocation.

Following oral argument TCPAworld waited. And waited. And waited. For what seemed like an eternity. And then, the promised occasion arrived. On March 16, 2019- just over a year ago now- the D.C. Circuit COA handed down its ruling, predictably striking down the FCC's TCPA Omnibus ruling in certain respects but replacing it with... nothing. No meaningful guidance at all on any of the key TCPA subjects that the FCC had addressed in the Omnibus. We were back to square one.

What a wretched square.

Before ACA Int'l the courts could at least agree that the FCC's various TCPA rulings were binding, even if their proper application remained elusive. But since ACA Int'l courts cannot seem to agree on anything TCPA related. Not whether the TCPA requires random or sequential number generation. Not whether the FCC's previous orders remain binding. Not on whether the statute applies to any dialer that calls automatically. Not on whether contractual consent is revocable. Not on how consent can be revoked. Not on whether calls to collect on government-backed debt are exempt from statutory coverage. [Not even on whether cases should be stayed pending the FCC's pending answers to these questions.](#)

Indeed, a year after ACA Int'l TCPAworld does not have clarity on... anything. Even when the FCC eventually rules on its TCPA Public Notice proceeding-more on that below- it is far from certain that the ruling will have binding effect across the country. This is particularly true in the Ninth Circuit-where courts will have to struggle with whether to follow *Marks* or the FCC's new ruling- but is likewise true elsewhere given the Supreme Court's momentous struggle with agency deference playing itself out in PDR Resources with TCPA serving as its chief pawn. (BTW- oral argument was held in that case today. We'll report shortly).

For its part, the FCC seemed to be moving quickly on TCPA reform following ACA Int'l. On May 14, 2018 the FCC issued its Public Notice [seeking comment on the scope and architecture of the TCPA](#). Notably that was just [6 days after the ACA Int'l opinion became final by way of the issuance of a mandate in that suit.](#)

Given how well-thought out the Public Notice was and how swiftly it followed on the heels of the mandate, there was little doubt that newly-installed Chairman Pai was eager to make his mark on the TCPA. And with a full mandate from the D.C. Circuit Court of Appeal empowering him to do so-and with the certainty of the Hobbs Act

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behind him- it, once again, seemed a virtual certainty that clarity would be restored to the TCPA in short order. Moreover, given Chairman Pai's on-the-record statements to the effect that the TCPA's ATDS definition was intended by Congress to be a statutory "rifle shot" it seemed very realistic that the FCC would act swiftly to end the scourge of TCPA litigation forever with a quick return to the statutory requirements of random or sequential number generation.

But the weeks turned to months and the best anyone could do is speculate as to what the FCC might be doing and when. And while the district courts tied themselves up in knots addressing the TCPA's ATDS formulation things really became murky when the Ninth Circuit Court of Appeal elected to re-write the statute entirely in its *Marks* opinion. Again the FCC responded, relatively quickly-re-opening the Public Notice proceeding in October, 2018 and requesting supplemental comments on the ATDS definition in light of *Marks*. The comment period closed anew later that month and since then... silence from the Commission.

Well, not complete silence.

In December, 2018 the FCC did enact a Reassigned Number Database-which was really just a Permanent Disconnect Database-designed to cut down on wrong number phone calls. But that database will not go into effect until the end of 2019, at the earliest, and its creation only seemed emphasize the need for a comprehensive recycled number safeharbor in the meantime. But no such safeharbor exists, and only a handful of courts seem to recognize ACA Int'l's edict that callers can rely on a former subscriber's consent for a reasonable timeframe until one is enacted.

Adding to the chaos, Congressional developments kicked into high gear in January, 2019 as a new class of legislators swept into Congress and began kicking up TCPA dust. [We've seen a dizzying array of legislative "robocall" proposals](#) over the last few weeks-with [TRACED remaining the best supported](#), most likely to pass and-in my opinion- the [most dangerous of the bunch](#).

And so that's where we stand today. The waiting game continues as the TCPA is not on the agenda for the FCC's April meeting-suggesting that we will not see a TCPA Public Notice ruling from the Commission until May at the earliest. But we will not know the effect of that ruling anyway until the Supreme Court issues its ruling in PDR Resources, likely sometime before summer recess. In the meantime, district courts are applying 5 different ATDS formulations. Congress is considering 5 different "robocall" enactments including 4 that will amend the TCPA. And to the extent any narrowing of the TCPA's scope has been effectuated, the expansion of the persons subject to the act continues with platform providers and [corporate officers](#) now facing direct liability for TCPA violations. Plus, the Ninth Circuit just held on Friday that a ratification theory in TCPA cases does not require a formal agency relationship after all.

What a time to be alive.

Without question the D.C. Circuit Court of Appeal could have helped prevent all of this chaos had it waded just a couple of inches deeper into the fray. But we are where we are. Unfortunately, though, it must be said that the legacy of the *ACA Int'l* ruling at this point-just over a year after it was handed down- is one of incompleteness and confusion.

I can't help but wonder what might have been.

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