

*Litigation*

**Companies Await D.C. Circuit's  
Robocall Autodialer Definition**

**M**any companies facing litigation for alleged robocall violations are strategically asking courts to halt the cases pending the resolution of a federal appeals court case that could clarify the definition of an autodialer, attorneys told Bloomberg BNA.

As the resolution of *ACA International v. FCC* approaches, courts are also more inclined to stay cases until the U.S. Court of Appeals for the District of Columbia Circuit renders a decision, they said.

Petrina Hall McDaniel, privacy and data security partner at Dentons in Atlanta, told Bloomberg BNA that waiting for the resolution in *ACA International* is a "strategy that makes sense for defendants" in cases that involve the interpretation of a 2015 Federal Communications Commission ruling that defined automatic telephone dialing systems (ATDS) as equipment that "generally has the capacity to store or produce, and dial random or sequential numbers," even if it isn't used for that purpose.

Many companies facing TCPA robocall lawsuits, including Time Warner Cable Inc., Geico Corp. and Navient Solutions Inc., have convinced courts to stay proceedings until the resolution of *ACA International*. However, other companies, such as Hyundai Capital America and Performant Financial Corp., have seen their stay requests denied.

**End in Sight.** The FCC's 2015 ruling, in addition to defining ATDS, addressed many issues that are critically important for maintaining lawsuits under the Telephone Consumer Protection Act (TCPA), including

specifying the identity of a called party from whom consent must be obtained and the method of revocation of consent, McDaniel said. If a lawsuit involves any of those issues, it may be a good idea to get a stay until *ACA International* is resolved, she told Bloomberg BNA.

Mark S. Eisen, privacy and data security associate at Sheppard, Mullin, Richter & Hampton LLP in Chicago, said that there is a lot of uncertainty as to the definition of an ATDS. Eisen told Bloomberg BNA that courts are now generally more receptive to a *ACA International*-related argument for a stay, compared to six or 12 months ago. "There is an end in sight" in the case, he told Bloomberg BNA.

In the case pending in the D.C. Circuit, debt collection trade group ACA International Inc. and others sued the FCC, alleging that the agency's interpretations and rules are overly restrictive. Oral argument in the case was held Oct. 19, 2016.

A worst case scenario for many companies would be the D.C. Circuit fully adopting the FCC's interpretations, McDaniel said. However, to do so, the court must find that the FCC's interpretations are reasonable, she said.

In any case, Eisen said, the D.C. Circuit's opinion "will be a lot to chew on."

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*The ACA International v. FCC docket is available at [http://www.bloomberglaw.com/public/document/ACA\\_International\\_v\\_FCC\\_et\\_al\\_Docket\\_No\\_1501211\\_DC\\_Cir\\_Jul](http://www.bloomberglaw.com/public/document/ACA_International_v_FCC_et_al_Docket_No_1501211_DC_Cir_Jul)*