

Rite Aid Files Opening Brief in Consolidated Appeal of FCC's TCPA Order

Article By:

John S. Yi

Michael P. Daly

On November 25th, petitioner ***Rite Aid Hdqtrs. Corp.*** (“Rite Aid”) filed its [opening brief](#) in the consolidated appeal of the **FCC**’s July 10, 2015 Declaratory Ruling and Order (the “Order”) in the United States Court of Appeals for the District of Columbia Circuit. See ***ACA Int’l, et al. v. FCC***, No. 15-1211 (D.C. Cir.). Although Rite Aid supports the opening brief filed by the joint petitioners on the same day, it obtained permission to file a short separate brief focusing on the healthcare-related portions of the Order. (Whereas the joint petitioners’ opening brief was limited to 12,5000 words, Rite Aid’s opening brief was limited to 2,500 words.)

Rite Aid explained that it “cares for millions of patients through approximately 4,600 stores in over 30 States,” that it “communicates with its patients via phone and text concerning, among other things, prescription refills and immunizations,” and that “all communications regarding protected health information” are regulated under HIPAA, which “specifically exempts these communications from its definition of marketing.” Brief at 1, 3. Because these communications have nevertheless been the target of TCPA litigation, Rite Aid asked the FCC to clarify that “its communications do not trigger TCPA liability – as seemed clear from existing regulations.” *Id.* at 2. Rite Aid contends that, instead of providing clarity, “the Commission adopted a patchwork of standards for healthcare communications that will sow confusion, fuel more litigation against providers, and chill communications uniformly recognized to improve clinical outcomes and public health.” *Id.*

Rite Aid notes that Congress excluded from the statute “a ‘broad’ category of calls ‘made for emergency purposes’ ... [which] encompasses any calls ‘affecting the health and safety of consumers.’” *Id.* at 4. Acting under Congressional authorization, the FCC previously “exempted from TCPA consent requirements [residential and wireless] calls that ‘deliver[] a ‘health care’ message made by, or on behalf of, a ‘covered entity’ or its ‘business associate,’ as those terms are defined in the HIPAA Privacy Rule.”” *Id.* at 4-5. Rite Aid notes that the FCC justified exempting such calls because: (1) “HIPAA-protected calls are ‘regulated extensively’ and HIPAA ‘safeguard[s] consumer privacy’ through its own enforcement mechanism,” (2) “[a]dditional regulation ‘could frustrate’ HIPAA and ‘other federal statutes governing’ healthcare programs,” (3) “[e]xemption ‘ensure[s] continued consumer access to’ healthcare information,” and (4) [t]here is little incentive for ‘abusive’ provider calls.” *Id.* at 5.

Rite Aid's chief argument is the fact that the FCC adopted "different rules applicable to different kinds of healthcare communications, depending on their form and content." *Id.* at 6. It argues that the TCPA was "intended to restrict certain calling practices, not further regulate HIPAA-protected communications." *Id.* at 3. "[Therefore], while the TCPA prohibits automated calls to residential and wireless numbers without the called party's consent, the statute does not erect a 'barrier' to – let alone *punish* – 'normal, expected or desired communications.'" *Id.* at 3-4 (emphasis in original).

Rite Aid states that the Order offered no reason or record in support of its decision to "adopt different rules applicable to different kinds of healthcare communications, depending on their form and content," i.e., HIPAA-protected residential calls and wireless calls that have an exigent healthcare treatment purpose and are not charged to the called party do not require consent, but HIPAA-protected wireless calls require prior express consent. *Id.* at 6. Rite Aid contends that doing so "exceeded [the FCC's] jurisdiction in restricting HIPAA-protected communications to wireless devices," will "fuel more abusive litigation against providers," and will "chill beneficial patient communications." *Id.* at 7-8. Rite Aid further argues that the "TCPA does not empower the Commission to restrict HIPAA calls and it cannot interpret the TCPA in conflict with HIPAA," which is precisely what the FCC did since "HIPAA does not restrict calls based on the type of number dialed and does not limit calls to those that are 'exigent' or for 'treatment purpose[s]'" *Id.* at 11, 12.

Rite Aid also highlights the FCC's failure to consider the threshold question of whether HIPAA-protected communications are subject to or exempted from the TCPA. *Id.* at 10 ("The Commission's refusal to even consider this issue is particularly glaring given its obligations to 'maximize consistency' with the FTC's exemption of all healthcare calls."). It contends that such communications qualify as "emergency purpose" calls that are exempt from the statute, and that the Order's failure to even consider this issue renders it "irrational, unsupported, and unlawful." *Id.* It refers in particular to the Order's exigent healthcare treatment purpose exemption for wireless calls. *Id.* ("Nowhere is the irrationality of the Commission's new regime for healthcare communications on greater display than with its newly-minted but ill-defined exigent healthcare treatment purpose exemption."). Rite Aid notes that the Order fails to define any of the critical terms from the exemption, fails to specify the scope of the exemption aside from a partial list of calls that may fit the exemption, conflicts with HIPAA's definition of health care, and fails to explain where the new "exigency" requirement came from. *Id.* at 10-11.

Next Steps in the Consolidated Appeal

The FCC's brief is due on or before January 15, 2016, the Petitioner's reply brief is due on or before February 16, 2016, and final briefs are due on or before February 24, 2016. The court has yet to set a date for oral argument.

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National Law Review, Volume V, Number 337

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