

Pai in the Sky: Commissioner Pai Ascends to Chairman of the FCC

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As expected, President Trump has tapped Commissioner Ajit Pai to Chair the new-look FCC. This is great news for proponents of TCPA reform but, as with all things Commission related, we may not see any tangible results from his ascension for some time.

For the uninitiated, the Telephone Consumer Protection Act (“TCPA”) requires “express consent” to call cell phones using automated dialing technology. Originally the statute only governed calls made using random or sequential number

generators. Beginning in 2003, however, the FCC expanded the reach of the statute—first to include predictive dialers, then dialers that call from a list of numbers, and now to any dialing device that is software enabled (read: *all modern phones*.) Currently, there is no escape from the TCPA—any customer outreach program is likely to raise TCPA concerns—and the statutory damages are astronomical: \$500.00-\$1,500.00 *per call*. As the FCC continues to issue “clarifying” orders that have the force of law and can further expand (or perhaps restrict) the reach of the statute, the composition of the Commission is a closely-watched topic for TCPA practitioners and industry participants.

But enough on the TCPA, and back to Pai. Judging from Pai’s past work on the Commission, he takes the task of faithfully interpreting Congressional enactments seriously, is a procedural stalwart, and is a masterful writer. His dissents—and he was forced to pen several of those in the shadow of Chairman Wheeler’s overreaching regime—were always well-reasoned and compelling. Colorful blooms of insight forcing

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their way through the cracked pavement, hinting at the promise the Commission might one day have if it were only in the right hands.

Now it is.

Under Chairman Pai the Commission will get faster and more nimble. From his first testimony before Congress in 2012 Commissioner Pai has focused on speed and efficiency. “Nimbleness” as he’s described it. He’s a proponent of Commission “shot clocks”—deadlines for the FCC to rule on petitions. (Remember that huge backlog of petitions that grew up for years before the Omnibus?) And he’s not afraid to hit substance with a bullet: “Speed is important for the small things, and especially so for the big ones,” he has quipped.

With Pai as Chairman the FCC also gets smarter and less activist. That is not to say Chairman Wheeler was a dummy, but as anyone will tell you the Commission’s recent TCPA rulings have been, at best, inconsistent, and at worst, indecipherable. This is because the Commission was always trying to *accomplish* something with the TCPA, and something it really should not have been after: namely, expanding the statute beyond its roots to permit the FCC more power—the ability to regulate calls to cell phones in a manner that Congress never bestowed. But as then-Commissioner Pai always recognized, that is not the FCC’s proper function, and the TCPA is not the proper tool to enable it anyway. As he wrote in dissent to the Omnibus: “[I]f the FCC wishes to take action against newer technologies beyond the TCPA’s bailiwick, it must get express authorization from Congress—not make up the law as it goes along.”

But under Chairman Wheeler the Commission never seemed to appreciate that it was making up the law as it went along and the results were dire. With every flick of the Commission’s pen that expanded the scope of the TCPA, hundreds or thousands of new lawsuits followed. Five-thousand federal TCPA suits were filed last year. *Five-thousand*. Consider that the statute resulted in *zero* lawsuits for about the first 15 years of its existence. As late as 2010 there were only 354 lawsuits filed. Heck, we just cracked a thousand lawsuits in 2012 and now—four years later—we have 5,000. And so the TCPA has earned its title as the “poster child for lawsuit abuse”; words that then-Commissioner Pai first penned in opposing the FCC’s disastrous 2015 Omnibus ruling.

And the Omnibus *was* a disaster. Since the Omnibus, TCPA class action filings have tripled on a monthly basis. The freight train rolls along with no end in sight. *Spokeo* barely slowed it down. *Campbell-Ewald* was a speed bump. We won a big one in *Stoops*, but even there the Court failed to adopt a bad faith TCPA defense—citing the Omnibus.

And no, it’s not all Chairman Wheeler’s fault. It cannot be forgotten that the TCPA was first expanded to include predictive dialers in 2003 under the watchful eye of *Republican* Chairman Michael Powell. At the time there was hardly a murmur from industry. Of the four Commission statements filed in support of the 2003 Order only one *even mentions* the predictive dialer component. No one seemed to realize that a monster was born that day.

So will Pai now act to slay the mighty TCPA dragon? Is he industry's St. George?

Maybe. As I wrote to a friend the day the Omnibus was decided—and yes my friends and I discuss the TCPA—“at least this Pai guy seems to get it.” I still believe he gets it. He seems to understand the damage that the statute—and the abusive lawsuits it has spawned—have done to industry and consumers (and the courts) alike. But more than this, he “gets” that the FCC’s job is to take a back seat to Congress, regulate with clarity, and never make the law up as it goes along. That’s important stuff, especially with \$1,500.00 per call on the line.

But will he get the chance to really (un)do any damage? That’s the big question. Unfortunately, Pai comes to us in a post-apocalyptic wasteland. While Pai now holds the nuclear codes, the silos have all long-since been emptied. Obviously TCPA reform cannot occur without a proper vehicle. The D.C. Circuit Court of Appeals can certainly provide such a vehicle with a remand of the Omnibus ruling back to Pai’s Commission. But what if—horror of horrors—the D.C. Circuit Court of Appeal *blesses* the Omnibus as appropriately decided? Surely industry will pursue their petitions to the Supremes, but in the meantime we may be stuck for additional years with terrible law decided by a prior Commission with a new FCC Chairman held hostage by earlier rulings.

In that instance it will be necessary for industry to “nibble around the edges” with smart and pointed petitions to the Commission on *specific* issues impacting the TCPA. It will need to trust the FCC’s new “shot clock” mentality will assure swift rulings. And trust, above all, that Chairman Pai lives up to his promise as a smart and capable pragmatist, if not a savior.