

“Dialing It Back?” Federal Courts Weigh in on “Autodialers” After Appeals Court Strikes Down FCC Interpretation of TCPA

The Bottom Line

- *In the aftermath of the DC Circuit’s ruling striking down the FCC’s interpretations of what constitutes an ATDS under the TCPA, ambiguity abounds.*
- *While the Herrick ruling represents a very positive development for marketers and their agencies, the Reyes ruling demonstrates that those companies still need to exercise caution in complying with the TCPA.*
- *Until the FCC issues further guidance — and likely even after it does so — marketers and agencies must continue to consult counsel to ensure any telemarketing or texting campaigns comply with the TCPA’s requirements.*

Following a March 2018 by the United States Court of Appeals for the D.C. Circuit that rejected certain Federal Communications Commission (FCC) interpretations of the Telephone Consumer Protection Act (TCPA), a federal district court has ruled that prior FCC rulings on elements of the TCPA — and even previous district court opinions adopting those rulings — are no longer due any deference on those elements.

Then, applying its own analysis of the TCPA’s provisions, the court found that a defendant’s computerized dialing platform was not an “Automated Telephone Dialing System” (ATDS) under the TCPA, and granted summary judgment dismissing a putative class action claim against that defendant.

Background

As explained in our previous [alerts](#), the TCPA generally prohibits the use of an ATDS to call or text wireless phone numbers without advance express consent. The TCPA defines an ATDS as equipment that “has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers.” A 2015 FCC order broadly defined this “capacity” to encompass even “potential functionalities” achievable with modifications, such as software changes. The 2015 FCC order also reaffirmed prior rulings that a “predictive dialer” qualifies as an ATDS, and declined to rule that a dialer is not an ATDS unless it has the capacity to dial without human intervention.

In March 2018, however, the DC Circuit ruled on several consolidated appeals from TCPA litigation throughout the country, and determined that the 2015 FCC Order’s interpretation of “capacity” was unreasonably over-expansive in light of the intent behind that statute itself. In that case, *ACA International v. FCC*, the court set aside the FCC’s effort to clarify the types of equipment that qualify as an ATDS, although the court left it to the FCC to further rule as to what qualifies as an ATDS going forward.

Autodialers: A Whole New Ballgame?

In *Herrick v. GoDaddy.com LLC*, the U.S. District Court for the District of Arizona held that a certain text messaging system used by GoDaddy's vendor to send a one-text marketing campaign to approximately 100,000 customers of the popular domain name registration service was not an ATDS. In light of the DC Circuit's ruling in *ACA International*, the district court declined to follow previous FCC opinions and court decisions holding that devices such as predictive dialers, which automatically dial from a list of preprogrammed numbers, are *de facto* ATDSs. Instead, the court found that this system was not an ATDS because it messaged a preprogrammed list of numbers but could not dial "using a random or sequential number generator." Further, even if the system in *Herrick* could have done so, the court found that it was still not an ATDS because it lacked the ability to dial without human intervention: a GoDaddy employee had to provide a list of phone numbers to receive the message; the vendor had to upload that list; an employee had to draft the message to be sent and select the date and time for transmission; and an employee had to enter a "Captcha" code, designed to ensure that a human, not a machine, was authorizing the message. While the FCC had previously rejected the "human intervention test," the court reasoned that this rejection was no longer relevant in light of the *ACA International* decision, which found the rejection inconsistent with the FCC's simultaneous interpretation of an ATDS as a system whose "basic function... is to dial numbers without human intervention." Based on these findings, the court granted summary judgment in GoDaddy's favor. The plaintiffs have appealed that decision.

Notably, while the *Herrick* decision bodes well for marketers, it may not represent a uniform approach by all courts going forward. The same day as the *Herrick* decision, another federal court held that a predictive dialer used by a collection agency was an ATDS. In *Reyes v. BCA Financial Services*, the US District Court of the Southern District of Florida found itself to be bound by the FCC's interpretations of an "ATDS" under the TCPA despite *ACA International*. Under those interpretations, the court found BCA's predictive dialer, as it was then configured and used – to automatically dial a list of phone numbers – to be an ATDS, despite its inability to dial random or sequential numbers. Although the court did distinguish systems that included "point-and-click" dialing systems that required human intervention, the court found that BCA Financial's system did not involve any human intervention.

Conclusion

The Arizona federal court's decision in *Herrick* seems to be a sounder approach to determining what constitutes an ATDS after *ACA International*. Still, as the *Reyes* case demonstrates, the *Herrick* approach is not the only one, and even that approach will now be tested on appeal. The FCC requested comments from the public on what constitutes an ATDS after *ACA International*; which were due no later than June 13, 2018, so it will likely be many months before the FCC issues a new interpretation of ATDS. Meanwhile, marketers and agencies must remain careful to comply with the TCPA's restrictions on automated dialing, knowing that the FCC's previous interpretations may still be applied in the interim.

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