

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

RE: CONSUMER AND GOVERNMENTAL AFFAIRS BUREAU SEEKS COMMENT ON
INTERPRETATION OF THE TELEPHONE CONSUMER PROTECTION ACT IN LIGHT OF
THE D.C. CIRCUIT’S ACA INTERNATIONAL DECISION

CG Docket No. 18-152
CG Docket No. 02-278

Filed by: Greenwald Davidson Radbil PLLC

Request for comment: “And so, like the court, we seek comment on ‘which is it?’ If equipment cannot itself dial random or sequential numbers, can that equipment be an automatic telephone dialing system?”

Comment: The Telephone Consumer Protection Act (“TCPA”) prohibits persons and entities from using an automatic telephone dialing system (“ATDS”) to place calls to cellular telephone numbers absent prior express consent. Recently, the D.C. Circuit addressed the FCC’s longstanding characterization of an ATDS: that a predictive dialer, which automatically places calls to telephone numbers from a list fed into the device, is an ATDS. Specifically, the D.C. Circuit suggested that the FCC could decide that equipment capable of dialing telephone numbers absent human intervention, but not capable of randomly or sequentially generating the telephone numbers it automatically dials, does not qualify as an ATDS:

So which is it: does a device qualify as an ATDS only if it can generate random or sequential numbers to be dialed, or can it so qualify even if it lacks that capacity? The 2015 ruling, while speaking to the question in several ways, gives no clear answer (and in fact seems to give both answers). It might be permissible for the Commission to adopt either interpretation.

Relying on the D.C. Circuit’s question and related comments, users of modern autodialing technology have begun to defend themselves against claims under the TCPA by arguing that the equipment they use—capable of automatically dialing thousands of telephone numbers from lists without human intervention—does not qualify as an ATDS. More particularly, as the users’ arguments go, they are free from liability under the TCPA for placing autodialed calls to hundreds-of-thousands of cellular telephone numbers (if not more) absent prior express consent simply because their autodialing technology does not randomly or sequentially generate telephone numbers. This argument flies in the face of both longstanding FCC opinions concluding that predictive dialers are ATDSs and common sense.

As an example, in defending a class action that my firm filed under the TCPA against a particular user of modern autodialing equipment, the user—a debt collection company that employs 20-25 people, not all of which are on-the-phone collectors—placed nearly 30 million

autodialed calls over the course of a 4-year period by uploading lists of telephone numbers to its dialing system, which then automatically placed calls to the telephone numbers on the lists. Of note, many of these 30 million calls went to approximately 128,000 cellular telephone numbers that the user internally marked as wrong numbers. Nonetheless, following the D.C. Circuit's opinion in *ACA Int'l*, the user suggested to the presiding court that it is not liable for its conduct—otherwise in violation of the TCPA—because the autodialing equipment it used cannot randomly or sequentially generate telephone numbers on its own, and is therefore not an ATDS.

Similarly, in defending a separate class action that my firm filed against another user of modern autodialing technology—a company that employs approximately 15 debt collector employees, and that does not make manual calls; rather, it makes all outbound calls through automated technology—repeatedly placed calls to nearly 500,000 telephone numbers, without human intervention, over the course of a 6-month period. No matter, the user recently argued that given the D.C. Circuit's ruling in *ACA Int'l*, it is not liable for placing calls to cellular telephone numbers absent proof of prior express consent, because its autodialing equipment could not produce telephone numbers to be called by using a random or sequential number generator.

Considering this, equipment should not have to be able to randomly or sequentially generate telephone numbers to qualify as an ATDS. Because if it did, users of modern autodialing technology would be able escape liability for mass-scale violations of TCPA simply because the autodialing technology they use places calls from lists they create or acquire. That is, if equipment must be able to randomly or sequentially generate telephone numbers to qualify as an ATDS, should, for instance, Company A buy a list of millions of cellular telephone numbers from a marketing entity, Company A could then use modern autodialing technology to repeatedly place calls—automatically and without any human intervention—to the millions of cellular telephone numbers on the list it purchased without being subject to any liability under the TCPA, despite lacking prior express consent to autodial any one of the cellular telephone numbers on the list it purchased. Accordingly, the FCC should reaffirm its long-standing determination that calls made via a predictive dialer can give rise to liability under the TCPA.

Request for comment: “[W]e seek comment on how to treat calls to reassigned wireless numbers under the TCPA. . . . Should we maintain our reasonable-reliance approach to prior express consent?”

Comment: The TCPA is essentially a strict liability statute. Its text includes no safe harbor for calls made to reassigned telephone numbers, nor does it contain a “reasonable reliance” exception. What’s more, the D.C. Circuit recently struck down the one-call safe harbor that the FCC engrafted onto the TCPA in 2015.

Nonetheless, emboldened by the D.C. Circuit’s discussion in *ACA Int'l* regarding treatment of reassigned wireless telephone numbers, TCPA defendants have begun to argue that reasonable reliance should not stop with a single call, and that such a concept should be effective until a defendant receives actual notice from a called party that he or she does not wish to be called. If adopted, however, such a concept—that liability under the TCPA cannot attach until a caller has actual notice that it is autodialing a wrong or reassigned number—would allow even the most

careless and unreasonable of callers to systematically autodial countless cellular telephone numbers for which they lack prior express consent, absent penalty.

As well, absolving callers from liability unless and until an aggrieved party takes specific action would shift current burdens under the TCPA, and turn the statute on its head. Because as the TCPA is written, callers bear the burden of obtaining and proving prior express consent to place autodialed calls to cellular telephone numbers. In other words, under the TCPA, a called party is not forced to receive and listen to scores of unwanted robocalls and then figure out how to affirmatively notify the caller of its violation. To be sure, the TCPA prohibits a shoot-first-ask-later approach; it does not sanction one.

As an illustration, in defending a class action that my firm filed under the TCPA, a particular defendant recently argued that it is not liable for wrong-number autodialed calls it placed to the plaintiff's cellular telephone number before the plaintiff affirmatively informed the defendant it reached a wrong number, despite the following factual scenario:

- The defendant received the plaintiff's cellular telephone number from its client by way of an electronic placement file, which included little more than a simple spreadsheet listing names, account numbers, addresses, and telephone numbers.
- But the defendant did nothing to confirm that the plaintiff's cellular telephone number belonged to the person it intended to reach before placing autodialed calls to it.
- In fact, the defendant conceded that, as a matter of pattern and practice, it does absolutely nothing to confirm that the telephone numbers it autodials belong to the people it intends to reach before dialing the numbers:

Q. Tell me, does [the defendant] ever do anything to confirm the telephone numbers it receives from its clients belong to the intended recipients of the calls before using this Noble Maestro system to place calls to the telephone numbers?

A. No.

Relatedly, in defending a separate class action that my firm filed under the TCPA, a different defendant argued that it is not liable for wrong-number autodialed calls—which it unilaterally terminated after delivering *non*-interactive prerecorded messages—because the plaintiff never affirmatively informed the defendant that it was autodialing a wrong-number. Stated otherwise, based on a “reasonable reliance” theory, the defendant suggested it was entitled to place autodialed calls to the plaintiff's cellular telephone number until she affirmatively informed the defendant that she did not want to receive calls from it, despite that the defendant's calls provided the plaintiff no way to communicate with the defendant, either by way of speaking to a representative or by using her telephone's keypad to select an option not to be called in the future.

With this in mind, equating “reasonable reliance” with actual notice, and thus permitting callers to autodial wrong or reassigned wireless telephone numbers until the called party

affirmatively informs the caller that he or she does not wish to receive calls, would almost certainly lead to the proliferation of unwanted autodialed calls to cellular telephone numbers.

At bottom, the TCPA requires that callers confirm they are directing calls to the right party before initiating autodialed calls. Of course, if a caller does not want to make the effort to confirm that its automated calls are directed to the person it intended to reach—for whatever reason—it is free to initiate manually dialed calls to any telephone number it desires, absent liability. But if a caller wants to use an autodialer, it must first make certain its calls are directed to the intended recipient. “Reasonable reliance,” as a concept based on actual notice, would destroy this basic concept and lead to more unwanted robocalls that only serve to aggravate and annoy Americans every day.

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Respectfully Submitted,

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