

## TCPA & Consumer Calling

# Monthly TCPA Digest

JUNE 2018

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We are pleased to present the latest edition of our *Monthly TCPA Digest*, providing insights and news related to the Telephone Consumer Protection Act (TCPA).

In this issue, we look at recent TCPA-related activity at the FCC, including the agency's reevaluation of some TCPA rulings as well as a notable fine levied against a robocaller for malicious spoofing. In addition, in our Class Action & Litigation Update, we look at recent district court rulings offering different interpretations of what constitutes an ATDS, and consider where this split between the circuits leaves TCPA defendants.

If you have suggestions for topics you'd like us to feature in this newsletter, or any questions about the content in this issue, please feel free to reach out to an attorney on Mintz Levin's [TCPA and Consumer Calling Practice Team](#). You can [click here to subscribe to the Monthly TCPA Digest](#).

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## Part I – TCPA: Regulatory Update

BY [RUSSELL H. FOX](#), [RADHIKA BHAT](#), AND [ELANA R. SAFNER](#)

### FCC Reevaluates TCPA Rulings and Seeks Comment on Several Petitions

The Federal Communications Commission (“FCC”) is reconsidering several issues central to TCPA liability, including what equipment constitutes an automatic telephone dialing system (“ATDS”) and who the “called party” is when a wireless number has been reassigned. A [Public Notice](#) released May 14 by the FCC's Consumer and Governmental Affairs Bureau seeks comment on how to interpret several aspects of the TCPA in light of the recent US Court of Appeals for the DC Circuit

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decision in *ACA International v. FCC*. That decision struck key portions of the FCC's 2015 Omnibus Order and Declaratory Ruling. The Public Notice generally seeks comment on the following:

- what constitutes an ATDS and the proper interpretation of “capacity” to engage in the functions of an ATDS;
- how to treat calls to reassigned wireless numbers (separately, the FCC is also conducting a proceeding on establishing a reassigned numbers database);
- how a called party may revoke prior express consent to receive robocalls;
- petitions for reconsideration of the FCC's Broadnet Declaratory Ruling's interpretation of “person” and whether federal government contractors are “persons” under the TCPA; and
- the petition for reconsideration of the FCC's 2016 Federal Debt Collection Rules filed by Great Lakes Higher Education Corp., *et al.*

The comment and reply comment deadlines are June 13 and June 28, respectively.

The Consumer and Governmental Affairs Bureau also released two Public Notices on May 23. The first [Public Notice](#) seeks comment on the [Petition for Clarification](#) filed by the Peer-to-Peer Alliance (“P2P Alliance”), reported in [last month's TCPA Digest](#). The P2P Alliance is a coalition of providers and users of peer-to-peer (“P2P”) text messaging. They have asked the FCC to clarify that P2P text messages are not subject to the TCPA.

The second [Public Notice](#) seeks comment on a [Petition for Declaratory Ruling](#) filed last year by Insights Association, Inc. and the American Association for Public Opinion Research that, among other things, asks the FCC to find that “communications are not presumptively ‘advertisements’ or ‘telemarketing’ under the TCPA simply because they are sent by a for-profit company, or might be for an ultimate purpose of improving sales or customer relations.” The petition also seeks clarification on dual-purpose communications and survey, opinion, and market research studies. Comments and reply comments for both Public Notices are due on June 22 and July 9, respectively.

## FCC Levies Historic Fine against Robocaller for Malicious Spoofing

The FCC issued its largest ever fine, imposing a \$120 million [forfeiture](#) against Adrian Abramovich for executing a massive robocall spoofing campaign. The FCC's investigation found that Abramovich, through his businesses Marketing Strategy Leaders, Inc., and Marketing Leaders, Inc., violated the Truth in Caller ID Act of 2009 and the FCC's rules by spoofing over 96 million robocalls during a three-month period in 2016 as part of an operation to sell timeshares and other travel packages. The FCC had received multiple consumer complaints about these calls, as well as complaints from companies whose names had been referenced in Abramovich's robocalls without authorization, or whose communication networks had been disrupted by the calls. In adopting the \$120 million fine – originally proposed the summer of 2017 – the FCC rejected Abramovich's arguments that he did not intend to cause harm and that the proposed forfeiture amount was unconstitutional.

Congress had previously subpoenaed Abramovich to testify in the Senate Commerce Committee hearing “Abusive Robocalls and How We Can Stop Them,” discussed in last month's TCPA digest [Legislative Update](#). In that hearing, many lawmakers expressed support for the fine levied against



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Abramovich, and several disagreed with Abramovich's decisions on multiple occasions to refuse to answer their questions and to invoke his Fifth Amendment rights.

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## Part II – TCPA: Class Action & Litigation Update

### West v. East: District Courts Split on Validity of pre-ACA *Int'l* FCC Orders re ATDS

BY [E. CRYSTAL LOPEZ](#) AND [GRACE ROSALES](#)

Our previous post discussed the decision in *Marshall v. CBE Group, Inc.*, which completely rejected the FCC's broad interpretation of an ATDS and found in favor of the defendant. Since then, another district court in the Ninth Circuit has followed suit, but three others in the Eleventh Circuit have concluded that the FCC's 2003 Order survives *ACA Int'l*. It could behoove some TCPA defendants to seek stays while this circuit split is sorted out or until after the FCC clarifies its position on the ATDS issue following *ACA Int'l*.

On May 14, 2018, the US District Court for the District of Arizona granted the defendant's motion for summary judgment in *Herrick v. GoDaddy.com LLC*.<sup>[1]</sup> Judge Humetewa found that *ACA Int'l* absolutely did away with the FCC's earlier predictive dialer pronouncements. The Judge squarely rejected reliance on the FCC's Orders by characterizing them as "defunct."<sup>[2]</sup> She went on to reject any subsequent district court rulings guided by the FCC's Orders "because the FCC interpretations relied upon by these courts were driven by policy considerations and not the plain language of the statute."<sup>[3]</sup> The Court also explained that any reading of the TCPA that included predictive dialers was plainly misguided because it broadened the definition of an ATDS to include any equipment that merely stores or produces telephone numbers in a database, which improperly renders the limiting phrase "using a random or sequential number generator" superfluous.<sup>[4]</sup> The Court concluded that the platform the defendant used to text consumers did not (1) have the ability to store or produce numbers to be called, using a random or sequential number generator and (2) involved human intervention throughout multiple stages.<sup>[5]</sup>

On the same day, the US District Court for the Southern District of Florida held that the FCC's 2003 and 2008 predictive dialer rulings survive *ACA Int'l*, and remain good law. In *Reyes v. BCA Fin. Servs.*, the Court granted summary judgment in favor of the plaintiff on the ATDS issue, holding that "the [] predictive dialer [at issue], as [defendant] use[d] it, is an ATDS under the TCPA."<sup>[6]</sup> The Court reasoned that the parties did not dispute that the dialing system at issue was a predictive dialer or that the dialer automatically dialed phone numbers without human intervention. The Court also distinguished *Marshall* noting that the District Court of Nevada did not address whether the 2003 FCC Order remained binding and that unlike CBE, BCA had "presented no facts or evidence that it used a manual-clicker application or point-and-click function or similar human-intermediary utility before placing a call using [its] predictive dialer."<sup>[7]</sup>

In *Maddox v. CBE Group, Inc.*, the US District Court for the Northern District of Georgia also reasoned that the FCC's 2003 Order survived *ACA Int'l* when granting the defendant's motion for summary judgment. The Court noted that *ACA Int'l* rejected the FCC's 2015 Order as an unreasonably broad expansion of the statute.<sup>[8]</sup> Unlike in *Herrick*, however, the Court relied on the FCC's 2003 Ruling, which focuses the ATDS analysis on whether a system can dial numbers



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without human intervention. The Court first rejected the plaintiff's argument that the defendant's system qualified as an ATDS unless CBE's agents manually dial each 10-digit telephone number one digit at a time. The Court concluded that "[t]he focus is on whether the system can *automatically* dial a phone number, not whether the system makes it easier for a person to dial the number."<sup>[9]</sup> Because CBE's system required an agent to click a bull's-eye on a computer screen to place a call and did not use any kind of algorithm to engage in predictive dialing, the Court found the system did not qualify as an ATDS.<sup>[10]</sup>

Similarly, in *Swaney v. Regions Bank*, the US District Court for the Northern District of Alabama adopted a Magistrate Judge's report and recommendation ruling that that the FCC's 2003 predictive dialer ruling "still stands."<sup>[11]</sup> Judge David Proctor reasoned that while the DC Circuit invalidated "certain portions" of the FCC's 2015 Order, it did not invalidate the portion of the Order reaffirming the FCC's 2003 determination that "while some predictive dialers cannot be programmed to generate random or sequential phone numbers, they still satisfy the statutory definition of an ATDS."<sup>[12]</sup> The court noted the "primary consideration" under the 2003 Order is "whether human intervention is required at the point in time at which the number is dialed."<sup>[14]</sup> According to Judge Proctor, the evidence showed that the defendant's system lacked such human intervention.<sup>[14]</sup>

The argument for defendants seeking primary jurisdiction stays is all the more compelling given that courts in different circuits are reaching opposite conclusions regarding which (if any) of the FCC's rulings on the ATDS issue survive *ACA Int'l*.

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## Endnotes

1 No. CV-16-00254-PHX-DJH, 2018 US Dist. LEXIS 83744 (D. Ariz. May 14, 2018).

2 *Id.* at \*18.

3 *Id.*

4 *Id.* at \*19.

5 *Id.* at \*19-24.

6 No. 16-24077-CIV, 2018 US Dist. LEXIS 80690, at \*4-5 (S.D. Fla. May 14, 2018) (emphasis in the original).

7 *Id.* at 38.

8 No. 1:17-CV-1909-SCJ, 2018 US Dist. LEXIS 88568, at \*9 (N.D. Ga. May 22, 2018).

9 *Id.* at \*11.

10 *Id.*

11 No. 2:13-cv-00544-JHE, 2018 US Dist. LEXIS 85217, at \*2 (N.D. Ala. May 22, 2018).

12 *Id.* at \*3.

13 *Id.*

14 *Id.*

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## About Our TCPA & Consumer Calling Practice

In an economy where timely and effective communication with both current and prospective customers is vital to the success of nearly every business, modern technology, such as autodialers, recorded and artificial voice messages, text messaging, and e-mail provide companies the ability to reach large numbers of people with increasingly smaller up-front costs. But, companies cannot

afford to overlook the hidden costs of using these mass communication methods if the many regulations that govern their use are not carefully followed.

Companies have been hit with class action lawsuits under the Telephone Consumer Protection Act (TCPA) for tens or even hundreds of millions of dollars. Mintz Levin's multidisciplinary team work tirelessly to help our clients understand the ever-changing legal landscape and to develop workable and successful solutions. TCPA rules can apply to certain non-sales calls, such as a recorded call to employees about a new work schedule or a text to customers about a new billing system. We advise on how to set up calling campaigns that meet state and federal requirements as well as how the Federal Communications Commission and the Federal Trade Commission apply their rules on calling, faxing, and texting. Given the uncertainties surrounding the TCPA as a result of the FCC's extensive and confusing rulings, we work with clients across many industries, health care, retail, communications and financial services, on matters relating to the following issues:

**Compliance:** Our TCPA team routinely advises companies on compliance with federal and state sales and marketing requirements. We also know what type of consumer consent is needed for each type of call and how specific consents must be worded. We know when and how to apply a do-not-call list and when and how an opt-out provision must be afforded.

**Consumer class action defense:** We've been called upon to handle TCPA class actions across all industries and in federal courts across the nation. Our seasoned litigators know the serial plaintiffs and counsel well and are unfazed by their schemes. Fortunately for our clients, our team has succeeded in winning at the motion stage or earlier in the vast majority of TCPA matters we have defended. That is what truly sets us apart. And if a case must go to trial, we have the experience and strength to follow it to the end.

**Insurance coverage disputes:** We know the arguments insurers use to deny coverage in TCPA suits because we've defended against them. More important, we have a long track record of convincing carriers to fund the defense of these actions and, in some cases, to pay significant portions of settlements. Our goal is to help secure insurance protection and to see to it that carriers make good on their coverage obligations when a claim arises.