

## Narrowing ATDS under the TCPA: Post- ACA Int'l in the Eleventh Circuit

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### Background: The TCPA and ACA Int'l

On March 16, 2018, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued its anticipated decision, *ACA Int'l v. Fed. Communications Comm'n*, 885 F.3d 687 (D.C. Cir. 2018), that, among other rulings, set aside the Federal Communications Commission's (FCC) 2015 Order. The FCC's 2015 Order attempted to clarify what constitutes an "automatic telephone dialing system (ATDS)" under the Telephone Consumer Protection Act (TCPA), 47 U.S.C.A. § 227. The TCPA prohibits the use of an ATDS to make a call to a cell phone number without prior express consent. *Id.* § 227(b)(1)(A)(iii). An ATDS is defined as equipment that has the capacity to "(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C.A. § 227(a)(1).

The D.C. Circuit found that the FCC's 2015 Order failed to satisfy the requirement of reasoned decision-making because it allowed for competing interpretations of what constitutes an ATDS under the TCPA, and it imposed a lack of clarity about which functions qualify a device as an autodialer. According to *ACA Int'l*, the 2015 FCC Order sometimes indicated "that a device *must* be able to generate and dial random or sequential numbers to meet the TCPA's definition of an autodialer" (emphasis added) while also supporting a competing view "that equipment can meet the statutory definition [of an ATDS] even if it lacks that capacity." *ACA Int'l*, 885 F.3d at 702. While it might have been permissible for the FCC to have adopted either interpretation, the D.C. Circuit found that it was unreasonable for the 2015 FCC Order to permit a device to qualify as an ATDS *only* if it could generate "random or sequential numbers to be dialed," *and* even if it lacked that capacity. *Id.* at 702—703. This distinction and lack of clarity in the 2015 FCC Order is important, as the *ACA Int'l* Court noted, because some predictive dialers call set lists of cell phone numbers without generating random or sequential numbers, and others do not have a capacity to generate random or sequential numbers at all. *Id.* at 703.

The D.C. Circuit also found that the FCC's 2015 Order was unclear about whether other referenced capabilities are necessary for a device to qualify as an ATDS. *Id.* The *ACA Int'l* Court noted that the 2015 FCC Order, as well as prior FCC Orders in 2003 and 2008, stated that a basic function of an autodialer is the ability to dial numbers without human intervention. The 2015 FCC Order however failed to clarify that a dialer *must* have the capacity or capability to qualify as an autodialer under the TCPA. Instead, the FCC stated that a "basic function" of an autodialer was to dial numbers without human intervention, and "to dial thousands of numbers in a short period of time." *Id.* The D.C. Circuit found that this interpretation was unreasonable because a device then still might qualify

as an autodialer even if it cannot dial numbers without human intervention. Further, the FCC also did not indicate whether dialing "thousands of numbers in a short period of time" was a necessary condition, a sufficient one, a reasonable one, etc., nor did it define what qualifies as a "short period of time." *Id.* As a result, the D.C. Circuit invalidated portions of the 2015 FCC Order.

### **The Eleventh Circuit Post-ACA *Int'l*: Maddox, Glasser, and Ramos**

In the months after *ACA Int'l*, the U.S. Circuit Courts of Appeal and U.S. District Courts (District Court) have enunciated differing interpretations of the impact of *ACA Int'l* on prior FCC Orders and the meaning of an ATDS under the TCPA. So far, the U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit) has not yet weighed in on the application of *ACA Int'l*. In that Circuit however, District Court decisions have addressed the qualifications for an ATDS under the TCPA following *ACA Int'l*, which has been regarded as binding authority. The following decisions resulted in a victory at the summary judgment stage of litigation for a defendant company who allegedly violated the TCPA.

In *Maddox v. CBE Grp., Inc.*, No. 1:17-CV-1909-SCJ, 2018 WL 2327037 (N.D. Ga. May 22, 2018), District Court relied on *ACA Int'l* and the 2003 FCC Order to determine if the dialing system at issue qualified as an ATDS. There, the defendant company allegedly violated the TCPA and Fair Debt Collections Practices Act ("FDCPA"). The defendant made calls to the plaintiff using a manual clicker application that required human intervention, a click for an agent to initiate a call, without the capacity to auto-dial or produce numbers to be called using a random or sequential number generator. *Id.* at \*2. The District Court rejected the plaintiff's argument that the defendant's system qualified as an ATDS unless its agents manually dialed each ten-digit number, as that would qualify nearly all phones as an ATDS. The defendant's system was found not to be an ATDS because it required human intervention and did not engage in predictive or automatic dialing. *Id.* at \*4-5. The defendant's motion for summary judgment then was granted as to the TCPA claims, while the plaintiff's FDCPA claim was allowed to proceed.

In *MELANIE GLASSER, individually & on behalf of all others similarly situated Plaintiff, v. HILTON GRAND VACATIONS COMPANY, LLC. Defendant.*, 8:16-CV-952-JDW-AAS, 2018 WL 4565751 (M.D. Fla. Sept. 24, 2018), the District Court found that the defendant's alleged predictive dialer was not an ATDS under the TCPA and granted the defendant's motion for summary judgment. The defendant used the Intelligent Mobile Connect system ("IMC System") to place telemarketing calls to the plaintiff's cell phone. The IMC System used a business software automation tool called "Interaction Process Automation" that retrieved and presented a customer's information, before requiring an agent to manually click a "make call" button to initiate a call. *Id.* at \*1—2.

In rendering its decision, the *Glasser* court stated that "the holding in *ACA Int'l*, the statutory definition of an ATDS, and prior FCC rulings interpreting that definition provide the necessary guidance in determining whether defendant's IMC System is an ATDS" (emphasis added), and cited *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 119 (3d Cir. 2018). *Id.* at \*4. The District Court rejected the plaintiff's argument that the defendant's system was an ATDS because internal software would queue numbers to be called without human intervention, because the defendant's agents were unable to confirm if the phone numbers were correct in making a call, and because the make call button did not launch a call or dial the phone number. The *Glasser* court noted that the plaintiff's

focus on the dialing of numbers was misplaced, and the District Court cited *ACA Int'l* in finding that nothing in the record demonstrated that the defendant's system generated numbers and then placed calls. *Id.*

In *Ramos v. Hopele of Fort Lauderdale, LLC*, 17-62100-CIV, 2018 WL 4568428 (S.D. Fla. Sept. 20, 2018), the District Court affirmed the magistrate judge's report and recommendation that the defendant companies be granted summary judgment against the plaintiff. The plaintiff had alleged TCPA violations arising out of the defendants' use of a promotional text messaging system, the EZ-texting program, that the plaintiff claimed was an ATDS. The District Court and magistrate judge cited the prior FCC orders and other district court decisions that reaffirmed them following *ACA Int'l*, and the District Court stated that the appropriate standard to evaluate the EZ-texting program was "whether the program (1) lacks the capacity to randomly or sequentially generate phone numbers, or alternatively, (2) lacks the ability to send messages without human intervention." *Id.* at \*1–2.

The District Court noted that there was a sufficient level of human intervention to negate the plaintiff's claim that the EZ-texting program because of expert testimony that for the system that stated it could not send messages automatically or generate phone numbers, and because a manager signed onto the system, created and edited a list of phone numbers to be texted, wrote and programmed the message, and sent the message. The District Court also rejected the Plaintiff's argument that because the EZ-program may have had the capacity to be an ATDS, there was an at least triable fact as to whether it could generate numbers and send the messages at issue. The magistrate judge analyzed the level of human intervention in similar TCPA cases in concluding that this was a sufficient level of human intervention to make the system not an ATDS. *Id.* at \*1–2. Importantly however, the magistrate judge rejected the defendants' argument that *ACA Int'l* invalidated the 2003, 2008, and 2012 FCC Orders. The magistrate judge stated that the prior orders remained in place and that the standard in evaluating an autodialer under the TCPA is if the system "has the present capacity to function as such. Latent or potential capacity to function as an autodialer does not satisfy the statute" (internal citations omitted). *Id.* at \*2.

## Conclusion

Uncertainty still exists in the Eleventh Circuit as to the application of the TCPA following *ACA Int'l*, particularly as to the status of the prior FCC orders, which will hopefully be rectified in forthcoming FCC guidance on the TCPA. In regards to what constitutes an ATDS, recent district court decisions such as *Maddox*, *Glasser*, and *Ramos* have demonstrated situations where a system's level of human intervention can defeat TCPA claims prior to the trial stage of litigation. Those cases seem to indicate a narrowing of the definition of an ATDS by the District Courts in the Eleventh Circuit, especially in regards to human intervention in dialing systems. Overall, the cases described above and others in the Eleventh Circuit have reaffirmed *ACA Int'l*'s narrowing of the TCPA in finding that claims for a device's potential or latent capacity to be an ATDS are insufficient for TCPA purposes.

## If you would like more information, please contact:

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