Bringing it All Together: Court Rulings, FCC Petitions and New Proposed Legislation Impacting TCPA Definition of ATDS Following Big ACA Int'l Ruling

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The D.C. Circuit's admonishment to the FCC over its failure to define "the precise functions that a device must have capacity to perform for it to be considered an ATDS" has created quite the fall out. Since *ACA Int'l v. FCC*, No. 15-1211, 2018 U.S. App. LEXIS 6535 at *9 (D.C. Cir. Mar. 16, 2018) ("*ACA Int'l*") was handed down a mere 45 days ago, activity is afoot in all three branches of government aiming to clarify what functionalities are required to make a phone call a "robocall."

Level setting, our story begins back in 2003 when the FCC first determined that predictive dialers perform the requisite functions of an ATDS, including (1) "dial[ing] numbers without human intervention," (2) dialing "thousands of numbers in a short period of time," (3) dialing numbers "from a database," and (4) "stor[ing] or produc[ing] telephone numbers to be called." *See* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 at 78-79 (2003). Notably, the former three functions are not part of Congress's definition of an ATDS, and the latter is pertinent only if two other statutory requisites also exist; i.e. the ability to randomly or sequentially generate numbers and dial them.

Missing from the FCC's 2003 ruling was any mention of making calls "using a random or sequential number generator," even though the Commission later maintained that these were essential functions of an ATDS in its 2015 TCPA Ruling. *Ibid;* In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7961, 7970, 2015 FCC LEXIS 1586 ¶¶ 6-7 (2015) ("2015 TCPA Ruling"). Because of these inconsistencies, the D.C. Circuit found in *ACA Int'l* that the Commission failed to provide "meaningful guidance to affected parties in material respects on whether their equipment is subject to the statute's autodialer restrictions." *ACA Int'l* at 25. It posed the core problem with the Commission's rulings on ATDS functionality as follows: "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?" *Id.* at 27.

Since the FCC failed to answer the court's question, lots of other folks have jumped up to take a stab at it. First, the Courts. Within weeks of *ACA Int'l* being handed down, the federal district court in Nevada decided that predictive dialers no longer met the definition of robocallers. See *Marshall v. CBE Group Inc.*, No. 2:16-cv-02406-GMN-NJK, 2018 U.S. Dist. LEXIS 55223 (D. Nev. Mar. 30, 2018). There, Chief Judge Navarro held that as a consequence of *ACA Int'l*, the court "will not stray

from the statute's language which mandates that the focus be on," random or sequential number generation. *Id.* at *12. The court therefore found that a device used by the defendant with predictive dialing functionalities – but without the requisite ability to generate random or sequential numbers – was not an ATDS based on the statute's definition of the term. *Id.* at *18.

Then Congress piped up. Not long after *Marshall*, came activity on the Hill with Congressman Frank Pallone, Jr.'s draft bill named the "Stopping Bad Robocalls Act" (read our full coverage of the bill [here](#)). The bill's summary minces no words – the bill was drafted in direct response to *ACA Int'l*, and is intended to "resolve the issue," over ATDS functionality. How does it propose to do that? By expressly expanding TCPA coverage to include "equipment that makes a series of calls to telephone numbers on a list," (i.e. predictive dialers) – but wait – so long as "no additional human intervention is required to make the call after initiating the series of calls." If those concepts seem familiar, it is because they are – the bill effectively seeks to codify the now-rejected pronouncements by the FCC that an ATDS includes a device that can dial from a list or database, without human intervention. And if passed, we can expect the focus on ATDS use to revert back to the classic battle over what kind, and how much "human intervention" is required before a device is no longer considered an ATDS.

Finally, the U.S. Chamber of Commerce – backed by some major industry associations – is advancing the ball at the agency level with a recent petition for expedited rulemaking to the FCC (read our coverage of the petition [here](#)). Although the petition covers a number of issues, its focus is squarely on ATDS functionality. Specifically, the Chamber is asking the FCC to confirm that to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers, and dial those numbers without human intervention. And Chairman Pai is on the record supporting this kind of approach. As he stated while serving as a commissioner in his dissent to the 2015 TCPA Ruling: "we should read the TCPA to mean what it says: Equipment that cannot store, produce, or dial a random or sequential telephone number does not qualify as an automatic telephone dialing system because it does not have the capacity to store, produce, or dial a random or sequential telephone number." 2015 TCPA Ruling at 117.

The flurry of activity sparked by *ACA Int'l* at multiple levels government just highlights the critical importance of the ATDS functionality issue. While we expect this to be a top priority for the FCC, Democrats in Congress aren't waiting around for a decision before taking action to expand the bounds of the TCPA. And we can expect that a new ruling by the FCC – particularly one that stays consistent with the statutory text of the TCPA – will accelerate lawmakers' efforts to expand the scope of the TCPA. In the meantime, lower courts will continue to sound off on the impact of *ACA Int'l* on current law, and we're off to a good start with Chief Judge Navarro's ruling in *Marshall*. No doubt this year has shaped up to be an exciting one here in TCPALand, and the fun isn't over yet with several more major developments on ATDS functionality starting to peek over the horizon.