Consumer Financial Services Committee

TCPA Litigation: Where Is It Heading Now?
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Legal Disclaimer

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What is an “ATDS”?

• This should be easy, because Congress defined it
• 47 USC 227 says: “(1) The term ‘automatic telephone dialing system’ means equipment which has the capacity— (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”

• What does “capacity” mean?
• What is the role of “random or sequential generator” here?
• Do all predictive dialers qualify as an ATDS?
What has the FCC said about an ATDS?

• The FCC has taken the position that predictive dialers satisfy the statutory definition of an ATDS even if they cannot be programmed to generate random or sequential phone numbers


The FCC’s 2015 Ruling re: ATDS


• An ATDS can include technology that has the potential capacity to make automated calls, even if devices needed to make automated calls are not installed

• The 2015 Ruling “reaffirmed” the 2003 and 2008 orders re: ATDS

• Predictive dialers – equipment that can perform automated dialing from a list of numbers qualifies as ATDS

• An ATDS is equipment that can “dial numbers without human intervention.”
ACA International v. FCC, 885 F.3d 687 (D.C. Cir. 2018)

• Rejects the FCC’s broad interpretation of ATDS

• “It is undisputed that essentially any smartphone, with the addition of software, can gain the statutorily enumerated features of an autodialer and thus function as an ATDS,” under the FCC’s interpretation.

• What impact does the ACA International decision have on earlier FCC Orders/Rulemaking (2003 and 2008) re: predictive dialers?

• D.C. Circuit: “While the Commission's latest ruling purports to reaffirm the prior orders, that does not shield the agency's pertinent pronouncements from review.”
Telephone equipment is not an “ATDS” unless it has the present or current capacity to store or produce telephone numbers using a random or sequential number generator, and to dial those numbers.
• The *ACA International* case vacated the FCC’s interpretation of a ATDS and therefore “we must begin anew to consider the definition of ATDS under the TCPA.”

• The definition of an ATDS in the statute is ambiguous. However, the “language in the statute indicates that equipment that made automatic calls from lists of recipients was also covered by the TCPA.”

• The definition of an ATDS is not limited to devices with the capacity to call numbers produced by a “random or sequential number generator.” It includes devices that have the capacity to dial stored numbers automatically.
More on Marks

• Has the Ninth Circuit re-written the definition of an ATDS?
  • *Marks* rules that an ATDS “means equipment that has the capacity — (1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers.”
  
  • *Marks* rejects, as an “unreasoned assumption,” the Third Circuit’s ruling in *Dominguez* that ATDS must possess random or sequential number generator.

  • *Marks* rejects the argument that an ATDS it must be “fully automatic, meaning that it must operate without any human intervention whatsoever.”
Post-Marks developments

• October 3, 2018 – FCC re-opens comment period

• October 30, 2018 – Ninth Circuit rejects the petition for *en banc* review filed by Crunch San Diego, LLC

• November 7, 2018 – Ninth Circuit grants stay of the mandate pending petition for writ of certiorari by Crunch San Diego, LLC
ACA International and Revocation

• Revocation Through Any Reasonable Means -- Affirmed FCC’s 2015 ruling that consent may be revoked “through any reasonable means” clearly expressing a desire not to receive further calls.

• Callers Cannot Unilaterally Set Revocation Means – Refused to allow “callers to designate the exclusive means of revocation.”

• Leaves Door Open for Bilateral Agreement on Revocation – Was clear to note that FCC’s 2015 ruling “did not address whether contracting parties can select a particular revocation procedure by mutual agreement.”
Does Bilateral Contractual Consent Require Bilateral Contractual Revocation?

-- *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 56 (2d Cir. 2017)

- **Facts** – Plaintiff leased a vehicle from a dealership and provided his cell number in the lease application. Plaintiff then executed a lease agreement which contained a provision wherein he consented to receiving (among other things) dialer calls to any number provided. At some point, plaintiff stopped making payments on his lease, and the defendant made calls to the cell number provided. Plaintiff alleged that the calls violated the TCPA because he had orally revoked any prior consent to be called at that number.

- **District Court Ruling** -- Granted summary judgment in favor of defendant, finding in part that plaintiff could not “unilaterally revoke bargained-for consent to be contacted by telephone.”
Reyes v. Lincoln Auto. Fin. Servs., (Cont’d.)

- 2nd Circuit Affirmed District Court’s Decision and Rationale

- Noted that plaintiff’s consent to defendant’s calls “was not provided gratuitously,” but instead “was included as an express provision of a contract to lease an automobile from [the defendant].”

- Accordingly, consent was part of the “bargained-for consideration” on which plaintiff and defendant had formed the lease agreement, and thus under the “common law of contracts” (and by extension the TCPA), that consent could not be unilaterally revoked.

- Black Letter Holding – “[t]he TCPA does not permit a party who agrees to be contacted as part of a bargained-for exchange to unilaterally revoke that consent.”
Decisions Following *Reyes*

- **Anthony v. GE Capital Retail Bank**, No. 14-CV-2809 (ALC), 2017 WL 10086175 (S.D.N.Y. Aug. 16, 2017) (plaintiff’s acceptance of credit card agreement, which included “consent to communication” provision was the kind of bargained-for consideration that is not unilaterally revocable).

- **Barton v. Credit One Fin.**, No. 16CV2652, 2018 WL 2012876 (N.D. Ohio Apr. 30, 2018) (plaintiff could not orally revoke consent when credit card agreement contained bargained-for language stating that revocation must be made in writing).

- **Harris v. Navient Sols., LLC**, No. 3:15-CV-564 (RNC), 2018 WL 3748155 (D. Conn. Aug. 7, 2018) (plaintiff’s execution of promissory note with consent to call provision was a bargained-for exchange that could not be unilaterally revoked).

- **Few v. Receivables Performance Management**, No. 1:17-CV-2038-KOB, 2018 WL 3772863 (N.D. Ala. Aug. 9, 2018) (because plaintiff provided consent “as part of a bargained-for exchange and merely gratuitously, she was unable to unilaterally revoke that consent”).

Decisions That Decline to Follow *Reyes*

- **McBride v. Ally Fin., Inc.**, No. CV 15-867, 2017 WL 3873615 (W.D. Pa. Sept. 5, 2017) (refused to adopt holding in *Reyes*, stating that “Gager is one of the strongest statements, in terms of interpreting revocation of consent consistently with the remedial purposes of the TCPA; and the Court cannot lightly case-aside language in Gager supporting a contrary conclusion”).

- **Ginwright v. Exeter Fin. Corp.**, 280 F. Supp. 3d 674 (D. Md. 2017) (the Court declined “to adopt the prohibition on revocation in *Reyes*, which would result in the effective circumvention of the TCPA in the debtor-creditor context”).

- **Patterson v. Ally Financial, Inc.**, No. 3:16-cv-1592-J-32-JBT, 2018 WL 647438 (M.D. Fla. Jan. 31, 2018) (“This Court ... finds nothing in either the TCPA or the text of the contract(s) that precludes Patterson from orally revoking his consent to be contacted.”)

- **Ammons v. Ally Financial, Inc.**, No. 3:17-cv-00505, 2018 WL 3134619 (M.D. Tenn. June 27, 2018) (“The Court finds it a bridge too far to conclude, that, where the FCC has found it inappropriate to limit revocation by any called party beyond a ‘reasonable’ or ‘easy’ means, the *Reyes* court could so easily eliminate any right to revocation for a potentially vase number of called parties.”)

- **Rico Tillman v. The Hertz Corp.**, No. 16-C-4242, 2018 WL 4144674 (N.D. Ill. Aug. 29, 2018) (refusing to apply *Reyes* and holding that consent can be revoked at any time through reasonable means).

ACA International and Reassigned/Wrong Numbers

• No More One-Call Safe Harbor – Set aside the 2015 order’s creation of a one-call safe harbor for reassigned number as “arbitrary and capricious.”

• Set Aside Definition of Called Party – In setting aside one-call safe harbor, Court also felt compelled to set aside 2015 Order’s interpretation of “called party” as referring only to current subscriber or customary user.

• Reasonable Reliance Standard? – Court repeatedly references FCC’s adherence to a “reasonable reliance” standard when assessing whether consent has been provided in other contexts.
Reasonable Reliance Standard?


• **Facts** – Consumer opened line of credit with defendant in 2013 and provided consent to be called at the cell number. In September of 2015, consumer fell behind on his payments, and defendant began making phone calls to the cell number. Unbeknownst to defendant, the cell number had been reassigned to plaintiff in May of 2015. Plaintiff never answered any of defendant’s phone calls. Also, plaintiff called into defendant on four different occasions but hung up every time the defendant answered. When plaintiff called into the defendant, the consumer’s information populated the caller I.D.

• **Holding** – Court first noted ACA International’s decision to “set aside the Commission’s treatment of reassigned numbers as a whole.” The Court then held that “[t]o determine whether there has been a violation of this section of the TCPA under current authority, the Court must consider the reasonableness of the caller’s reliance on a prior number holder’s expres consent.” The Court found that, under the circumstances here, the defendant has no reason to know that the cell number had been reassigned. Accordingly, the Court concluded that it “was reasonable for [the defendant] to reply on [consumer’s] prior express consent to call his number, and therefore summary judgment on this issue or proper.”
New FCC Interpretations on the Horizon?

The FCC has requested comment on the following issues relating to reassigned numbers:

- How to interpret “called party” for calls to reassigned numbers
  - Intended recipient vs. actual recipient (or different things in different contexts)
  - Customary user vs. subscriber
- Whether a “reasonable reliance” approach should be adopted vs. a safe-harbor approach vs. strict liability
- Whether establishment of a reassigned number database impacts the interpretation
Questions?

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