Consumer Financial Services Committee

TCPA Litigation: Where Is It Heading Now?
Abbas Kazerounian – Kazerouni Law Group
Tomio Narita, Simmonds & Narita
Matt Mitchell – Burr Forman
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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 \textit{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
Revocation Landscape At The Time of *Reyes* Decision

- **Gager v. Dell Financial Servs., LLC, 727 F.3d 265 (3rd Cir. 2013)** – “[T]he TCPA provides consumers with the right to revoke their prior express consent to be contacted on cellular phones by autodialing systems.” Third Circuit based its decision on the “common law principle that consent is revocable” and the fact that “the TCPA is a remedial statute . . . That should be construed to benefit consumers.”

- **Osorio v. State Farm Bank, 746 F.3d 1242 (11th Cir. 2014)** – “[I]n the absence of any contractual restriction to the contrary, [called parties] were free to orally revoke any consent previously given” to call the cell number at issue. Eleventh Circuit based its decision on the fact that “[c]ommon-law notions of consent generally allow oral revocation.”

- **2015 FCC Order** – “Consumers have a right to revoke consent, using any reasonable method including orally or in writing.” “Consumers may revoke consent in any manner that clearly expressed a desire not to receive further messages, and . . . Callers may not infringe on that ability by designating an exclusive means to revoke.”
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.

• **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.”
Reyes v. Lincoln Auto. Fin. Servs., (Cont’d.)

• Distinguished Consent in the Context of Tort and Contract law – The Second Circuit addressed the notion (as outlined in Gager and Osorio) that common law consent is revocable and held that a distinction “must be drawn between tort and contract law.”

• Consent in Tort Law -- “In tort law, ‘consent’ is generally defined as a gratuitous action. . . . Consent of this kind, which is not given in exchange for any consideration, and which is not incorporated into a binding legal agreement, may be revoked by the consenting party at any time.”

• Consent in Contract Law -- Conversely, “[t]he common law is clear that consent to another’s actions can ‘become irrevocable’ when it is provided in a legally binding agreement. . . . It is black-letter law that one party may not alter a bilateral contract by revoking a term without the consent of the counterparty.”
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.”
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).

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).


Few v. Receivables Performance Management, LLC

• Initial Holding – “[Plaintiff] could not unilaterally revoke her consent to receive debt collection call because she agreed to provide that consent as part of a bargained-for exchange.”

• Vacated on Motion for Reconsideration Per Osorio – “[B]inding Eleventh Circuit precedent established that [Plaintiff] could unilaterally and orally revoke her consent to receive debt-collection calls unless a contract restricted the means by which she could revoke consent. Her contract contains no such restriction so she was free to orally revoke consent.”

• Cliff Notes Holding -- A called party’s right to unilaterally revoke consent by any reasonable means is unassailable unless the parties contract to a more restrictive means of revocation.
Take-aways

- **Outside Defense Counsel** – Pursue *Reyes* defenses where applicable.

- **In-House Defense Counsel** – Consult your contracts for possible implementation of contractual consent or contractual revocation provisions.
FCC’s 2015 Order on Reassigned Numbers

• **Broadly Defined “Called Party”** -- The FCC clarified the definition of “called party” from whom callers must obtain consent, stating that “the TCPA requires consent not of the intended recipient of a call, but of the current subscriber (or non-subscriber customary user of the phone).”

• **Provided One-Call Safe Harbor** – The FCC created a one-call safe harbor for calls to reassigned numbers where the caller does not have actual or constructive notice of the reassignment.

• **Practical Impact** – Good faith calls to reassigned numbers became incredibly difficult to defend under the TCPA, at least as it relates to consent.
ACA International and Reassigned 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 express 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.”
FCC’s December 2018 Order on Reassigned Numbers

• **Reassigned Number Database** – FCC establishes “a single, comprehensive database that will contain reassigned number information from each provider” and that will “enable any caller to verify whether a telephone number has been reassigned before calling that number.”

• **New Safe Harbor** – FCC provides a safe harbor from TCPA liability for those callers that properly use the new reassigned number database and, yet, still inadvertently call a reassigned number.
FCC Database Logistics

• **Monthly Provider Reporting Requirement** – On the 15th of every month, providers are required to report to the database Administrator the most recent “permanent disconnection” for each number allocated to or ported to the provider.

  • Permanent Disconnection – The date when a subscriber permanently has relinquished a number, or the provider permanently has reversed its assignment of the number to the subscriber such that the number has been disassociated with the subscriber for active service in the service provider’s records.”

• **New Aging Period** – FCC Order established a new minimum aging period of 45 days, meaning that providers must wait at least 45 days before reassigning a disconnected number to a new subscriber.

• **Functional Use of the Database** – The caller submits a query to the database asking whether a number has been permanently disconnected since a date chosen by the caller making the query. The database then provides a response of “yes,” “no,” or “no data.”
New Reassigned Number Safe Harbor

- **Safe Harbor Rule** – If the caller demonstrates that they appropriately checked the most recent update of the database and the database inaccurately responded “No” when asked whether a number had been permanently disconnected since the date provided by the caller, then the caller is not liable under the TCPA for calls made to the reassigned number until the next monthly update of the database.

- **Caller’s Burden** – Callers bear the burden of proof and persuasion to show that they checked the database and that it responded inaccurately.

- **Limited Scope** – Safe harbor only extends to the next monthly update to the database, meaning that Callers must check every month (and have continued inaccurate responses from the database) in order to maintain safe harbor.

- **Limited to FCC Database** – The FCC expressly declined to extend the safe harbor to other commercial databases.
So, When’s the Database Going to be Operational?

• **No Meaningful Timeline Provided** – FCC Order provides no timeline or deadline for implementing the database and ensuring its operation.

• **Solicit Administrator Within 12 Months?** – FCC “expects to issue the solicitation for the new reassigned numbers database administrator in the next twelve months.”

• **Bottom Line** – As Commissioner Jessica Rosenworcel noted in her personal statement attached to the Order, “[t]he database we establish today won’t be up and running anytime soon.”
Take-aways?
Questions?

- Abbas Kazerounian – Kazerouni Law Group
- Tomio Narita, Simmonds & Narita
- Matt Mitchell – Burr Forman
A Walk on the Wild Side: Recent Truth-in-Lending Act Litigation

Leonard Chanin, Moderator
Angela Kleine, Panelist
Eric Mogilnicki, Panelist
Ben Olson, Panelist

I. Truth in Lending Litigation in a post-Spokeo World

The U.S. Supreme Court’s 2016 decision in Spokeo, Inc. v. Robins clarifies what a plaintiff must plead in order to have standing to bring an action for a “procedural” statutory violation. In particular, the Court held that to meet the constitutional requirement of having suffered an “injury-in-fact,” a plaintiff’s alleged injury must be both “concrete” and “particularized.” While no monetary or other “tangible” injury is required, a bare procedural violation of a statute is not enough to create standing. The plaintiff’s injury must be “real, and not abstract,” and must “actually exist.” The Court did not give any guidance on how these requirements apply to Truth in Lending Act (TILA) cases, but it did provide a few analogous guideposts. For example, the Court held that a plaintiff may lack standing to assert a Fair Credit Reporting Act (FCRA) claim for a credit reporting agency’s failure to provide consumers certain required notices if the agency was in any event accurately reporting information about the consumer.

Two federal Courts of Appeal and several federal district courts have now applied Spokeo to cases in which plaintiffs claim that a creditor violated TILA by failing to provide required disclosures. Specifically, they have addressed the question of whether alleged violations of TILA’s disclosure-related provisions create a cognizable “injury” for the consumer to have standing to bring the action. Consistent with Spokeo, these courts generally find no standing where the alleged failure to send a disclosure
caused the plaintiff no discernable harm. However, the decisions are not entirely consistent, and some courts have held that the risk of harm to the consumer is sufficient to satisfy the standing requirement, particularly at the pleadings stage.

The following cases have addressed this issue. Note: the summary below solely refers to the question of whether a consumer has standing to bring an action under TILA. Some of the decisions may have been decided in favor of the defendant on other grounds.

**Strubel v. Comenity Bank, 842 F.3d 181 (2d Cir. 2016).**
- Holding that the consumer *had standing* to bring an action for two of four billing-right disclosures required to be provided at account-opening in connection with her credit card. *Standing found* with respect to notices relating to “how the consumer's own actions can affect his rights with respect to credit transactions,” because failing to send the notice “gives rise to a ‘risk of real harm’ to the consumer's concrete interest in the informed use of credit.” *No standing found* with respect to notices regarding a consumer's right to “timely notice to stop automatic payment of a disputed charge” because the creditor did not offer an automatic payment plan.

**McQuinn v. Bank of America, N.A., 656 Fed. App’x 848 (9th Cir. 2016).** *(This decision is unpublished and not precedential.)*
- Holding that the consumer *had standing* to bring an action when a creditor who is the “new owner” of a mortgage failed to provide a timely notice to the consumer of the transfer. Plaintiffs' allegation that “they were deceived into paying their monthly mortgage payment to an entity which ha[d] no right collect monies on [the] contract, and were prevented from satisfying their obligations under the Note” held to be “particularized and sufficiently concrete injury.”

- Holding that a consumer *did not have standing* due to the failure of a credit card issuer to disclose on the front of a periodic statement that a late payment could trigger a “penalty” APR and the amount of that APR. *(See also Schwartz v. HSBC Bank USA, N.A., No. 14 CIV 9525, 2017 WL 95118 (S.D.N.Y. Jan. 9, 2017).)*
- Holding that a consumer did not have standing due to the alleged failure of the creditor to provide notice of a transfer of the servicing rights for a mortgage loan.

- Holding that a consumer did not have standing due to the alleged failure of the creditor/servicer to provide a sufficiently detailed “payoff” statement for the consumer’s mortgage loan.

- Holding that a consumer did not have standing due to the lessor’s alleged failure to segregate certain lease disclosures and provide certain lease disclosures under the Consumer Leasing Act (which was enacted as an amendment to TILA).

- Holding that a consumer did not have standing due to a creditor’s alleged failure to disclose an insurance claim proceeds on mortgage payoff statements. (See also Jamison v. Bank of America, N.A., No. 2:16-CV-00422, 2017 WL 3394120 (E.D. Cal. Aug. 8, 2017).

- Holding that a consumer did not have standing due to a credit card issuer’s alleged erroneous disclosures about returned payment and late payment fees, when those fees might be less than the amounts disclosed.

- Holding that the consumer had standing due to the alleged failure of the creditor to disclose insurance proceeds on mortgage payoff statements.
II. Property Assessed Clean Energy (PACE) “Loans” -- Recent Legislative and Other Developments

Background

PACE programs are the product of state legislation authorizing counties, cities, or other local governments to provide financing to residents to pay for energy efficient or related home improvement projects over time through tax assessments. For example, consumers may “finance” the purchase and installation of solar panels or energy efficient windows. PACE financing is not structured like a typical “loan” made by a lender to a consumer to finance the purchase and/or installation of energy efficient products. Instead, PACE transactions involve three parties: (1) the consumer/property owner; (2) a local government entity, which establishes the PACE program; and (3) a PACE “administrator,” which is typically a private entity that operates the program on behalf of the government entity.

The financing of a PACE transaction does not result in a loan made by a lender, but in a special assessment on the consumer's real property by the government entity that established the program. Payment is generally due and made annually or biannually by the consumer as part of the payment of real estate taxes to the local government where the real property is located. Funds paid by the consumer are then provided by the local government to the PACE administrator, which in turn pays investors in the receivables. In general, PACE loans are nonrecourse. That is, the loan is not a personal debt of the consumer, but rather is imposed on the property and, in theory, could be passed on to a subsequent purchaser (although, in practice, PACE assessments are typically paid off when the property is transferred). The term of a PACE loan varies, but can be up to 20 years.

If the consumer fails to pay the special assessment, pursuant to applicable State or other law, foreclosure proceedings can be brought, similar to the situation in which a consumer fails to pay real estate taxes. In general, depending on state law, a PACE loan creates a senior priority lien over existing mortgages.

PACE programs must be authorized by the state in which the transactions will take place. To date, more than 30 states have authorized PACE programs – starting in 2008 with California. It appears that over $4 billion
in financing using PACE programs have been made over the past several
years, with well over 100,000 “loans.”

**Court Decisions Involving TILA**

There appears to be only one federal court decision addressing whether
TILA applies to PACE transactions. In In re Hero Loan Litig., (No. CV-16-
08943-AB, 2017 WL3038250 (C.D. Cal. July 17, 2017), plaintiffs brought
class action claims based on allegations that, among other things, PACE
transactions were “residential mortgage loans” and “high-cost mortgages”
under TILA but failed to comply with the applicable requirements, such as
ability to repay, APR and finance charge disclosures, and the prohibition on
prepayment penalties and certain other terms for high-cost mortgages.
The federal district court dismissed the TILA claims on a 12(b)(6) motion,
holding that, under California law, a tax assessment lien on property is not
a personal debt owed by a consumer, and thus PACE transactions are not
“consumer credit transactions” subject to TILA. The court also concluded
that dismissal of the TILA claims was warranted because the official
interpretations of Regulation Z expressly exclude” tax liens” and “tax
assessments” from the definition of “credit.” (Other entities have also noted
that the TILA does not cover PACE transactions. (See “FHFA Statement
on Certain Energy Retrofit Loan Programs”, July 6, 2010, at
www.fhfa.gov/Media/PublicAffarirs/Pages/FHFA-Statement-on-Certain-
Energy-Loan- Programs.aspx))

**Federal Legislative Developments**

In May 2018, the Economic Growth, Regulatory Relief, and Consumer
Protection Act (“Act”) was enacted into law. Section 307 of the Act amends
section 129C(b)(3) of TILA to require the Bureau of Consumer Financial
Protection (Bureau) to take two actions. First, the amendments state that
the Bureau shall prescribe regulations “that carry out the purposes of
subsection (a)” regarding PACE financing, which “shall account for the
unique nature” of such financing. The reference to “subsection (a)” is the
provision in TILA that sets forth the ability to repay provisions. That is, the
Bureau’s authority to prescribe regulations to carry out the purposes of
subsection (a) appears to grant authority solely to prescribe rules regarding
the ability of consumers to repay PACE transactions. (In general, the
ability to repay provisions in TILA require creditors to make a reasonable
and good faith determination, based on information such as a consumer’s
income, credit history, and other information, that a consumer has a reasonable ability to repay the loan.)

The second amendment provides that the Bureau’s regulations shall “apply section 130 with respect to violations under subsection (a)” for PACE transactions, taking into account the unique nature of such transactions. (Section 130 of TILA sets forth the civil liability provisions of TILA, including the right of consumers to bring private actions against creditors for failing to comply with specified provisions of TILA. Section 130 generally applies solely to creditors (with certain narrow exceptions). TILA provides that a creditor is a person who extends “consumer credit.”) Notably, paragraph (k) of Section 130 allows consumers to assert violations of the ability to repay requirements at any point during the life of the loan, and as a set-off against the amount owed in a foreclosure action brought by or on behalf of the loan’s owner.

Finally, the amendments provides that in prescribing regulations, the Bureau may collect such information and data that the Bureau deems necessary (and shall consult with state and local governments and bond-issuing authorities).

In October 2018, the American Bankers Association and the Center for Responsible Lending, as well as several other industry trade associations and consumer groups sent a letter to the Bureau urging it to “expeditiously initiate” the rulemaking process set forth under the Act. The letter also states that the Bureau should “explicitly incorporate PACE into TILA’s overall mortgage protections.” That is, the letter urges the Bureau to apply all of TILA’s mortgage provisions to PACE loans (rather than just the ability to repay requirements and liability provisions), while implementing the statutory provisions.