

# A TCPA FOR THE 21<sup>ST</sup> CENTURY: WHY TCPA LAWSUITS ARE ON THE RISE AND WHAT THE FCC SHOULD DO ABOUT IT

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## **Abstract:**

*Litigation related to the Telephone Consumer Protection Act (TCPA) has increased exponentially over the past several years, by more than 60 percent by some estimates in 2012 alone. The law was written more than two decades ago for yesterday's technology to prevent harassing and unwanted calls to consumers. Some plaintiff's lawyers are taking advantage of the well-intended but outdated TCPA statutory language to invent novel legal theories under which to sue companies that are communicating with consumers in ways that were not invented twenty years ago. The Federal Communications Commission must move quickly to clarify the meaning of "capacity" under the TCPA by taking into account today's technology. The FCC should start by clarifying that modern dialing technologies are not "automatic telephone dialing systems" under the TCPA unless they possess the current ability "to store or produce telephone numbers to be called, using a random or sequential number generator [and] to dial such numbers." Without regulatory changes frivolous lawsuits will continue and substantial resources will continue to be wasted, hurting consumers and businesses alike.*

**Keywords:** ATDS, autodialer, FCC, Telephone Consumer Protection Act, TCPA

## **INTRODUCTION**

The Telephone Consumer Protection Act (TCPA) was signed into law in 1991, more than twenty years ago, with the specific purpose of stopping harassing and unwanted phone calls to consumers. Over the past few years there has been an astonishing increase in the number of TCPA lawsuits alleging violations of the TCPA, with one study estimating that TCPA lawsuits rose by 63 percent in 2012 alone (WebRecon, 2012). So what is the cause of this explosive increase in litigation? The answer seems to be a confluence of factors: modern technology allowing companies to reach multitudes of consumers in a short amount of time, no limits on damages combined with litigation that is often unchecked by any common sense application of the statutory language to modern technology, and the lack of an updated regulatory interpretation of the decades-old statutory language that takes into account how consumers and businesses communicate today.

Obviously, technology has changed over the past twenty years, allowing companies to communicate with consumers much more efficiently in many ways, including by text or by dialing numbers using a software system rather than manually. However, each individual communication that a company sends to an individual consumer that is alleged to be without "prior consent" can expose the communicating company to potential liability under the TCPA. The TCPA provides a private right of action for violations and statutory damages in the amount of \$500 for each separate violation and up to \$1,500 for each "willful" violation (47 U.S.C. § 227 (b)(3), (f)(1)). This is for every single individual text or individual call. And, the recipient of a message does not have to show any actual injury. As a result, liability exposure in individual actions can be high and in a single class action lawsuit liability can quickly reach tens of millions of dollars or higher. The TCPA has become fertile ground for nuisance lawsuits because class action lawyers are

often rewarded with quick settlements, even in cases without any merit, simply because litigation uncertainty and the potential financial exposure resulting from a bad decision are too great a risk for a company to bear.

However, the major driving force behind the recent rise of TCPA lawsuits is the legal ambiguity surrounding how the language of the TCPA itself can be squared with today's telephone software and equipment. In 2003, the FCC noted that in enacting the TCPA Congress had not contemplated changing technologies that necessitated revisiting the TCPA after eleven years (Federal Communications Commission, 2003 TCPA Order). Given the rapid pace of technological change, it is little wonder that in 2013 many provisions of the TCPA and the FCC's implementing regulations are even more outdated. The effect of outdated TCPA statutory language and implementing regulations is apparent. In recent years, the filing of TCPA lawsuits has become a growth industry, as aggressive plaintiff's counsel take advantage of ambiguity caused by the regulatory lag in addressing change. The FCC must act quickly to stem this tide in frivolous litigation.

The first section of this article provides a brief overview of the TCPA. Section two highlights several recent lawsuits, many of them class actions, that exploit the language of the TCPA and the regulatory lag in updating its implementing regulations. Section three discusses a major focus of frivolous TCPA lawsuits, the meaning of the term "automatic telephone dialing system" (ATDS or autodialer), and posits that modern dialing technologies do not qualify as an autodialer under the TCPA if they do not have the current ability to store or produce telephone numbers by using a random or sequential number generator. Finally, section four urges the FCC to employ its regulatory authority to sensibly clarify the TCPA in the context of today's technology.

## **THE TELEPHONE CONSUMER PROTECTION ACT AND AUTOMATIC TELEPHONE DIALING SYSTEMS**

The TCPA was passed in 1991 to "protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." (47 U.S.C. § 227(c)(1)). Congress specifically sought to address telemarketing calls to homes that annoyed consumers or made them feel "frightened, threatened and harassed." (Federal Communications Commission, 2003 TCPA Order, p. 14017). And, Congress specifically sought to protect the public from disruptions to essential public safety services caused by random or sequential number generators that were jamming business private branch exchange systems (PBX) and flooding local exchanges. (A PBX is a private telephone network used within a company. Users share a designated number of outside lines for making calls external to the system.)

The TCPA contains a variety of prohibitions on outbound calls, including most calls using an autodialer to a wireless phone number. Under the TCPA, an autodialer is "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 (47 U.S.C. § 227(a)(1)). The TCPA prohibits all calls to wireless numbers made using an autodialer without obtaining prior express consent from the called party. (47 U.S.C. § 227(b)(1)(A)).

The FCC has issued various TCPA rulings over the last two decades, but has not yet tackled the fundamental question of how to define capacity. In 1992, the FCC required telemarketers to maintain do-not-call lists and limit calls to certain hours of the day (Federal Communications Commission, 1992 TCPA Order). Later, in cooperation with the Federal Trade Commission (FTC), the FCC instituted the national do-not-call registry (Federal Communications Commission, 2003 TCPA Order, p. 14017). In 2003, the FCC found that a predictive dialer, which assists

telemarketers in predicting when an agent will be available to take a call, could not be excluded from the definition of an ATDS “simply because it relies on a given set of numbers.” (Federal Communications Commission, 2003 TCPA Order, p. 14092). In that same order, the FCC found that although technologies such as short message service (SMS or text messages) were not yet in use when the TCPA was enacted, the FCC has asserted that such messages are “calls” under the TCPA (p. 14115).

While not the subject of this article, there are several reasons to question the FCC’s conclusion that text messages are “calls” under the TCPA. The TCPA was enacted well before the advent of text messages. While a “call” is not defined in the TCPA, the plain-meaning interpretation is an oral communication, not a written communication. Text messages do not present the same underlying concerns that prompted Congress to enact the TCPA, such as tying up phone lines (Senate Report No. 102-178, 1991, p. 2), or calls that were the basis of numerous consumer complaints. As described by Senator Hollings, “This bill is purely targeted at those calls that are the source of the tremendous amount of consumer complaints at the FCC and at the State commissions around the country – the telemarketing calls placed to the home.” (Congressional Record, 1991). Senator Hollings described such calls as the “scourge of modern society. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall.”

In 2008, the FCC clarified that autodialed prerecorded message calls to wireless numbers that are provided to a creditor in connection with an existing debt are calls made with “prior express consent” of the called party (Federal Communications Commission, ACA Declaratory Ruling, 2008). More recently, in February 2012, the FCC revised its rules to define prior express consent as requiring “written

consent” to make an autodialed or prerecorded telemarketing call to a wireless number (Federal Communications Commission, 2012 TCPA Order). In 2012, the FCC also issued a declaratory ruling that clarified that single-confirmatory text messages sent in response to a consumer’s opt-out request do not violate the TCPA (Federal Communications Commission, SoundBite Declaratory Ruling, 2012). And, in May 2013, the FCC issued a declaratory ruling that sellers may be held vicariously liable under principles of agency for some violations of the TCPA committed by seller’s contractors (Federal Communications Commission, 2013, DISH Network Declaratory Ruling). A number of states have also adopted their own restrictions that are similar to and sometimes more restrictive than the TCPA (Federal Communications Commission, 2003 TCPA Order, pp. 14024-25).

As described in more detail below, given the multiplying number of TCPA lawsuits that are choking the judicial system, the FCC must publicly recognize that dialing technologies without the current ability to dial or produce numbers in a random or sequential fashion cannot be the basis of TCPA liability. The FCC must act quickly to ensure that companies using equipment that not only does not, but cannot send messages in the manner prohibited by the TCPA are no longer subjected to frivolous lawsuits.

## OVERVIEW OF TCPA LAWSUITS

The cases addressed here demonstrate, as some judges have candidly opined, that application of the TCPA without considering common sense or current technology can lead to results that could not have been intended by the statute (Ryabyshchuk v. Citibank, 2012).

In *Mais v. Gulf Coast Collection Bureau* (2013), a federal district court in Florida, in examining the meaning of “consent” under the TCPA, rejected the FCC’s declaration that providing a cell phone number

for contact purposes constitutes “prior express consent” (Federal Communications Commission, 2008, ACA Declaratory Ruling, n. 13). In this case, a patient included a cell phone number in his admissions paperwork for a hospital emergency room, and in the related “Notice of Privacy Practices” form, agreed that the patient’s healthcare information may be released “to bill and collect payment.” When the patient did not pay his bill, a debt collection agency contacted the phone number given to the hospital in an attempt to collect the debt. Despite the language in the Privacy Notice, the court found that the patient had “not directly, clearly and unmistakably stated that the creditor may call him,” and so “he has not given ‘express consent.’”

In *Nelson v. Santandar Consumer USA Inc.* (2013), the court determined that whether the defendant in fact even made automated calls was irrelevant, awarding an individual plaintiff \$571,000 for telephone calls to plaintiff’s cellular phone related to attempts to collect a debt. The defendant argued, in part, that it had made calls through “preview dialing,” in which an employee chooses which numbers to dial, rather than an automated system. The court nonetheless found there was TCPA liability. The court stated that “*how* the defendant made a particular call” was not the deciding factor (even if the call was not automated), but rather, and only, “whether the system it used had the ‘capacity’ to make automated calls (*Nelson v. Santandar Consumer USA Inc.*, 2013, p. 8).

The *Nelson* court relied on a Ninth Circuit Court of Appeals opinion, *Satterfield v. Simon & Schuster, Inc.* (2009), which had held that “a system need not *actually* store, produce, or call randomly or sequentially generated numbers, it need only to have the capacity to do it” to be considered an ATDS. (In *Satterfield*, the class representative plaintiff alleged that Simon and Schuster had sent text advertisements for a newly released novel in violation of the TCPA,

after the plaintiff signed up for free ringtones that required consent to receive promotions from affiliates.) The district court found that because the equipment at issue did not store, produce or call randomly or sequentially generated telephone numbers, it did not constitute ATDS, and therefore TCPA liability did not apply (*Satterfield v. Simon & Schuster, Inc.*, 2007). In overturning the district court, the appellate court emphasized that the “focus must be on whether the equipment has the *capacity*” to store or produce numbers to be called using a random or sequential number generator, not on whether the equipment actually does so (*Satterfield v. Simon & Schuster, Inc.*, 2009). Interestingly, the court found that there was a genuine issue of material fact concerning whether the equipment had the actual requisite capacity. The appellate court remanded the issue to the district court. Before the district court entered rulings on the capacity question, the case settled for \$10 million (*Satterfield v. Simon & Schuster, Inc.*, Settlement Agreement and Final Judgment and Order of Dismissal, 2010).

After *Satterfield*, it was clear that it would no longer be a sufficient defense in TCPA litigation to argue that a system did not actually store, produce or call randomly or sequentially generated telephone numbers. Instead, TCPA defendants have had to argue that their systems lack the actual ability to do so in order to demonstrate that their systems do not qualify as an ATDS. Nevertheless, TCPA defendants in many instances have now also found themselves subject to expensive and lengthy discovery in order to demonstrate that their systems would need to be altered in order to have the ability in the future to store, produce or call randomly or sequentially generated telephone numbers. This clearly goes beyond the statutory language and introduces the current absurdity surrounding much TCPA litigation.

In *Griffith v. Consumer Portfolio Serv.* (2011), the court decided that even if equipment *does not even*

have the ability to store, dial, or generate random or sequential numbers, it is still an ATDS, that can subject the calling party to TCPA liability as long as it is in the category of a “predictive dialer.” In coming to this conclusion, the court relied on the FCC’s 2003 TCPA Order which found that predictive dialers could not be excluded from the definition of ATDS (Federal Communications Commission, 2003 TCPA Order, pp. 14092-93). The *Griffith* court interpreted the FCC’s order to mean that all predictive dialers are ATDS, instead of interpreting the order to mean that a predictive dialer can be an ATDS. As a result, the *Griffith* court found that whether the equipment in question had the “capacity” under the TCPA to store, dial or generate random or sequential numbers was irrelevant as long as the equipment was a “predictive dialer.” Interestingly, in a footnote, the ruling states that to the extent the *Satterfield* could be read to lead to a different result, the court rejects it because *Satterfield* did not analyze or even cite the relevant provisions of the FCC’s 2003 and 2008 orders (*Griffith v. Consumer Portfolio Serv.*, 2011, n. 3)

This set of cases illustrates why TCPA litigation is an endless opportunity for wasteful litigation: Providing a phone number for the express purpose of being contacted in connection with a bill is not sufficient “express consent” to be called under the TCPA. A company can still be liable under the TCPA for using an autodialer, even if the call was not automated but instead made manually. A company does not actually have to make calls using a random or sequential number generator in order to be liable. And, as it turns out, the equipment need not even have the capacity to store numbers or make calls in this way, as long as the equipment is labeled a “predictive dialer.”

By contrast, some courts have recognized that the purpose of the statute and context are important considerations when evaluating the applicability of the TCPA. For example, a federal court in California held

that where a plaintiff had initiated contact and provided his cellular number to Taco Bell, that Taco Bell’s subsequent texts to plaintiff, including a single, confirmatory text in response to an opt-out request, did not violate the TCPA (*Ibey v. Taco Bell Corp.*, 2012). The court reasoned that “[t]o impose liability under the TCPA for a single, confirmatory text message would contravene public policy and the spirit of the statute.” (The *Ibey* court sits in the Ninth Circuit and noted, pursuant to *Satterfield*, that a text message is a “call” under the TCPA and that an ATDS is equipment that has the capacity to store or produce telephone numbers to be called using a random or sequential number generator.) In another case involving similar facts, the court held it is incumbent upon the courts to approach questions of TCPA violations with “a measure of common sense” and that “context is indisputably relevant to determining whether a particular call is actionable under the TCPA” (*Ryabyshchuk v. Citibank*, 2012).

Companies should not face liability based on the luck of the draw of a particular court or judge. Instead, the FCC should act decisively to clarify the meaning of key TCPA provisions, particularly in the context of modern technology used for communications today.

#### **AUTODIALER PROVISION MUST BE UPDATED TO ACCOUNT FOR TODAY’S TECHNOLOGY**

The cases above highlight that in the absence of clear guidance, some judges have applied “common sense” and “spirit of the statute” rationales, while at least one judge candidly opined that application of the TCPA to a widespread practice would produce an “impermissibly absurd and unforeseen result.” However, other judges have done just the opposite by impermissibly overstressing the boundaries of the TCPA as described above, leading to absurd results.

Opportunistic plaintiff attorneys have exploited TCPA ambiguity and will continue to do so absent FCC intervention. One open opportunity for the FCC to

step in is to clarify the meaning of a “capacity” as it relates to an automatic telephone dialing system, the meaning of which is at the core of much TCPA litigation.

As explained above, Congress defined an autodialer as “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” (47 U.S.C. § 227(a)(1)). The TCPA prohibits calls to wireless numbers using an autodialer without obtaining prior express consent from the called party (47 U.S.C. § 227(b)(1)(A)).

Whether or not equipment has the “capacity” to be an autodialer has been one of the most contentious issues under the TCPA. It is estimated that within the past five years the number of class action cases involving the meaning of “capacity” has risen by nearly 700% (Portfolio Associates Comments, 2012). In these cases, appropriately identifying equipment as an “autodialer” is critical for liability determinations (47 U.S.C. § 227 (b)(1)(A)(i)-(iii)). As discussed above, some courts have interpreted this definition to mean that it does not matter whether or not equipment *actually* stores or produces numbers, whether or not calls are made to numbers *randomly or sequentially*, or even if the equipment in question *actually even has the ability* to generate and dial random or sequential numbers. The Commission has contributed to this tortured reading by stating “any equipment that has the specified capacity to generate numbers and dial them without human intervention *regardless of whether the numbers called are randomly or sequentially generated* or come from calling lists” is an autodialer (Federal Communications Commission, SoundBite Declaratory Ruling, 2012, n.5).

Unfortunately, neither Congress nor the FCC has defined “capacity,” leaving a gaping hole that has grown larger and larger as technology has advanced and even basic systems have become more sophisticated. Despite not defining the term capacity,

the FCC has rightfully recognized that capacity must be evaluated in the context of hardware as it is programmed with software (Federal Communications Commission, 2003 TCPA Order, p. 14091). In other words, if software is added to hardware that enables a system to meet the definition of an autodialer then that system has the requisite capacity to be an autodialer under the TCPA. If that is the case, the opposite must then be true: if a system is not programmed with the software that enables it to be an autodialer, then it cannot have the capacity to be an autodialer. This idea is consistent with the FCC’s determination that the purpose of evaluating capacity when making autodialer determinations is to ensure that the prohibition on autodialed calls is not circumvented (p. 14093).

While these acknowledgements make complete sense, they have proven insufficient in providing judges with the guidance they need to determine what capacity means in the first place. As a result, in the absence of a statutory or regulatory definition of capacity or any other clear guidance from the FCC to limit the scope of capacity, judges have been forced to give meaning to this ambiguous term. Companies are currently facing significant risk based on messaging equipment that does not even have the capability to send random or sequential messages, but instead would require hardware or software changes to create that capability.

This has presented enormous obstacles to mobile advertisers because nearly all computers, including smartphones, can be altered or programmed to have the capacity to store and generate random or sequential numbers. Yet some courts have allowed litigation to progress despite any current ability to dial random or sequentially generated numbers.

So the question is how should ATDS be interpreted so that consumers are in fact protected from the privacy intrusions and public emergency concerns that Congress was worried about while at

the same time ensuring companies can properly call mobile numbers without fear of TCPA liability? Put simply, the FCC must adopt boundaries on what constitutes capacity under the TCPA by clarifying it refers solely to a system's "current" capacity at the time a call is made. This definition is consistent with the plain language of the statute, Congressional intent, common sense, good public policy, and the FCC's stated view of capacity.

Clarifying capacity as current ability has received much support in the TCPA docket at the FCC. As several parties have vigorously argued in formal FCC filings, a current, actual capacity reading makes sense because with today's technology nearly any computer, including the ubiquitous smartphone, could be altered at some point in the future to become an ATDS (YouMail Petition, 2013). Clearly, however, Congress could not have intended to attach potential TCPA liability to every smartphone used to dial a wireless number in the absence of prior express consent. To help ensure that courts are appropriately evaluating TCPA liability, the FCC should clarify that ATDS should refer only to equipment that at the time a call is placed has the actual ability to store and generate random or sequential numbers.

This approach is also consistent with the FCC's limited stance on capacity. If a system in its current form contains hardware paired with software that allows it to store and generate random or sequential numbers, then it will still be considered to have the requisite capacity under the current ability clarification. Only if a system does not have actual capability in its current form will it be excluded from the definition of an ATDS.

Such a reading also aligns with the FCC's acknowledged purpose of why a capacity evaluation is important in the first place: if a system lacks any current ability to store or generate random or sequential numbers then there is no way that system could circumvent the prohibition on autodialers. Thus,

under a "current ability" interpretation, a system that lacks the ability to store and autodial random or sequential numbers without human interaction cannot be considered an autodialer unless and until some affirmative action is taken to create such capacity.

Also, applying general principles of statutory construction, there are several aspects of the ATDS definition that support a reading of current ability:

First, a plain language reading of the statute yields a present capability interpretation (i.e., an ATDS is equipment that has the ability to store or produce randomly or sequentially generated telephone numbers to be called and the ability to dial randomly or sequentially generated telephone numbers). Nothing in this implicates future or theoretical alterations.

Second, Congress used the present tense, "has the capacity," when defining ATDS. There is no reason to read anything more into this clear choice of present verb tense. The language does not, for example, say "could have the capacity" or the "theoretical capacity."

Third, a capacity reading that focuses on current, actual ability ensures that all the words in the definition of ATDS are given effect as required by the rules of statutory interpretation. The definition of ATDS states "equipment which has the capacity – (A) to store or produce telephone numbers *to be called* ...." The only reading that gives this phrase effect is that Congress intended the definition of ATDS to apply to equipment that actually has the capacity to be an ATDS in current form (to store or produce telephone numbers *to be called*) instead of the theoretical capacity to become an ATDS at some point in the future (to store or produce telephone numbers *that could be called*). Under basic principles of statutory construction, it would be impermissible to ignore the "to be called" phrase altogether.

Interpreting capacity as current ability also has support in legislative history. The reason Congress

specifically targeted autodialers was to protect the public from being bombarded by unsolicited computerized telemarketing which was believed to be particularly annoying and to shield essential public safety services from being disrupted by lines being tied up by sequential automated calls (Senate Report No. 102-178, 8 October 1991, pp. 4-5). By limiting the scope of capacity to current, actual ability, none of the concerns raised by Congress will be threatened. Equipment that has the current ability to store or produce telephone numbers *to be called* ... will still be prohibited from calling wireless numbers outside of obtaining express consent or in an emergency. Finally, clarifying capacity as current ability will also create additional public policy benefits. Consumers will have access to informational messages that the FCC has acknowledged are “highly desirable” (Federal Communications Commission, 2012 TCPA Order, p. 1841). Businesses will benefit from increased regulatory certainty and a substantially reduced risk of frivolous lawsuits. And judges will be able to dismiss many TCPA cases outright, avoiding the need for expensive and lengthy discovery.

#### **FCC ACTION IS REQUIRED TO MODERNIZE THE TCPA**

The FCC has broad authority to interpret the TCPA and clarify its own rules without an act of Congress, and the agency has shown a willingness to act quickly when properly presented with an urgent matter (Charvat v. Echostar Satellite, 2010, 466-467; Federal Communications Commission, Soundbite Declaratory Ruling, 2012, p. 15394).

In November 2012, the FCC issued a Declaratory Ruling that demonstrates the importance of modernizing the TCPA (Federal Communications Commission, SoundBite Declaratory Ruling, 2012, p. 15392). In that ruling, the agency affirmed that a one-time text message sent to confirm a consumer’s request to opt-out of receiving future messages does not violate the TCPA so long as the message conforms

to certain requirements (p. 15391). At the time, many class action lawsuits had been filed or threatened alleging that an individual’s prior express consent to receive text messages from a company ends at the point the person sends an opt-out request to the sender and that any message sent thereafter confirming receipt of the opt-out request is sent without consent in violation of the TCPA. Under this argument, a company choosing to send a one-time message confirming that a request not to receive any further messages has been received and will be honored, as required by industry best practices, would actually subject themselves to millions of dollars of potential liability.

Fortunately, the FCC quickly recognized the need to take action, and issued a ruling less than nine months after the Petition for Declaratory Ruling was filed (SoundBite Petition, 2012). The Commission held that a consumer’s original prior express consent to receive text messages from a sender includes consent to receive a final, one-time text message that confirms that the opt-out request was received (SoundBite Declaratory Ruling, 2012, p. 15394). The Commission found that these messages are consistent with consumer expectations, noting that a review of consumer complaints from July 2011 to July 2012 did not uncover any complaints about receiving a confirmatory text message, but did uncover complaints from consumers about not receiving these messages (p. 15395). In a statement accompanying the ruling, Commissioner Ajit Pai referred to this decision as “common-sense” and voiced hope that the ruling would “end the litigation that has punished some companies for doing the right thing, as well as the threat of litigation that has deterred others from adopting sound marketing practice” (p. 15401).

There are numerous vehicles available to the FCC to resolve the question of capacity and the definition of autodialer. Currently pending before the FCC are two unresolved public notices that sought comment



on separate petitions filed by GroupMe and Communications Innovators. GroupMe specifically asks the FCC to clarify the meaning of the terms “automatic telephone dialing system” and “capacity,” and argues that the definition of autodialer should exclude technologies with only theoretical capacity (and not actual capacity) to dial random or sequential numbers (Federal Communications Commission, GroupMe Public Notice, 2012). Communication Innovators similarly requests that the FCC clarify through a declaratory ruling that predictive dialers that are not used for telemarketing purposes and do not have the current ability to generate and dial random or sequential numbers are not “automatic telephone dialing systems” (Federal Communications Commission, Communication Innovators Public Notice, 2012).

The Professional Association for Customer Engagements’ (“PACE”) recent Petition for Reconsideration and YouMail’s Petition for Expedited Declaratory Ruling also both provide opportunities for the FCC to resolve these questions. In its Petition regarding the 2012 TCPA Order, PACE requests, among other things, that the FCC clarify that a predictive dialer only constitutes an autodialer if it has the capacity to store or produce telephone numbers to be called using a “random or sequential number generator” (PACE Petition for Reconsideration, 2012). The association also asks the FCC to define the term “random or sequential number generator” (p. 4). Similarly, in its recent Petition, YouMail urges the FCC to declare that its software, which enables the sending of an optional text message confirming receipt of a caller’s voicemail, is not an autodialer because it lacks current capacity to “store or produce numbers to be called using a random or sequential number generation (YouMail Petition, 2012, pp. 9-11). The company prophetically explains that “without some guidance, the evolution of the definition of the term ATDS is limited only by class counsel’s imagination, or

worse yet, will come to encompass every type of telephonic device in existence, thereby preventing anyone from calling a cellular phone number without express consent or except in an emergency” (p. 11).

Taking into account how equipment actually works is consistent with the FCC’s recognition in 2008 that “current industry practice and technology” is a factor when determining how to apply TCPA restrictions (Federal Communications Commission, ACA Declaratory Ruling, 2008, p. 566). As reflected in the FCC record submitted since that time, the capacity of today’s dialing technology has changed and does not universally have the ability to “store or produce telephone numbers to be called, using a random or sequential number generator [and] to dial such numbers.” The FCC should evaluate the meaning of capacity in the context of current technology and clarify that equipment is not ATDS unless it has the current ability to “store or produce telephone numbers to be called, using a random or sequential number generator [and] to dial such numbers.”

## CONCLUSION

The FCC should take decisive action to clarify that “capacity” in the context of evaluating the definition of an ATDS under the TCPA means “current ability.” This clarification will make a significant dent in the overwhelming increase in frivolous TCPA lawsuits and will help ensure that consumers receive the kind of communications they want and expect, businesses are able to act confidently and without fear of being subject to wasteful litigation, and judges are able to quickly dismiss cases that clearly fall outside the scope of the TCPA.

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