TEXT MESSAGING AND THE REQUIREMENTS OF THE TELEPHONE CONSUMER PROTECTION ACT

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Ian C. Ballon
Greenberg Traurig, LLP

Silicon Valley:	Los Angeles:
1900 University Avenue, 5th Fl.	1840 Century Park East, Ste. 1900
East Palo Alto, CA 914303	Los Angeles, CA 90067
Direct Dial: (650) 289-7881	Direct Dial: (310) 586-6575
Direct Fax: (650) 462-7881	Direct Fax: (310) 586-0575

Ballon@gtlaw.com
<www.ianballon.net>
LinkedIn, Twitter, Facebook: IanBallon

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GT GreenbergTraurig

Ian C. Ballon

Shareholder
Internet, Intellectual Property & Technology Litigation

Admitted: California, District of Columbia and Maryland
Second, Third, Fourth, Fifth, Seventh, Ninth, Eleventh and Federal Circuits
U.S. Supreme Court
JD, LLM, CIPP

Ballon@gtlaw.com
LinkedIn, Twitter, Facebook

Silicon Valley
1900 University Avenue
5th Floor
East Palo Alto, CA 94303
T 650.289.7881
F 650.462.7881

Los Angeles
1840 Century Park East
Los Angeles, CA 90067
T 310.586.6575
F 310.586.0575

Ian C. Ballon is Co-Chair of Greenberg Traurig LLP's Global Intellectual Property & Technology Practice Group and represents companies in the defense of data privacy, cybersecurity breach and TCPA class action suits, in addition to other technology, Internet and mobile-related litigation. A list of recent cases may be found at http://www.gtlaw.com/Ian-C-Ballon-experience.

Ian is also the author of the leading treatise on internet and mobile law, *E-Commerce and Internet Law: Treatise with Forms 2d edition,* the 5-volume set published by West (www.IanBallon.net), which includes extensive coverage of data privacy and security breach issues, including a novel transactional approach to handling security breaches and exhaustive treatment of trends in data privacy, security breach and TCPA class action suits. In addition, he serves as Executive Director of Stanford University Law School's Center for E-Commerce, which hosts the annual Best Practices Conference where lawyers, scholars and judges are regularly featured and interact. He also chairs PLI's annual Advanced Defending Data Privacy, Security Breach and TCPA Class Action Litigation conference.

Ian was named the Lawyer of the Year for Information Technology Law in the 2019, 2018, 2016 and 2013 editions of Best Lawyers in America and was recognized as the 2012 New Media Lawyer of the Year by the Century City Bar Association. In 2018 he was recognized by *World Trademark Review* for his trademark litigation practice and was named one of the Top 20 Cyber/Artificial Intelligence Lawyers by the *Los Angeles and San Francisco Daily Journal*. He received the "Trailblazer" Award, Intellectual Property, 2017 from *The National Law Journal* and he has been recognized as a "Groundbreaker" in *The Recorder*'s 2017 Litigation Departments of the Year Awards for winning a series of TCPA cases. In addition, he was the recipient of the California State Bar Intellectual Property Law section's Vanguard Award for significant contributions to the development of intellectual property law (http://ipsection.calbar.ca.gov/IntellectualPropertyLaw/IPVanguardAwards.aspx). He is listed in Legal 500 U.S., The Best Lawyers in America (in the areas of information technology and intellectual property) and Chambers and Partners USA Guide in the areas of privacy and data security and information technology. He has been recognized as one of the Top 75 intellectual property litigators in California by the *Los Angeles and San Francisco Daily Journal* in every year that the list has been published (2009 through 2018). Mr. Ballon was also listed in *Variety's* "Legal Impact Report: 50 Game-Changing Attorneys" (2012) and was recognized as one of the top 100 lawyers in L.A. by the *Los Angeles Business Journal*. Mr. Ballon also holds the CIPP/US certification from the International Association of Privacy Professionals (IAPP).

29.16 Text Messaging and the Requirements of the Telephone Consumer Protection Act (TCPA)

The Telephone Consumer Protection Act ("TCPA")[1] was enacted to place "restrictions on unsolicited, automated telephone calls to the home," and to limit "certain uses of facsimile (fax) machines and automatic dialers."[2] Congress, in enacting the TCPA, was concerned about "the increasing number of telemarketing firms in the business of placing telephone calls, and the advance of technology which makes automated phone calls more cost-effective."[3] The statute and legislative history focus largely on *unsolicited telemarketing* and *bulk communications*. The TCPA seeks to address "intrusive nuisance calls" and "certain practices invasive of privacy."[4] Among other things, it includes express provisions governing commercial fax advertisements.[5] It also subsequently has been construed by the FCC to apply to text messages,[6] which did not exist at the time of the TCPA's enactment in 1991. As a consequence, courts generally have held that a text message is considered a *call* within the meaning of the TCPA.[7] The application of the TCPA to text message marketing was clarified and expanded in a 138 page omnibus

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[Section 29.16]

[1]47 U.S.C.A. § 227.

[2]S. Rep. 102-178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968.

[3]S. Rep. 102-178, at 2 (1991); *see also* 47 U.S.C.A. § 227(b)(1)(B) (prohibiting the initiation of a telephone call to residences using an artificial or prerecorded voice without prior consent); 47 U.S.C.A. § 227(b)(1)(C) (prohibiting unsolicited fax advertisements subject to certain exceptions); Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, 2395 (1991) (incorporating Congressional findings expressing concerns about telemarketing such as "the increased use of cost-effective telemarketing techniques," and that "[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety").

[4]*Mims v. Arrow Financial Services, LLC*, 565 U.S. 368, 271 (2012); *see also ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 514 (3d Cir. 1998) ("Enacted in 1991 as part of the Federal Communications Act, the TCPA seeks to deal with an increasingly common nuisance—telemarketing.").

[5]*See* 47 U.S.C.A. § 227(b)(1)(C).

[6]*See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14115 ¶ 165 (2003).

[7]*See, e.g.*, *Gager v. Dell Financial Services, LLC*, 727 F.3d 265, 269 n.2 (3d Cir. 2013); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009); *Murphy v. DCI Biologicals Orlando, LLC*, 797 F.3d 1302,

Order that the FCC issued on July 10, 2015, which addressed nineteen separate petitions and implicitly abrogated some court rulings that predate it.[8] Portions of that Order, however, were struck down by the D.C. Circuit as "arbitrary and capricious."[9] Which regulations remain in effect and which ones are no longer effective is addressed at length in this section. It is also likely that the FCC will issue further clarifications of the scope of the TCPA after this update is published in late 2018.

The TCPA makes it unlawful to "initiate" a call using an artificial or prerecorded voice to a home phone number[10] or to "make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice."[11] The TCPA does not define what it means to *make* or *initiate* a call—*i.e.*, to call someone or, pursuant to section 227(b)(1)(A), to send them a text mes-

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1305 (11th Cir. 2015).

[8]*See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961 (2015). This Order, containing declaratory rulings, is referred to in this chapter as the 2015 Order or 2015 declaratory rulings.

[9]*See ACA Int'l v. FCC*, 855 F.3d 687 (Fed. Cir. 2018). The D.C. Circuit heard the appeals of eleven separate petitions, which were consolidated before the D.C. Circuit by the Judicial Panel on Multidistrict Litigation, and therefore the D.C. Circuit's is binding on all circuits. *See, e.g.*, *King v. Time Warner Cable Inc.*, 894 F.3d 473, 476 n.3 (2d Cir. 2018); *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1049 (9th Cir 2018); *Keyes v. Ocwen Loan Servicing, LLC*, Case No. 17-cv-11492, 2018 WL 3914707, at *6 (E.D. Mich. Aug. 16, 2018); *Herrick v. GoDaddy.com, LLC*, 312 F. Supp. 3d 792, 797 n.5 (D. Ariz. 2018), *citing Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057 (9th Cir. 2008). As explained by the Second Circuit:

> Under the Hobbs Act, the courts of appeals "ha[ve] exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders" of the FCC that are reviewable under 47 U.S.C. § 402(a). 28 U.S.C. § 2342(1). When agency regulations are challenged in more than one court of appeals, as they were in the present case, 28 U.S.C. § 2112 requires that the multidistrict litigation panel consolidate the petitions and assign them to a single circuit. Challenges to the 2015 Order were assigned to the D.C. Circuit, which thereby became "the sole forum for addressing . . . the validity of the FCC's" order. *GTE S., Inc. v. Morrison*, 199 F.3d 733, 743 (4th Cir. 1999); *see also MCI Telecomms. Corp. v. U.S. W. Commc'ns*, 204 F.3d 1262, 1267 (9th Cir. 2000). After hearing argument in this case, we held the appeal in abeyance pending resolution of the challenges to the validity of the FCC's 2015 Order.

King v. Time Warner Cable Inc., 894 F.3d 473, 476 n.3 (2d Cir. 2018).

[10]47 U.S.C.A. § 227(b)(1)(B).

[11]47 U.S.C.A. § 227(b)(1)(A).

sage—but the FCC has clarified that, although no specific set of factors need be considered, the terms suggest some "direct connection between a person or entity and the making of a call."[12] In evaluating whether a party is the *initiator* or *maker* of a call, the FCC looks "to the totality of the facts and circumstances surrounding the placing of a particular call to determine: 1) who took the steps necessary to physically place the call; and 2) whether another person or entity was so involved in placing the call as to be deemed to have initiated it, considering the goals and purposes of the TCPA."[13]

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[12]*Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7980-81 ¶¶ 29-30 (2015).

[13]*Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7980 ¶ 30 (2015). For example, the Commission ruled that the provider of the YouMail mobile app that automatically sent a text message in the form of an "auto-reply" in response to a voicemail message left for the user by a calling party did not *make* any of the automatic text messages sent by its users where the YouMail app user determined "whether to send the auto-reply text messages, which categories of callers should receive auto-replies, how the user's name should appear in the auto-reply, and whether to include a message with the auto-reply (such as when the called party will be available to return the call)." *Id.* at 7981 ¶ 31. In that case, the auto-reply was sent only if four criteria were met: (1) the YouMail user had set the app's options to send an auto-reply to some group of callers; (2) the calling party fell into that group; (3) the calling party had not previously opted out of receiving auto-replies from YouMail; and (4) "sufficient 'caller id' information" was available to send the text." *Id.* The fact that a YouMail auto-reply message included a link to the YouMail website, where a recipient could access identifying information and instructions for how to opt out from receiving future auto-reply messages from YouMail users, did not transform YouMail into the maker or initiator of the message. *See id.* at 7982 ¶ 33 (explaining that You Mail was not a maker or initiator merely because it had "some role, however minor, in the causal chain that results in the making of a telephone call.").

By contrast, the FCC held that Glide, a provider of video streaming services, was the maker of invitational text messages sent automatically to every contact in its app user's contact list with little or no obvious control by the user. *Id.* at 7982-83 ¶¶ 34-35. The Commission explained that "the app user plays no discernible role in deciding whether to send the invitational text messages, to whom to send them, or what to say in them" and contrasted this with the YouMail app, "where the app user determines whether auto-reply messages are sent in response to a caller leaving a message for the app user, and the content of those messages." *Id.* at 7983 ¶ 35.

On the other hand, the FCC ruled that invitational text messages sent by users of the TextMe app (inviting recipients to install the app so

Consent and Revocation of Consent

Like the CAN-SPAM Act,[14] which regulates commercial email, the TCPA does not *prohibit* commercial text messages. Calls and text messages are permissible so long as they are directed to numbers not on the National Do-Not-Call Registry.[15] However, when an *automatic telephone dialing*

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that the user and recipient could "text for free") were not calls made or initiated by TextMe, where, to send an invitational message, TextMe users were required to engage "in a multi-step process" in which users had to make "a number of affirmative choices" to invite third parties to become app users. Specifically, they had to: (1) tap a button that read "invite your friends"; (2) choose whether to invite all friends or merely individually selected contacts; and (3) choose to send the invitational text message by selecting another button. *Id.* at 7983-84 ¶¶ 36-37. Although the FCC expressed concern about TextMe's control over the contents of the invitational message, TextMe was found not to be the maker or initiator because it was "not programming its cloud-based dialer to dial any call, but 'merely ha[d] some role, however minor, in the causal chain that result[ed] in the making of a telephone call.' " *Id.* at 7984 ¶ 37, *quoting Matter of Joint Petition Filed by DISH Network, LLC*, 28 FCC Rcd 6574, 6583 ¶ 26 (2013).

Based on these determinations, courts have held in several cases that the operator of a platform that allows users to send SMS messages to third parties is not the maker or initiator of the messages sent using the platform. *See, e.g.*, *Serban v. CarGurus, Inc.*, No. 16 C 2531, 2018 WL 1293226, at *3-5 (N.D. Ill. Mar. 12, 2018) (entering summary judgment for the defendant, finding that a third party user, not the defendant, mistyped plaintiff's phone number into the CarGurus' app, requesting to receive information about a specific car, where CarGurus' messaging functionality was similar to YouMail's, and "simply sends a text message to that caller, and only to that caller" and where, like "YouMail and TextMe, instead of playing an active role in choosing what content to send to which numbers, CarGurus 'merely has some role, however minor, in the causal chain that results in the making of a telephone call.' "); *Reichman v. Poshmark, Inc.*, 267 F. Supp. 3d 1278, 1285-86 (S.D. Cal. May 15, 2017) (the app user, not the app, made calls within the meaning of the TCPA, where absent the app user taking certain affirmative steps, the text message would not have been sent); *Warciak v. Nikil, Inc.*, No. 16 C 5731, 2017 WL 1093162, at *3 (N.D. Ill. Mar. 23, 2017) (finding that the user had initiated text message, where the user was required to take several affirmative steps to generate text messages through the app, including deciding whether a text message was sent and to whom).

[14]15 U.S.C.A. §§ 7701 to 7713; *supra* § 29.03.

[15]*See* 15 U.S.C.A. §§ 6101 *et seq.* (the Do-Not-Call Implementation Act); 47 U.S.C.A. §§ 227(c)(3)(F) (authorizing the FCC to issue regulations prohibiting "any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database"), 227(c)(5) (establishing a cause of action for any user "who has received more than one telephone call within any 12–month period by or

system or *ATDS* is used to call or send text messages, calls or texts may only be directed to wireless recipients who have consented to receive them (and not revoked their consent). For text messages and calls to cellphones where an ATDS is used, prior opt-in consent is required in most cases. Pursuant to FCC regulations that took effect in October 2013, *prior express written consent* must be obtained for telemarketing calls sent from an ATDS to a mobile device, including text messages, although the form of consent required is relaxed for purely informational calls and text messages.[16] Even where consent has been provided, it may be withdrawn at any time.[17]

Consent may be limited in scope or unrestricted and may be revoked entirely or merely partially.[18]

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on behalf of the same entity" in violation of FCC regulations promulgated under that section); 47 C.F.R. §§ 64.1200(c) (implementing section 227(c)(3)(F) and prohibiting "initiat[ing] any telephone solicitation to . . . [a] residential telephone subscriber who has registered his or her telephone number on the [NDNCR] . . . ."), 64.1200(d) (requiring any person who initiates calls for telemarketing purposes to institute and maintain do-not-call procedures, including a written policy, available upon demand, and to make certain disclosures when calling residential or wireless numbers). Only telemarketing calls may lead to liability for calls to numbers on the Do-Not-Call registry. *See Mejia v. Time Warner Cable Inc.*, 15-CV-6445 (JPO), 2017 WL 3278926, at *10-11 (S.D.N.Y. Aug. 1, 2017) (granting partial summary judgment to Time Warner where plaintiff could not present evidence that the alleged calls were telemarketing calls).

[16]*See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991,* 27 FCC Rcd. 1830 (2012). The TCPA is silent on the type of consent required, which allowed the FCC discretion, consistent with legislative intent, to prescribe the form of express consent required. *See id.* at 1838.

[17]*See Gager v. Dell Financial Services, LLC*, 727 F.3d 265, 270–72 (3d Cir. 2013); *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1253 (11th Cir. 2014).

[18]*See, e.g.*, *Schweitzer v. Comenity Bank*, 866 F.3d 1273, 1276-78 (11th Cir. 2017) (reversing the entry of summary judgment for the defendant-bank where the plaintiff alleged she had partially revoked her consent, holding that "the TCPA allows a consumer to provide limited, i.e., restricted, consent for the receipt of automated calls. It follows that unlimited consent, once given, can also be partially revoked as to future automated calls under the TCPA."); *Lawrence v. Bayview Loan Servicing, LLC,* 666 F. App'x 875, 878-80 (11th Cir. 2016) (applying common law principles of consent and affirming summary judgment for the defendant-bank where the plaintiff provided general consent to be called under the TCPA by providing his phone number to the plaintiff without qualification or restriction; while "a consumer can orally revoke consent, and consent

Because the rules governing consent are more involved, and require consideration of the contents of a given message—whether it is a marketing message or informational—and are subject to a number of specific exceptions, it is helpful analytically to first address the rules for revocation of consent before considering in greater detail the various ways in which consent may be obtained and the type of consent that may be required for a given communication.

The FCC clarified in 2015 that "[c]onsumers have a right to revoke consent, using any reasonable method including orally or in writing."[19]

For a revocation to be effective, "the TCPA requires only that the called party clearly express his or her desire not to receive further calls."[20] Revocation will be found where the sender of the text message "kn[ew] or ha[d] reason to know that the other is no longer willing for him to continue" sending messages.[21] Further, companies may not purport to restrict what constitutes a *reasonable method* (such as, for

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can be limited by the particular circumstances under which it was granted[,] . . . it is equally clear that the provision of a mobile phone number, without limiting instructions, suffices to establish the consumer's general consent to be called under the TCPA.").

[19]*Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7996 ¶ 64 (2015); *see also id.* at 7965 ("Consumers may revoke consent at any time and through any reasonable means . . . ."), 7993-99 ¶¶ 55-70 (addressing revocation of consent). Revocation may be determined by traditional common law standards. *See id.* at 7994 ¶ 58; *see also, e.g.*, *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1047-48 (9th Cir. 2017) (holding that the plaintiff "did not clearly express his desire not to receive further text messages . . . ," and therefore did not revoke his consent, merely by cancelling his gym membership, without also "plainly telling Defendants not to contact him on his cell phone when he called to cancel his gym membership or messaging 'STOP' after receiving the first text message" or taking other steps to notify the defendant to stop contacting him, because "[r]evocation of consent must be clearly made and express a desire not to be called or texted.").

The FCC's 2015 declaratory ruling that a called party may revoke consent at any time and through any reasonable means—orally or in writing—that clearly expresses a desire not to receive further messages, was upheld when challenged on appeal. *See ACA Int'l v. FCC*, 855 F.3d 687, 709-10 (Fed. Cir. 2018).

[20]*Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7997 ¶ 67 (2015).

[21]*Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7994 ¶ 58 n.223 (2015) (quoting Restatement (Second) of Torts § 892A, cmt. i (1979) ("[C]onsent is terminated when the actor knows or has reason to know that the other is no longer willing for

example, requiring that consent be withdrawn by texting "stop" or emailing the company at a particular address).[22]

While a consumer who has freely and unilaterally given his or her informed consent to be contacted may later revoke that consent, the Second Circuit has held that if "consent is given, not gratuitously, but as bargained-for consideration in a bilateral contract" then, by contrast, it may not be unilaterally revoked.[23]

Subsequently, in connection with a legal challenge to the FCC's 2015 Order pending before the D.C. Circuit, the Commission conceded that its 2015 declaratory ruling on revocation did not address whether contracting parties could select a particular revocation procedure by mutual consent.[24] Hence, the D.C. Circuit explained that while the 2015 declaratory ruling "precludes unilateral imposition of revocation rules by callers; it does not address revocation rules mutually adopted by contracting parties. Nothing in the Commission's order thus should be understood to speak to parties' ability to agree upon revocation procedures."[25]

As a practical matter, this means that companies may be permitted to set terms for revocation in connection with a mutual agreement. Otherwise, they may request, but not require, that users employ particular methods for revocation, and should be vigilant to make sure that requests that come in through other means are directed to the right place. While *unreasonable* means of revocation would not be enforceable, what is or is not reasonable would be determined in litigation. Hence, it is a better practice for companies to

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him to continue the particular conduct.")).

[22] *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7996 ¶ 63 (2015) (ruling that "callers may not control consumers' ability to revoke consent."); *see also id.* at 79970 ¶ 47 ("A caller may not limit the manner in which revocation may occur."). The Commission noted, however, that "consumers must be able to respond to an unwanted call—using either a reasonable oral method or a reasonable method in writing—to prevent future calls." *Id.* at 7996 ¶ 64.

[23] *Reyes v. Lincoln Automotive Financial Services*, 861 F.3d 51, 56-59 (2d Cir. 2017) (applying common law principles in holding that the plaintiff could not unilaterally withdraw the consent to receive calls he had previously given by an express provision in a contract to lease an automobile from Lincoln).

[24] *See ACA Int'l v. FCC*, 855 F.3d 687, 710 (Fed. Cir. 2018) (quoting the FCC's brief to the D.C. Circuit).

[25] *See ACA Int'l v. FCC*, 855 F.3d 687, 710 (Fed. Cir. 2018).

seek to identify and act on all requests received by a company.

Consent may be obtained or revoked by either the *subscriber* (the person assigned a telephone number and billed for a call) or, if different, the non-subscriber customary user of a telephone number.[26] For a given phone number, the subscriber and customary user often are different people.[27]

Consequently, companies may have difficulty keeping track of revocations of consent, which reasonably could come by mail, fax, email, phone, text or via an in person communication with an employee, from either a subscriber or a customary user, and where revocation can be found in circumstances where a company does not have actual knowledge but merely *should have*[28] *known* about the revocation.[29]

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[26]*Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 8000-01 ¶¶ 73-74 (2015).

[27]A *subscriber* is the actual customer, whereas the user of a phone may or may not be the subscriber. For example, as of 2013, more than 40% of AT&T subscribers were on group plans. *See Sherman v. Yahoo! Inc.*, No. 13cv0041–GPC–WVG, 2015 WL 5604400, at *7 (S.D. Cal. Sept. 23, 2015). "While a parent subscriber most likely could provide notice to his child, if the subscriber was a business, there is a reasonable chance the employee who used the phone [years earlier] . . . is no longer with the company or simply cannot be identified." *Id.* Likewise, the subscriber and user of a given number, where different, could be former boyfriends and girlfriends or formerly married couples who are now divorced.

[28]*See City Select Auto Sales Inc. v. David Randall Associates, Inc.*, 885 F.3d 154, 162 (3d Cir. 2018) (affirming the lower court's finding that the co-owner of the defendant entity, which had been held liable for sending faxes in violation of the TCPA, was not personally liable).

[29]The complexity associated with evaluating whether individual members of a putative class have provided or revoked consent may make it more difficult for a plaintiff to certify a class action in a TCPA case where individual questions of whether consent was provided and by whom (the subscriber or the user, if different), or reasonably revoked, and if so by whom, could predominate over class questions (and in some cases, as a consequence, the composition of the class could also be unascertainable). *See, e.g.*, *True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 931-33 (9th Cir. 2018) (finding common questions predominant in a TCPA case based on unsolicited fax advertisements, with respect to consent based on the provision of fax numbers on product registration forms or by entering into defendant's end-user license agreement (EULA), but affirming denial of class certification of a proposed subclass whose members asserted consent based on individual communications and personal messages); *Sherman v. Yahoo! Inc.*, No. 13cv0041–GPC–WVG, 2015 WL 5604400, at *9-11 & n.18 (S.D. Cal. Sept. 23, 2015) (denying class certification in a TCPA texting case in part because the proposed class was

In this regard, the FCC has clarified that "the caller's intent does not bear on liability . . . ."[30]

Prior express consent may be established by various means, including evidence that a person provided his or her cellular telephone number to the person or entity who called or sent a text message.[31] Verbal consent is also a permissible

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subject to different website or mobile Terms of Service, depending on when putative class members first registered with Yahoo and whether and under what circumstances they subsequently assented to various different versions). In a putative class action suit, it is the plaintiff's burden to show that issues that may be analyzed on a classwide basis—regardless of who bears the burden of proof—predominate over issues requiring individualized proof. Fed. R. Civ. P. 23(b)(3); *see also Wal-Mart Stores v. Dukes*, 564 U.S. 338, 349-52 (2011); *supra* § 25.07[2] (analyzing class certification issues, including ascertainability); *see generally* Ian C. Ballon, Lori Chang, Nina Boyajian & Justin Barton, *A "Silver Linings Playbook" for Defending TCPA Class Actions,* Class Action Litigation Reporter (BNA July 1, 2016).

Class certification issues are addressed in greater detail later in this section, in connection with litigation issues, and in chapter 25 (in section 25.07[2]).

[30]*Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 8003 ¶ 80 (2015).

[31]*See, e.g.*, *Zani v. Rite Aid Headquarters Corp.*, 725 F. App'x 41, 42-44 (2d Cir. 2018) (affirming summary judgment for the defendant where the defendant provided prior express consent to receive flu shot reminders by providing his cell phone number to a pharmacy and signing the privacy notice consenting to receive messages, where the flu shot reminder calls were "health care messages" sent by an associate within the meaning of the TCPA exemption); *Latner v. Mount Sinai Health System, Inc.*, 879 F.3d 52, 55 (2d Cir. 2018) (affirming judgment on the pleadings for the defendant where the plaintiff provided his cell phone number to Mount Sinai Health System and signed a consent form acknowledging receipt of privacy notices, prior to receiving a text message sent by a third party hired by Mount Sinai, reminding him to make an appointment for a flu shot); *Baisden v. Credit Adjustments, Inc.*, 813 F.3d 338, 342-46 (6th Cir. 2016) (finding consent when the plaintiffs provided their cell phone numbers to one entity as part of a commercial transaction, which then provided the numbers to another related entity from which they incurred a debt that was "part and parcel" of the reason they gave their numbers in the first place); *Hill v. Homeward Residential, Inc.,* 799 F.3d 544, 551-52 (6th Cir. 2015) ("a person gives his 'prior express consent' under the [TCPA] if he gives a company his number before it calls him."); *Blow v. Bijora, Inc.*, 855 F.3d 793, 803-05 (7th Cir. 2017) (affirming summary judgment for the defendant where the plaintiff gave her cell number to the defendant on several occasions and where the texts she received were reasonably related to the purpose for which she provided her cell number, over plaintiff's objection that she consented to receive discounts but not marketing messages, where the cards she filled out stated that her information could be

used to provide exclusive information and special offers, where she in fact received one welcome message, 41 promotional or discount offer messages, and 18 texts announcing special events, and where Blow received initial messages with instructions on how to unsubscribe and never did so); *Fober v. Management & Technology Consultants, LLC*, 886 F.3d 789, 792-95 (9th Cir. 2018) (affirming summary judgment for the defendant because, by completing and submitting a form enrolling in her health plan and thereby agreeing that the plan could disclose her information "for purposes of treatment, payment and health plan operations, including but not limited to, utilization management, *quality control*, disease or case management programs[,]" the plaintiff had given prior express consent to receive patient satisfaction survey calls from a survey company retained by the health plan); *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1044-46 (9th Cir. 2017) (rejecting the argument that a consumer consents to be contacted "for any reason" when he or she provides a telephone number, but holding that the plaintiff had provided consent by providing his telephone number to his gym and had not revoked that consent by cancelling his gym membership, where the text message he subsequently received was part of a campaign to get former or inactive gym members to return and therefore related to the reason that the plaintiff had supplied his number in the first place, because "an effective consent is one that relates to the same subject matter as is covered by the challenged calls or text messages."); *Aderhold v. Car2go N.A., LLC,* 668 F. App'x 795 (9th Cir. 2016) (affirming dismissal of a putative TCPA class action suit where the named representative alleged that car2go sent him a text message as part of its online registration process where he had entered his mobile number on the website to receive a validation code by text to complete the registration process); *Baird v. Sabre, Inc.,* 636 F. App'x 715 (9th Cir. 2016) (affirming the lower court's ruling that the plaintiff expressly consented to receive the text message at issue in that case by providing her cellular telephone number to Hawaiian Airlines while making a flight reservation; the text message at issue was sent by a vendor of Hawaiian Airlines about the plaintiff's reservation); *Roberts v. PayPal, Inc.,* 612 F. App'x 478 (9th Cir. 2015) (affirming summary judgment for PayPal where the plaintiff provided his cellular phone number to PayPal); *Lawrence v. Bayview Loan Servicing, LLC*, 666 F. App'x 875, 878-80 (11th Cir. 2016) (applying common law principles of consent and affirming summary judgment for the defendant-bank where the plaintiff provided general consent to be called under the TCPA by providing his phone number to the plaintiff without qualification or restriction; while "a consumer can orally revoke consent, and consent can be limited by the particular circumstances under which it was granted[,] . . . it is equally clear that the provision of a mobile phone number, without limiting instructions, suffices to establish the consumer's general consent to be called under the TCPA."); *Murphy v. DCI Biologicals Orlando, LLC,* 797 F.3d 1302, 1308 (11th Cir. 2015) (holding that the plaintiff gave prior express consent when he provided his cell phone number when asked for his contact information before donating blood); *Mais v. Gulf Coast Collection Bureau,* 768 F.3d 1110, 1113-14, 1122-24 (11th Cir. 2014) (finding consent where the plaintiff's wife (i) gave his cell phone number to a hospital representative when he was admitted for emergency treatment,

means of obtaining prior express consent.[32]

Consent also potentially may be obtained in some instances through an intermediary as long as the intermediary has actually obtained consent.[33] In a declaratory ruling involving GroupMe (and subsequently in its omnibus 2015

(ii) signed a form in which she expressly agreed and acknowledged that the hospital could "release [plaintiff's] healthcare information for purposes of treatment, payment or healthcare operations," and (iii) received a privacy notice stating that the hospital "may also use and disclose health information about your treatment and services to bill and collect payment"); *Wick v. Twilio Inc.*, No. C16-00914RSL, 2017 WL 2964855, at *5 (W.D. Wash. July 12, 2017) (granting Twilio's motion to dismiss based on consent where plaintiff entered his identifying information on defendant's website, agreed to the offer's terms and conditions, and then clicked on "Rush My Order"; "[w]hatever his subjective intent regarding making a purchase, the text message he received was aimed at completing a commercial transaction that he had initiated and for which he had provided his phone number."); *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8752, 8769 (1992) (stating that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary."); *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 21 FCC Rcd. 3787, 3812 ¶ 49 (2006) (noting, as an example, that a "travel itinerary for a trip a customer has agreed to take or is in the process of negotiating is not an unsolicited advertisement."); *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991,* 23 FCC Rcd. 559, 564-65 (2008) (clarifying that "autodialed and prerecorded message calls to wireless numbers provided by the called party in connection with an existing debt are made with the 'prior express consent' of the called party").

[32]*Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7971 ¶ 9 (2015) ("if a caller uses an autodialer or prerecorded message to make a non-emergency call to a wireless phone, the caller must have obtained the consumer's prior express consent or face liability for violating the TCPA. Prior express consent for these calls must be in writing if the message is telemarketing, but can be either oral or written if the call is informational.").

[33]*Forber v. Management & Technology Consultants, LLC*, 886 F.3d 789, 792 (9th Cir. 2018) (affirming the entry of summary judgment for the defendant, holding that a survey company had consent to call the plaintiff where it got her number through an intermediary (her insurer) which had received her consent, where the plaintiff had taken steps to make her number available to the defendant by authorizing the insurer to make her number available to others for certain purposes); *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7790-91 ¶ 49 (2015).

The 2015 Order also addresses more specifically consent requirements in connection with various apps that allow users to send text messages. *See id.* at 7978- 84, 7990-92 ¶¶ 25-37, 48-52.

Order), the FCC ruled that a texting platform had consent to send a text message to an individual when that individual provided her number to a third party user of the texting platform.[34] The Commission cautioned that, "while the scope of consent must be determined upon the facts of each situation, it was reasonable to interpret the TCPA to permit a texter such as GroupMe to send texts based on the consent obtained by and conveyed through an intermediary (the group organizer), with the caveat that if consent was not actually obtained, . . ." the texting platform such as GroupMe would remain liable.[35] The FCC Ruling concluded:

> For non-telemarketing and non-advertising calls, express consent can be demonstrated by the called party giving prior express oral or written consent or, in the absence of instructions to the contrary, by giving his or her wireless number to the person initiating the autodialed or prerecorded call.[36]

For any text message that "includes or introduces an advertisement[37] or constitutes telemarketing,[38]" the FCC

It further considers internet-to-phone text message services. *See id.* at 8017-22 ¶¶ 108-122. Internet-to-phone services potentially could be subject to regulation under both the TCPA and the CAN-SPAM Act. *See id.* at 8021-22 ¶¶ 120-22. The requirements of the CAN-SPAM Act, 15 U.S.C.A. §§ 7701 to 7713, are separately addressed in section 29.03.

[34]*See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7990-92 ¶¶ 49-52 (2015); *GroupMe, Inc./Skype Communications S.A.R.L. Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, 29 FCC Rcd 3442, 3444-45 ¶¶ 7-8 (2014).

[35]*See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7990-91 ¶ 49 (2015).

[36]*See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7991-92 ¶ 52 (2015). The FCC further ruled:

> By itself, the fact that a phone number is in a contact list fails to provide any evidence that the subscriber to that number even gave the number to the owner of the contact list. To the contrary, the owner of the contact list could have obtained the number by any variety of means other than the subscriber providing it. . . . Standing alone, the fact that a particular telephone number is present in a contact list is not sufficient to prove that the subscriber to that number gave oral or written prior express consent to be called by the owner of the wireless telephone or by . . . [the texting platform].

Id.

[37]An *advertisement* is defined as "any material advertising the commercial availability or quality of any property, goods, or services." 47 C.F.R. § 64.1200(f)(1).

[38]A communication is considered to involve *telemarketing* if it is undertaken "for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services." 47 C.F.R. § 64.1200(f)(12); *see*

requires *prior express written consent*[39] of the "called party" (*i.e.,* the recipient), which must be signed by the consumer (including an electronic signature "using any medium or format permitted by the E-SIGN Act[40] . . ."[41]) and be sufficient to show that he or she:

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also, e.g., *Broking v. Green Brook Buick GMC Suzuki*, Civil Action No. 15-1847 (BRM)(LHG), 2017 WL 3610490, at *8 (D.N.J. Aug. 22, 2017) (entering summary judgment for defendant Green Brook Buick, holding that seeking to cultivate goodwill from a former customer is "too attenuated . . . to render a robocall a telemarketing message" in a case where a car dealership contacted a former customer whose car it had serviced, who had given the dealership his number); *Smith v. Blue Shield of California Life & Health Co.*, 228 F. Supp. 3d 1056, 1067-68 (C.D. Cal. 2017) (holding that the defendant's automated, pre-dialed call to a consumer's cellular phone did not constitute "telemarketing" for which the consumer's prior written consent was required under the TCPA because a business's "overarching incentive to retain customers" is not enough to "transform" a communication into telemarketing).

[39]*Prior express written consent* means

> an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.
>
> (i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that:
>
> (A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and
>
> (B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.
>
> (ii) The term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

47 C.F.R. § 64.1200(f)(8). The FCC Enforcement Division has further expressed the view that prior express written consent requires a company to obtain the specific phone number for which consent is being given and cannot broadly apply to any phone number assigned to a given user. *See* Letter from Travis LeBlanc to Louise Pentland, 2015 WL 3645783 (June 11, 2015).

[40]15 U.S.C.A. §§ 7001 *et seq.*; *see generally supra* § 15.02.

[41]*Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991,* 27 FCC Rcd. 1830, 1884 (2012). The FCC has expressly found that "consent obtained via an email, website form, text message, telephone keypress, or voice recording are in compliance with the E-SIGN Act and would satisfy the written consent requirement . . . ." *Id.*; *see generally supra* § 15.02 (analyzing the federal e-SIGN law and its interaction with state electronic signature laws).

- received "clear and conspicuous disclosure"[42] of the consequences of providing the requested consent (*i.e.,* that the consumer will receive future calls that deliver prerecorded messages by or on behalf of a specific seller); and
- having received this information, agrees unambiguously to receive such calls at a telephone number the consumer designates.[43]

Where consent language is buried, prior express written

In *Winner v. Kohl's Department Stores, Inc.*, Civil Action No. 16-1541, 2017 WL 3535038, at *5-7 (E.D. Pa. Aug. 17, 2017), the court held that Kohl's had obtained prior express written consent pursuant to a "call to action" that complied with e-Sign. In that case, in response to an advertisement for discount coupons inviting consumers to text "APP" to Kohl's, plaintiffs Winner and Jennings had sent Kohl's a text message, containing the word "APP" from their mobile phone numbers. The advertisement to which they were responding stated that, (1) by doing so, the customer "will receive two to three auto-dialed text messages" to set up their participation; (2) "Participation is not required to make a purchase;" (3) customers could "Reply HELP for help, reply STOP to cancel;" (4) message and data rates may apply; and (5) the terms and conditions of the program were available via a link to Kohl's website. In response to Winner's "APP" text, Kohl's transmitted two text messages to Winner's phone number, one of which instructed her to text "SAVE30" if she wished to participate in the calls to action program. Kohl's then received from Ms. Winner's phone a text message reading "SAVE30." The same was true for Jennings. Each telemarketing text Kohl's sent thereafter instructed them to text "STOP" if they wished to stop receiving the telemarketing texts. The court held that the text "SAVE30" constituted an electronic signature affirmatively consenting to receive marketing messages under terms that were "clear and conspicuous" and which made clear that a purchase was not necessary to participate in the program.

A subsequent court enforced an arbitration agreement incorporated by reference via a link to a call to action. *See Greenberg v. Doctors Associates, Inc.*, __ F. Supp. 3d __, 2018 WL 4927910 (S.D. Fla. 2018) (compelling arbitration of a TCPA putative class action suit where the plaintiff acknowledged that he was presented with an offer for a free 6-inch sub and accepted the terms by opting in to receive text messages from Subway "after seeing Subway's call to action" by texting "Offers2" to 78929 "to join Subway's text club" and plaintiff admitted that the Subway offer contained a "disclaimer" stating that Terms and Conditions "would be found at subway.com/subwayroot/TermsOfUse.aspx.").

[42]The term *clear and conspicuous* means "a notice that would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or other disclosures." 47 C.F.R. § 64.1200(f)(3).

[43]47 C.F.R. § 64.1200(a)(2); *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991,* 27 FCC Rcd. 1830, 1884 (2012).

consent will not be found.[44]

The written agreement contemplated by the regulations must be obtained "without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service."[45]

A communication memorializing prior express written consent should include an acknowledgement that the person providing consent was not required to do so as a condition of purchasing any good or service and, where prior express written consent is sought electronically, it should contain confirmation that the action taken to manifest assent is intended to serve as an electronic signature (consistent with the requirements of e-SIGN[46]).

The rationale for requiring only prior express consent for non-marketing calls, rather than prior express *written* consent, is to not inhibit communications that consumers may wish to receive.[47]

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[44]*See, e.g., Sullivan v. All Web Leads, Inc.,* Case No. 17 C 1307, 2017 WL 2378079, at *7-8 (N.D. Ill. June 1, 2017) (holding, in denying defendant's motion to dismiss, that the defendant failed to obtain prior express written consent, as required by the TCPA to send certain marketing text messages, where the consent language was buried below the "Submit" button such that a reasonable consumer would assume he or she merely was consenting to submit information from a health questionnaire in order to obtain a health insurance quote).

[45]*Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991,* 27 FCC Rcd. 1830, 1884 (2012). In *Greenberg v. Doctors Associates, Inc.*, __ F. Supp. 3d __, 2018 WL 4927910, at *2 (S.D. Fla. 2018), the court rejected the plaintiff's argument that inclusion of the standard disclaimer required to comply with this FCC regulation that "consent is not a condition of making any purchase" made the terms of a call to action, and its incorporated arbitration agreement, ambiguous, and therefore unenforceable.

[46]15 U.S.C.A. §§ 7001 *et seq.*; *see generally supra* § 15.02[2].

[47]*See, e.g., Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 FCC Rcd. 1830, 1841 (2012) ("While we observe the increasing pervasiveness of telemarketing, we also acknowledge that wireless services offer access to information that consumers find highly desirable and thus do not want to discourage purely informational messages. As was roundly noted in the comments, wireless use has expanded tremendously since passage of the TCPA in 1991. We believe that requiring prior express written consent for all robocalls to wireless numbers would serve as a disincentive to the provision of services on which consumers have come to rely.") (footnote omitted); *GroupMe, Inc./Skype Comm'cns S.A.R.L. Petition for Expedited Declaratory Ruling*, 29 FCC Rcd. 3442, 3442 ¶ 1 (2014) ("The TCPA and our rules help consumers avoid unwanted com-

To the extent not expressly addressed by FCC regulations, the scope and extent of consent (and revocation) should be determined by common law principles under applicable state law.[48]

FCC regulations include two narrow exceptions where *prior express consent*, rather than prior express *written* consent, is all that is required for text messages that include or introduce an advertisement or which constitute telemarketing: (1) when the call or text is made or sent by or on behalf of a tax-exempt nonprofit organization; or (2) if the call or text delivers a "health care" message made by, or on behalf of, a "covered entity" or its "business associate" (as those terms are defined in the HIPAA Privacy Rule[49]).[50]

Certain free calls about time-sensitive financial and healthcare issues are exempted entirely from the TCPA's consumer consent requirements, subject to an opt-out right

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munications that can represent annoying intrusions into daily life and, in some cases, can cost them financially. At the same time, our goal is to make sure the TCPA is not interpreted to inhibit communications consumers may want and that do not implicate the harms TCPA was designed to prevent.").

[48]*See Lawrence v. Bayview Loan Servicing, LLC,* 666 F. App'x 875, 880 (11th Cir. 2016), *citing Osorio v. State Farm Bank*, 746 F.3d 1242, 1255 (11th Cir. 2014).

[49]45 C.F.R. § 160.103.

[50]47 C.F.R. § 64.1200(a)(2); *see also, e.g.*, *Zani v. Rite Aid Headquarters Corp.*, 725 F. App'x 41, 42-44 (2d Cir. 2018) (affirming summary judgment for the defendant where the defendant provided prior express consent to receive flu shot reminders by providing his cell phone number to a pharmacy and signing the privacy notice consenting to receive messages, and because flu shot reminder calls were "health care messages" sent by an associate within the meaning of the TCPA exemption); *Latner v. Mount Sinai Health System, Inc.*, 879 F.3d 52, 54-55 (2d Cir. 2018) (affirming judgment on the pleadings for the defendant where the plaintiff provided his cell phone number to Mount Sinai Health System and signed a consent form acknowledging receipt of privacy notices, prior to receiving a text message sent by a third party hired by Mount Sinai, reminding him to make an appointment for a flu shot, because a flu shot reminder is a health care message delivered by or on behalf of a covered entity or business associate within the meaning of the TCPA); *Sullivan v. All Web Leads, Inc.*, Case No. 17 C 1307, 2017 WL 2378079, at *5-6 (N.D. Ill. June 1, 2017) (holding that the defendant's lead generating calls did not qualify as "health care messages."). By contrast, there is no health care exemption for faxes. *Zani v. Rite Aid Headquarters Corp.*, 725 F. App'x 41, 44 (2d Cir. 2018), *citing Kohll's Pharmacy & Homecare, Inc.*, 31 FCC Rcd. 13289, 13292-93 ¶¶ 8-10 (Dec. 21, 2016).

and limits on how many calls may be made.[51] These exceptions apply to messages intended to prevent fraudulent transactions or identity theft by providing security breach notices[52] and fraud warnings. A similar exemption was granted for calls or text messages sent in connection with money transfers. In granting these exceptions, the FCC took note of American Bankers Association research suggesting that 98 percent of text messages are opened within three minutes of delivery.[53]

Special exemptions also were created for calls to people who are incapacitated or experiencing medical issues or for healthcare-related information such as appointment confirmations and reminders.[54] And, of course, emergency calls or texts are expressly permitted under the statute.[55]

The regulations provide that "should any question about the consent arise, the seller will bear the burden of demonstrating that a clear and conspicuous disclosure was provided and that unambiguous consent was obtained."[56] For this reason, where it is unclear whether a message constitutes *advertising* or *telemarketing*—in which case prior express *written* consent, rather than merely prior express consent, generally is required—it may be a good practice for a company to assume that the more stringent requirements for prior express written consent will apply. Similarly, if it is unclear if a message will be sent using an ATDS, it is safer to assume that an ATDS will be used and that the requirements for some form of prior express consent apply (even though a similar presumption does not apply with respect to the use of an ATDS).

For "non-telemarketing, informational" calls and text messages, such as those sent by or on behalf of tax-exempt nonprofit organizations, calls for political purposes and calls for

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[51] *See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 8023-32 ¶¶ 125-48 (2015).

[52] Laws governing security breach notifications are separately analyzed in section 27.08 and 27.09.

[53] *See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 8024 ¶ 128 (2015).

[54] *See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 8028-32 ¶¶ 140-48 (2015).

[55] *See* 47 U.S.C.A. § 227 (b)(1)(A).

[56] *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991,* 27 FCC Rcd. 1830, 1884 (2012).

other noncommercial purposes, including those that deliver purely informational messages such as school closings (or which update consumers on airline flight schedules or warn them about fraudulent bank account activity[57]), oral consent is sufficient for calls or text messages sent to wireless phones (and no prior consent is required at all for calls to residential wireline consumers).[58] Prior written consent also is not required for calls made to a wireless customer by his or her wireless carrier if the customer is not charged.[59] As a practical matter, however, businesses that send these types of text messages should keep adequate records to prove that consent was obtained, in the event of litigation.

The FCC has recognized a narrow exception for one-time, on-demand text messages sent in response to a consumer's specific request.[60]

The TCPA also permits a one-time confirmatory opt-out text message, confirming a consumer's request that no further text messages be sent when the sender of the text message previously had obtained prior express consent to send text messages using an ATDS.[61] In *Ibey v. Taco Bell Corp.*,[62] Judge Marilyn Huff of the Southern District of California ruled more broadly that the "TCPA does not impose liability for a single, confirmatory text message . . . ."[63] She explained that "[t]o impose liability under the TCPA for a

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[57]*Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991,* 27 FCC Rcd. 1830, 1875 (2012) (Statement of FCC Chairman Julius Genachowski) (providing examples of "informational" calls).

[58]*Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991,* 27 FCC Rcd. 1830, 1841 (2012). Companies should retain evidence that a request was made, in the event of litigation.

[59]*Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991,* 27 FCC Rcd. 1830, 1840 (2012).

[60]*See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 8015-16 ¶¶ 103-06 (2015). This exception applies if the one-time text is sent in response to a consumer's request and: (1) is requested by the consumer; (2) is a one-time only message sent *immediately* in response to a specific consumer request; and (3) contains only the information requested by the consumer with no other marketing or advertising information. *Id.* at 8016 ¶ 106.

[61]*Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, SoundBite Communications, Inc.*, 27 FCC Rcd. 15391 (2012).

[62]*Ibey v. Taco Bell Corp.*, No. 12-CV-0583-H (WVG), 2012 WL 2401972 (S.D. Cal. June 18, 2012), *appeal dismissed*, Docket No. 12-56482 (9th Cir. Nov. 28, 2012).

[63]*Ibey v. Taco Bell Corp.*, 12-CV-0583-H WVG, 2012 WL 2401972, at

single, confirmatory text message would contravene public policy and the spirit of the statute—prevention of unsolicited telemarketing in a bulk format."[64]

Where a message contains both information and an advertisement, the FCC considers the communication to be a telemarketing communication.[65]

Which specific regulations apply, if any, thus depend on the circumstances surrounding how a message is sent (either with or without use of an *automatic telephone dialing system*), to whom (someone who has or has not provided either prior express or prior express written consent or who has revoked consent, or someone who requested a one-time on-demand text, for example), by whom (a tax exempt nonprofit; a covered entity or business associate within the meaning of HIPAA; a bank or health care provider communicating with a customer or patient; or some other person or entity) and based on its contents (such as general telemarketing or advertising; telemarketing or advertising involving health care matters; "non-telemarketing, informational" messages; messages sent about a security breach, identity theft, a fraud alert or communications about medical issues; a single confirmatory message; or messages sent

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*3 (S.D. Cal. June 18, 2012), *appeal dismissed*, Docket No. 12-56482 (9th Cir. Nov. 28, 2012). *Taco Bell* was decided before the FCC addressed more narrowly the issue of confirmatory text messages. In *Taco Bell,* the plaintiff, an employee of the plaintiff's law firm, had opted-in to receive commercial text messages from Taco Bell, then opted-out, and then sued when he received a final text message confirming receipt of his opt out request.

[64]*Ibey v. Taco Bell Corp.*, 12-CV-0583-H WVG, 2012 WL 2401972, at *3 (S.D. Cal. June 18, 2012), *appeal dismissed*, Docket No. 12-56482 (9th Cir. Nov. 28, 2012). The Ninth Circuit explained that "the purpose and history of the TCPA indicate that Congress was trying to prohibit the use of ATDSs in a manner that would be an invasion of privacy." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009). With respect to ATDSs, the House Report accompanying the statute underscores that

> these systems are used to make millions of calls every day. Each system has the capacity to automatically dial as many as 1,000 phones per day. Telemarketers often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations, as well as unlisted telephone numbers.

H.R. Rep. 102-317, at 10 (1991).

[65]*Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991,* 27 FCC Rcd. 1830, 1842 (2012); *see also Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14098 (2003) (addressing " 'dual-purpose' robocalls").

"for emergency purposes . . ."[66]).

Despite best efforts, companies may nonetheless risk exposure when sending a text message using an ATDS to a number that has been reassigned since the time consent was obtained. The FCC, in its 2015 declaratory ruling, had held 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) . . . ."[67] The FCC also created a very narrow safe harbor that allowed a one-call exception to a reassigned number, when the current subscriber or customary user of the number had not consented, if the caller did not have actual or constructive knowledge of the reassignment.[68] Both of these provisions were invalidated as arbitrary and capricious by the D.C. Circuit.[69] It is therefore unclear as of the time of this update whether or to what extent calls or text messages sent to reassigned numbers may be actionable where consent had been obtained from the prior subscriber or customary user. The FCC has invited comments on this issue and is likely to clarify whether the "called party" means the intended recipient or the person subscribing to the called number (or customary user) at the time the call is made (even if it was a previous subscriber who had provided intent) and whether there should be any sort of safe harbor.[70] The FCC has also sought comment on potential methods for requiring service providers to report

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[66]*See* 47 U.S.C.A. § 227(b)(1)(A). Regulation of the contents of a text message may raise First Amendment issues.

[67]*Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7999 ¶ 72 (2015).

[68]*See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7965, 8006-11 ¶¶ 85-93 (2015). The FCC made clear that:

> The caller, and not the called party, bears the burden of demonstrating: (1) that he had a reasonable basis to believe he had consent to make the call, and (2) that he did not have actual or constructive knowledge of reassignment prior to or at the time of this one-additional-call window we recognize as an opportunity for callers to discover reassignment.

Id. at 8007 ¶ 85.

[69]*See ACA Int'l v. FCC*, 855 F.3d 687, 704-09 (Fed. Cir. 2018).

[70]*See* FCC, *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision*, 83 Fed. Reg. 26284, 26285-26286 (June 5, 2018). Among other things, the FCC has sought commentary on whether the "called party" refers to (a) "the person the caller expected to reach," (b) the party the caller reasonably expected to reach, (c) "the person actually reached, the wireless number's present-day

information about number reassignments, to reduce unwanted calls.[71]

In light of the current uncertainty, companies engaged in mobile marketing should subscribe to services that provide carrier data on reassigned numbers and limit the frequency of their calls or texts that use an ATDS to avoid running afoul of the TCPA.[72]

Comparing The TCPA To The CAN-SPAM Act

Like the CAN-SPAM Act,[73] the TCPA does not comprehensively regulate all text messages or even all unsolicited text

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subscriber after reassignment" and/or (d) a " 'customary user' ('such as a close relative on a subscriber's family calling plan'), rather than the subscriber. The FCC also sought comments on what interpretation best implements the statute in light of *ACA Int'l v. FCC*, 855 F.3d 687 (Fed. Cir. 2018).

The FCC further sought commentary on whether it should maintain its reasonable-reliance approach to prior express consent and whether a reassigned numbers safe harbor was necessary (and if so, what the specific statutory authority is for such a safe harbor). Further, it asked for comment on whether the Commission could, consistent with the statute, interpret the term "called party" to mean different things in differing contexts and how the Commission's proceeding to establish a reassigned numbers database should impact its interpretation, if at all.

[71]*See In re Advanced Methods to Target and Eliminate Unlawful Robocalls, Second Notice of Inquiry*, 32 FCC Rcd. 6007, 6010 ¶ 9 (2017).

[72]The FCC acknowledged, in its 2015 declaratory ruling, that there was no publicly available directory of reassigned numbers and that "marketplace solutions for identifying reassigned numbers are not perfect . . . ." *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7999-8000 ¶¶ 71, 72 n.257 (2015).

In connection with announcing the one call safe harbor (which has since been invalidated by the D.C. Circuit), the FCC had suggested that callers could ask consumers to notify them when they switched numbers, "creating, through a contract or other private agreement, an obligation for the person giving consent to notify the caller when the number has been relinquished." *Id.* at 8007-08 ¶ 86. Whether consumers would honor this obligation (or even recall that it had been undertaken) is questionable. It is likewise doubtful that a caller would have any effective recourse if a consumer were to breach this obligation.

The Commission clarified that "the TCPA does not prohibit calls to reassigned wireless numbers, or any wrong number call for that matter. Rather, it prescribes the method by which callers must protect consumers *if they choose* to make calls using an autodialer, a prerecorded voice, or an artificial voice. In other words, nothing in the TCPA prevents callers from manually dialing. Callers could remove doubt by making a single call to the consumer to confirm identity." *Id.* at 8006 ¶ 84 (emphasis in original).

[73]15 U.S.C.A. §§ 7701 to 7713; *supra* § 29.03.

messages. Text messages sent manually from one phone to another or through technologies other than an ATDS are not subject to the TCPA's consent requirements (although they are still subject to compliance with national Do-Not-Call list requirements). Businesses that do not use an ATDS nonetheless may find it a "best practice" to comply with FCC consent guidelines to avoid litigation (and the cost of proving in litigation that an ATDS was not used, which may be significant).

Unlike the CAN-SPAM Act, the TCPA requires opt-in consent ("prior express consent"[74] or, for marketing messages, prior express written consent[75]) to receive text messages that are subject to the Act, rather than simply requiring that recipients be given the opportunity to opt out as in the case of email messages subject to the CAN-SPAM Act.[76] For text messages, the TCPA does not include an exception for messages sent where there is an "established business relationship," even though such an exception exists under the TCPA for fax transmissions.[77]

Also unlike the CAN-SPAM Act which only authorizes suits by *Internet access services* or government agencies,[78] the TCPA provides for a private cause of action. Marketing by text message therefore can be riskier and potentially more expensive than email marketing because of the number of putative class action suits filed by plaintiffs' lawyers against both advertisers and text message marketing firms or platform providers seeking to recoup statutory damages of up to $500 per violation[79] (potentially increased as high as $1,500 per violation, in the discretion of the court, if a

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[74]*See* 47 U.S.C.A. § 227(b)(1)(A).

[75]*See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 FCC Rcd. 1830 (2012). The requirements for *prior express consent* and *prior express written consent* are discussed earlier in this section.

[76]*See supra* § 29.03.

[77]*See* 47 U.S.C.A. § 227(b)(1)(C)(i).

[78]*See supra* § 29.03[7].

[79]*See* 47 U.S.C.A. § 227(b)(3). The statute authorizes up to $500 *per violation*. Plaintiffs' lawyers typically argue that each message is a separate violation. Given how many lawsuits have been filed there is surprisingly little case law explaining how damages should be calculated in a TCPA case—because so few cases actually go to trial or result in a judgment on the merits for the plaintiff. Most cases are either won by the defendant or settled (either because the amount of damages is *de minimis*

defendant "willfully or knowingly" violated the statute),[80] whenever an unwanted message is received (and in many of these lawsuits, even when the messages sent complied with the TCPA or are not subject to its regulations). The lure of large statutory damages has made TCPA litigation a cottage industry for plaintiffs' counsel.

Defining an Automatic Telephone Dialing System (ATDS)

For text messages and voice calls to cellular telephones, the TCPA prohibits any person from making

> any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using

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compared to the cost of litigation or because liability is clear and the defendant's potential exposure is substantial). Attorneys' fees are not recoverable under the Act.

In one unreported decision, Northern District of California Judge Laurel Beeler held that a plaintiff may only recover a single award per text message involving multiple violations of the same provision of the TCPA but could recover more than one award for the same message, if more than one provision of the statute was violated. *See Drew v. Lexington Consumer Advocacy, LLC*, Case No. 16-cv-00200-LB, 2016 WL 1559717, at *11-13 (N.D. Cal. Apr. 18, 2016) (awarding $3,500 (or seven statutory damage awards of $500) in a TCPA texting case involving six calls, following entry of a default judgment, where the court found two separate violations of the same do-not-call regulations promulgated pursuant to section 227(c) (which, she held, justified one award pursuant to section 227(c)) and where each of the calls violated section 227(b)).

[80] 47 U.S.C.A. § 227(b)(3). A *willful or knowing* violation, to establish potential entitlement to a discretionary award of treble damages, requires, in the Eleventh Circuit, that a plaintiff show not only that the defendant knew that it was making a call or sending a fax, but that it knew that its conduct constituted the alleged violations of the TCPA. *See Lary v. Trinity Physician Financial & Insurance Servs*, 780 F.3d 1101, 1106-07 (11th Cir. 2015). The court reasoned that if the statute were construed to merely require that a defendant knew it was making a call, there would be "almost no room" for violations that were not deemed willful or knowing. *Id.* at 1107, *citing Harris v. World Fin. Network Nat'l Bank*, 867 F. Supp. 2d 888, 895 (E.D. Mich. 2012) (rejecting plaintiff's assertion that the term could be satisfied merely by evidence that a call was willfully or knowingly made because virtually all calls would be characterized as willful or knowing, including calls to a wrong number; "Such a broad application of 'willfull' or 'knowing' would significantly diminish the statute's distinction between violations that do not require an intent, and those willfull and knowing violations that congress intended to punish more severely); *see also Haysbert v. Navient Solutions, Inc.*, Case No. CV 15–4144 PSG (Ex), 2016 WL 890297, at *10 (C.D. Cal. Mar. 8, 2016) (following *Lary v. Trinity Physician* on the definition of *willfully or knowingly* in a TCPA case).

> any automatic telephone dialing system or an artificial or prerecorded voice . . .
> (iii) to any telephone number assigned to a paging service, cellular telephone service,[81] specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call . . . .[82]

An *automatic telephone dialing system*, or *ATDS*, is defined 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."[83] What constitutes an ATDS is subject to differing legal standards because of the sheer volume of litigation and the reality that with so many new cases filed[84] some judges will simply get it wrong. The better view is that unless a text message is sent (or a call is placed to a cellular telephone number) by equipment or technology that has the capacity to send messages (or call) to numbers that were randomly or sequentially generated, the message will not be actionable because it cannot have been sent by an ATDS.[85]

Where ownership of different components of dialing equip-

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[81]A call to a VoIP service (such as Google Voice VoIP) that a user configures to forward calls to his or her cellular phone is not a "telephone number assigned to a . . . cellular telephone number" within the meaning of 47 U.S.C.A. § 227(b)(1)(A)(iii). *See Karle v. Southwest Credit Systems*, Civil Action No. 14–30058–MGM, 2015 WL 5025449, at *6 (D. Mass. June 22, 2015) (recommending the entry of summary judgment for the defendant where the evidence "demonstrates that the calls were made to a telephone number assigned to a Comcast VoIP home telephone line" and the plaintiff introduced no evidence that it was charged for the calls at issue to come within the provision for "any service for which the called party is charged for the call"), *report and recommendation adopted*, 2015 WL 5031966 (D. Mass. Aug. 25, 2015). VoIP technology allows a person to make voice calls using a broadband Internet connection instead of a regular (or analog) telephone line. *See Karle*, 2015 WL 5025449, at *2 n.4.

[82]47 U.S.C.A. § 227 (b)(1)(A).

[83]47 U.S.C.A. § 227(a)(1).

[84]There were 4,860 new TCPA suits filed in 2016, and 4,392 in 2017. *See* Web Recon LLC, *2016 Year in Review: FDCPA Down, FCRA & TCPA Up* (Jan. 2017), https://webrecon.com/2016-year-in-review-fdcpa-down-fcra-tcpa-up/; *WebRecon LLC, WebRecon Stats for Dec 2017 & Year In Review*, https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review/; *see also In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 8073 (Pai, Comm'r, dissenting) (noting that the TCPA has "become the poster child for lawsuit abuse, with the number of TCPA cases filed each year skyrocketing from 14 in 2008 to 1,908 in the first nine months of 2014.").

[85]*See, e.g.*, *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018) (af-

firming summary judgment for the defendant, holding that plaintiff could not present evidence of capacity to generate numbers randomly or sequentially *and dial* those numbers; explaining that, after *ACA*, the "key" question under the TCPA is whether the equipment "had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers"); *Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 373 & nn.1, 2 (3d Cir. 2015) (holding that the TCPA only applies where a message is sent by a system that (a) has the capacity to generate numbers randomly or sequentially and to "store or produce" those numbers, and (b) has the capacity to dial those numbers); *Gary v. TrueBlue, Inc.*, Case No. 17-cv-10544, 2018 WL 4931980, at *3-6 (E.D. Mich. Oct. 11, 2018) (granting defendant's motion for summary judgment based on the plain terms of the statute, holding that the TCPA did not prohibit the use of devices with automated features or "Internet-to-text" messages unless the device used was an ATDS, and ruling that defendant could not raise a genuine issue of fact over whether the WorkAlert system, combined with third party aggregator mBlox, had the capacity to "randomly or sequentially dial or text phone numbers."); *Fleming v. Associated Credit Services, Inc.*, Civ. No. 16-3382 (KM) (MAH), 2018 WL 4562460, at *9 (D.N.J. Sept. 21, 2018) (following *Dominguez* and *Pinkus* in holding that after *ACA,* a court must apply only the plain terms of the statute in evaluating what constitutes an ATDS and opining that "[t]he phrase 'using a random or sequential number generator,' . . . applies to the manner in which the numbers make their way onto the list—not to the manner in which the numbers are dialed once they are on the list . . ."); *Keyes v. Ocwen Loan Servicing, LLC,* Case No. 17-cv-11492, 2018 WL 3914707, at *7-8 (E.D. Mich. Aug. 16, 2018) (granting partial summary judgment for the defendant; "a device must be able to call and generate numbers randomly or sequentially to qualify as an ATDS. Put another way, simply calling from a set list is not enough for equipment to constitute an autodialer."); *Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 937-39 (N.D. Ill. 2018) (construing the statute as requiring number generation, consistent with *ACA*); *Lord v. Kisling, Nestico & Redick, LLC*, 1:17-CV-01739, 2018 WL 3391941, at *2-3 (N.D. Ohio July 12, 2018) (dismissing plaintiff's claim; "For the telephone system KNR allegedly uses to constitute a violation of the TCPA, Plaintiffs' claim must allege plausible facts that KNR's system has the ability to store or produce telephone numbers using a random or sequential number generator."); *Marshall v. CBE Group, Inc.,* Case No.: 2:16–cv–02406–GMN–NJK, 2018 WL 1567852, at *5 (D. Nev. Mar. 30, 2018) (holding that in light of *ACA,* the court was required to apply only the statutory language, in granting summary judgment for the defendant; holding that the system at issue was not an ATDS); *Emanuel v. Los Angeles Lakers, Inc.,* CV 12-9936-GW SHX, 2013 WL 1719035, at *4 n.3 (C.D. Cal. Apr. 18, 2013) (granting the defendant's motion to dismiss and holding that the plaintiff failed to adequately plead that the defendant used an ATDS); *Ibey v. Taco Bell Corp.*, No. 12-CV-0583-H (WVG), 2012 WL 2401972 (S.D. Cal. June 18, 2012) (granting defendant's motion to dismiss with leave to amend to allege facts supporting use of an ATDS but expressing skepticism that an ATDS was used based on the facts alleged and holding that the TCPA cannot be read to impose liability for a single, confirmatory opt-out message),

ment work in concert to constitute an ATDS but ownership of the components is divided among different people or entities, those people or entities collectively are responsible for complying with the TCPA.[86]

Nevertheless, "courts broadly recognize that not every text message or call constitutes an actionable offense."[87]

The Ninth Circuit has held that the definition of ATDS is "clear and unambiguous," and therefore the court's "inquiry begins with the statutory text, and ends there as well . . . ."[88] There is, however, uncertainty about the contours of what constitutes an ATDS, including a circuit split on the issue,[89] which is likely to be clarified by the FCC in response to a 2018 request for comment[90] (if not otherwise addressed by the courts).

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appeal dismissed, Docket No. 12-56482 (9th Cir. Nov. 28, 2012). *But see Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 & n.8 (9th Cir. 2018) (disagreeing with the Third Circuit that number generation is required by the plain terms of the statute, holding that the definition of an ATDS is ambiguous, and construing the statute to define an ATDS as including even equipment that merely has the capacity to dial from storage).

[86]*See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7972 ¶ 10 (2015) ("callers cannot avoid obtaining consent by dividing ownership of pieces of dialing equipment that work in concert among multiple entities."); *see generally id.* at 7977-78 ¶¶ 23-24.

[87]*Ryabyshchuck v. Citibank (S. Dakota) N.A.*, 11-CV-1236-IEG WVG, 2012 WL 5379143 at *2 (S.D. Cal. Oct. 30, 2012) (collecting cases), *appeal dismissed*, Docket No. 12-57090 (9th Cir. Feb. 4, 2013).

[88]*Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951, 953 (9th Cir. 2009). *But see Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1051 (9th Cir. 2018) (holding the term to be ambiguous in a subsequent opinion).

[89]*Compare Dominguez v. Yahoo, Inc.,* 894 F.3d 116, 121 (3d Cir. 2018) (holding that, after *ACA,* the "key" question under the TCPA is whether the equipment "had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers"); *Dominguez v. Yahoo, Inc.,* 629 F. App'x. 368, 372, 373 n.2 (3d Cir. 2015) ("an autodialer must be able to store or produce numbers that themselves are randomly or sequentially generated") *with Marks v. Crunch San Diego, LLC,* 904 F.3d 1041, 1052 & n.8 (9th Cir. 2018) (disagreeing with the Third Circuit that number generation is required for equipment to constitute an ATDS; construing the statute to require *either* (1) storage of numbers to be called *or* (2) the production of numbers to be called, using a random or sequential number generator; rather than storage or production of numbers to be called, using a random or sequential number generator).

[90]*See* FCC, *Consumer and Governmental Affairs Bureau Seeks Com-*

An ATDS "is equipment with the 'capacity' to perform each of two enumerated functions: (i) storing or producing telephone numbers 'using a random or sequential number generator' and (ii) dialing those numbers."[91] Prior FCC rulings had injected uncertainty, however, over whether the FCC had intended to expand the statutory definition of an ATDS beyond the plain terms of the statute, to encompass merely dialing from a list of numbers. Although the Third Circuit had held that the FCC had not intended to expand the statutory definition of an ATDS in its 2015 Order and that number generation was required,[92] the D.C. Circuit concluded that the FCC's pronouncements were contradictory.[93] In addition, the FCC, in its 2015 Order, had given a broad meaning to the term *capacity,* which in turn expanded the definition of an ATDS. The FCC's prenouncements on what constitutes an ATDS ultimately were struck down as arbitrary and capricious by the D.C. Circuit in 2018 in *ACA Int'l v. FCC*.[94] In response, the FCC has solicited comments on the proper scope of an ATDS and what consti-

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ment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision, 83 Fed. Reg. 26284, 26285 (June 5, 2018).

[91] *ACA Int'l v. FCC,* 855 F.3d 687, 693 (Fed. Cir. 2018).

[92] *See Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 373 & n.2 (3d Cir. 2015) (holding that the FCC's 2015 Order did not expand the statutory definition of what constitutes an ATDS).

[93] *See ACA Int'l v. FCC,* 855 F.3d 687, 701 (Fed. Cir. 2018) (finding that the 2015, 2003 and 2008 declaratory rulings on what constituted an ATDS uncertain and contradictory and striking them down as arbitrary and capricious).

[94] *ACA Int'l v. FCC,* 855 F.3d 687 (Fed. Cir. 2018). The D.C. Circuit addressed not merely the 2015 declaratory ruling but earlier 2003 and 2008 declaratory rulings on what constituted an ATDS which had "left significant uncertainty about the precise functions an autodialer must have the capacity to perform." *Id.* at 701; *see also Fleming v. Associated Credit Services, Inc.,* Civ. No. 16-3382 (KM) (MAH), 2018 WL 4562460, at *8-9 (D.N.J. Sept. 21, 2018) (agreeing with *Pinkus* that *ACA* necessarily invalidated both the 2003 and 2008 FCC regulations, in addition to the 2015 Order, with respect to what constitutes an ATDS, leaving only the plain terms of the statute); *Gonzalez v. Ocwen Loan Servicing,* Case No: 5:18-cv-340-oc-30PRL, 2018 WL 4217065, at *11-13 (M.D. Fla. Sept. 5, 2018) (holding that *ACA* set aside all prior FCC Orders defining ATDS, not just the 2015 Order); *Washington v. Six Continents Hotels, Inc.*, No. 2:16-CV-03719-ODW-JEM, 2018 WL 4092024, at *3 (C.D. Cal. Aug. 24, 2018) ("As the court in *ACA* did not set aside a ruling, but rather the FCC's treatment of the definition of an autodialer, this treatment was set aside from all previous FCC rulings.") (holding the 2003, 2008 and 2015 declaratory

rulings on what constitutes an ATDS invalidated); *Keyes v. Ocwen Loan Servicing, LLC,* Case No. 17-cv-11492, 2018 WL 3914707, at *6 (E.D. Mich. Aug. 16, 2018) (rejecting the argument that the FCC's 2003, 2008 or 2012 Orders remained binding to the extent they addressed the definition of an ATDS because "pre-2015 guidance, to the extent it was reaffirmed in the 2015 Declaratory Ruling, no longer warrants judicial deference."); *Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 932–36 (N.D. Ill. 2018) (holding that *ACA* "necessarily invalidated" "not only the 2015 Declaratory Ruling's interpretation of the statutory term ATDS, but also the 2008 Declaratory Ruling's and 2003 Order's interpretation of that term" "insofar as they provide, as did the 2015 Declaratory Ruling, that a predictive dialer qualifies as an ATDS even if it does not have the capacity to generate phone numbers randomly or sequentially and then to dial them."); *Herrick v. GoDaddy.com, LLC,* 312 F. Supp. 3d 792, 798-800 (D. Ariz. 2018) (holding that after *ACA* none of the FCC's prior pronouncements on what constituted an ATDS were entitled to deference); *see also Dominguez v. Yahoo, Inc.,* 894 F.3d 116, 119-21 (3d Cir. 2018) (holding that after *ACA* the proper focus is on whether a technology has the "present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers."); *Gary v. TrueBlue, Inc.,* Case No. 17-cv-10544, 2018 WL 4931980, at *3-6 (E.D. Mich. Oct. 11, 2018) (following *Keyes v. Ocwen Loan Servicing* in holding that after *ACA* only the plain terms of the statute control (without specifically discussing the 2003 or 2008 Orders), and granting defendant's motion for summary judgment based on the plain terms of the statute).

In *Reyes v. BCA Financial Services, Inc.,* 312 F. Supp. 3d 1308 (S.D. Fla. 2018), a magistrate judge misread *ACA* as not invalidating portions of earlier FCC Orders on what constitutes an ATDS, despite the clear rejection of this argument by the D.C. Circuit in *ACA*. *See* 855 F.3d at 701. *Reyes,* in which the court granted summary judgment for the plaintiff finding the defendant's system constituted an ATDS under pre-2015 FCC Orders and case law construing those Orders, is simply wrongly decided. *See, e.g., Washington v. Six Continents Hotels, Inc.,* No. 2:16-CV-03719-ODW-JEM, 2018 WL 4092024, at *3 (C.D. Cal. Aug. 24, 2018) (rejecting *Reyes* as inconsistent with the plain terms of the *ACA* opinion); *Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 932–36 (N.D. Ill. 2018) (rejecting *Reyes* as wrongly decided based on the plain terms of the D.C. Circuit's opinion in *ACA*); *Sessions v. Barclays Bank Del*., 317 F. Supp. 3d 1208, 1213-14 (N.D. Ga. 2018) ("Contrary to the pronouncement of the *Reyes* court, the D.C. Circuit clearly held that it invalidated all of the FCC's pronouncements as to the definition of 'capacity' as well as its descriptions of the statutory functions necessary to be an ATDS."); *see also Herrick v. GoDaddy.com, LLC,* 312 F. Supp. 3d 792, 798-800 (D. Ariz. 2018) (holding that after *ACA,* the FCC's 2003, 2008 and 2015 Orders are no longer entitled to deference on the issue of what constitutes an ATDS).

For the same reason, the court in *Pinkus* expressly disareed with other opinions that had followed *Reyes* in misreading *ACA. See Pinkus,* 319 F. Supp. 3d at 934–36, *disagreeing with Pieterson v. Wells Fargo Bank, N.A.*, Case No.17-cv-02306-EDL, 2018 WL 3241069, at *3 (N.D. Cal. July 2, 2018) ("*ACA Int'l* vacated the 2015 Declaratory Ruling but it did not

tutes capacity[95] and is likely to clarify its position in or before

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clearly intend to disturb the FCC's 2003 and 2008 orders."); *Ammons v. Ally Financial, Inc*., 326 F. Supp. 3d 578, 587 (M.D. Tenn. June 27, 2018) (holding, in a predictive dialer case, that "[i]n the wake of *ACA International*, this Court joins the growing number of other courts that continue to rely on the interpretation of § 227(a)(1) set forth in prior FCC rulings."); *McMillion v. Rash Curtis & Assocs*., Case No. 16-cv-03396-YGR, 2018 WL 3023449, at *3 (N.D. Cal. June 18, 2018) ("*ACA International* invalidated only the 2015 FCC Order—the court discusses but does not rule on the validity of the 2003 FCC Order or the 2008 FCC Order."); *Maddox v. CBE Group, Inc*., Civil Action No. 1:17-CV-1909-SCJ2, 018 WL 2327037, at *4 (N.D. Ga. May 22, 2018) ("Given the *ACA Int'l* decision, the Court relies on the FCC's 2003 interpretation of § 227(a)(1) to determine if Defendant's system qualifies as an ATDS."); *Swaney v. Regions Bank*, Case No.: 2:13-cv-00544-JHE, 2018 WL 2316452, at *1 (N.D. Ala. May 22, 2018) ("In *ACA International*, the D.C. Circuit invalidated certain portions of the 2015 FCC Order, but not the portion of the Order reaffirming the FCC's 2003 determination that, 'while some predictive dialers cannot be programmed to generate random or sequential phone numbers, they still satisfy the statutory definition of an ATDS.' ") (quoting *ACA Int'l*, 885 F.3d at 702).

Other cases that followed *Reyes* or its progeny in misreading *ACA* as invalidating only the 2015 FCC Order and not the earlier 2003 and 2008 interpretations on which it was based, include: *Abante Rooter and Plumbing, Inc. v. Alarm.com Inc.*, No. 15-cv-06314-YGR, 2018 WL 3707283, at *6 (N.D. Cal. Aug. 3, 2018) (concluding that *ACA* invalidated only the 2015 FCC order but did not rule on the validity of the 2003 and 2008 orders); *O'Shea v. American Solar Solution, Inc.*, No. 3:14-cv-00894-L-RBB, 2018 WL 3217735 (S.D. Cal. July 2, 2018) (concluding in *dicta* that *ACA* "left intact" the FCC's 2003 and 2008 Orders in a case where defendant stipulated that it used a predictive dialer that admittedly was an ATDS).

[95] *See* FCC, *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision,* 83 Fed. Reg. 26284, 26285 (June 5, 2018). Among other things, the FCC asked for comments on the following:

> *First*, we seek comment on what constitutes an "automatic telephone dialing system." The TCPA defines an automatic telephone dialing system 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." The Commission had interpreted the term "capacity" to include a device "even if, for example, it requires the addition of software to actually perform the functions described in the definition"—"an expansive interpretation of 'capacity' having the apparent effect of embracing any and all smartphones." The court set aside this interpretation, finding the agency's "capacious understanding of a device's 'capacity' lies considerably beyond the agency's zone of delegated authority."
>
> *Second*, the Bureau seeks comment on how to interpret "capacity" in light of the court's guidance. For example, how much user effort should be required to enable the device to function as an automatic telephone dialing system? Does equipment have the capacity if it requires the simple flipping of a switch? If the addition of software can give it the requisite functionality? If it requires es-

2019. Given the change in the composition of the FCC since the time of the 2015 Order, any new interpretive ruling may be narrower and more business friendly than the 2015

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sentially a top-to-bottom reconstruction of the equipment? In answering that question, what kinds (and how broad a swath) of telephone equipment might then be deemed to qualify as an automatic telephone dialing system? Notably, in light of the court's guidance that the Commission's prior interpretation had an "eye-popping sweep, " the Bureau seeks comment on how to more narrowly interpret the word "capacity" to better comport with the congressional findings and the intended reach of the statute.

Third, the Bureau seeks further comment on the functions a device must be able to perform to qualify as an automatic telephone dialing system. Again, the TCPA defines an "automatic telephone dialing system" 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." Regarding the term "automatic," the Commission explained that the "basic function[]" of an automatic telephone dialing system is to "dial numbers without human intervention" and yet "declined to 'clarify[] that a dialer is not an [automatic telephone dialing system] unless it has the capacity to dial numbers without human intervention."' As the court put it, "[t]hose side-by-side propositions are difficult to square." The court further noted the Commission said another basic function was to "dial thousands of numbers in a short period of time," which left parties "in a significant fog of uncertainty" on how to apply that notation. How "automatic" must dialing be for equipment to qualify as an automatic telephone dialing system? Does the word "automatic" "envision non-manual dialing of telephone numbers"? Must such a system dial numbers without human intervention? Must it dial thousands of numbers in a short period of time? If so, what constitutes a short period of time for these purposes?

Fourth, regarding the provision concerning a "random or sequential number generator," the court noted that "the 2015 ruling indicates in certain places that a device must be able to generate and dial random or sequential numbers to meet the TCPA's definition of an autodialer, [and] it also suggests a competing view: that equipment can meet the statutory definition even if it lacks that capacity." The court explained "the Commission cannot, consistent with reasoned decisionmaking, espouse both competing interpretations in the same order." And so, like the court, the Bureau seeks comment on "which is it?" If equipment cannot itself dial random or sequential numbers, can that equipment be an automatic telephone dialing system?

Fifth, the court also noted that the statute prohibits "mak[ing] any call . . . using any automatic telephone dialing system"-leading to the question "does the bar against 'making any call using' an [automatic telephone dialing system] apply only to calls made using the equipment's [automatic telephone dialing system] functionality?" The Bureau seeks comment on this question. If a caller does not use equipment as an automatic telephone dialing system, does the statutory prohibition apply? The court also noted that adopting such an interpretation could limit the scope of the statutory bar: "the fact that a smartphone could be configured to function as an autodialer would not matter unless the relevant software in fact were loaded onto the phone and were used to initiate calls or send messages." Should the Commission adopt this approach? More broadly, how should the Commission interpret these various statutory provisions in harmony? The Bureau also seeks comment on a petition for declaratory ruling filed by the U.S. Chamber Institute for Legal Reform and several other parties, asking the Commission to clarify the definition of "automatic telephone dialing system" in light of the D.C. Circuit's decision.

Id. (emphasis in original; footnotes omitted).

declaratory rulings. In the interim, unless and until the FCC issues new regulations or interpretations, an ATDS must meet the statutory definition—and only the statutory definition of what constitutes an ATDS, which focuses on the capacity for random or sequential number generation, not dialing from a list.[96] The proper interpretation of the statutory term

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[96]*See, e.g., Dominguez v. Yahoo, Inc.,* 894 F.3d 116, 121 (3d Cir. 2018) (holding that, after *ACA*, the "key" question under the TCPA is whether the equipment "had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers"); *Gary v. TrueBlue, Inc.,* Case No. 17-cv-10544, 2018 WL 4931980, at *3-6 (E.D. Mich. Oct. 11, 2018) (granting defendant's motion for summary judgment based on the plain terms of the statute); *Fleming v. Associated Credit Services, Inc.,* Civ. No. 16-3382 (KM) (MAH), 2018 WL 4562460, at *9 (D.N.J. Sept. 21, 2018) (following *Dominguez* and *Pinkus* in holding that after *ACA,* a court must apply only the plain terms of the statute in evaluating what constitutes an ATDS and opining that "[t]he phrase 'using a random or sequential number generator,' . . . applies to the manner in which the numbers make their way onto the list—not to the manner in which the numbers are dialed once they are on the list . . ."); *Keyes v. Ocwen Loan Servicing, LLC,* Case No. 17-cv-11492, 2018 WL 3914707, at *7-8 (E.D. Mich. Aug. 16, 2018) (granting partial summary judgment for the defendant; "a device must be able to call and generate numbers randomly or sequentially to qualify as an ATDS. Put another way, simply calling from a set list is not enough for equipment to constitute an autodialer."); *Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 937-39 (N.D. Ill. 2018) (construing the statute as requiring number generation, consistent with *ACA*); *Lord v. Kisling, Nestico & Redick, LLC*, 1:17-CV-01739, 2018 WL 3391941, at *2-3 N.D. Ohio July 12, 2018) (dismissing plaintiff's claim; "For the telephone system KNR allegedly uses to constitute a violation of the TCPA, Plaintiffs' claim must allege plausible facts that KNR's system has the ability to store or produce telephone numbers using a random or sequential number generator."); *Marshall v. CBE Group, Inc.,* Case No.: 2:16–cv–02406–GMN–NJK, 2018 WL 1567852, at *5 (D. Nev. Mar. 30, 2018) (holding that in light of *ACA,* the court was required to apply only the statutory language, in granting summary judgment for the defendant; holding that the system at issue was not an ATDS). *But see Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1049-52 (9th Cir. 2018) (agreeing that after *ACA* "only the statutory definition of ATDS as set forth by Congress in 1991 remains . . . ," but disagreeing with the Third Circuit that number generation is required by the plain terms of the statute, and holding that the definition of an ATDS is ambiguous, and construing the statute to define an ATDS as including even equipment that merely has the capacity to dial from storage).

In *Gary v. TrueBlue, Inc.,* Case No. 17-cv-10544, 2018 WL 4931980, at *3-6 (E.D. Mich. Oct. 11, 2018), the court did not address dialing from a list but held that the "human intervention" test (which is discussed later in this section) was no longer applicable after *ACA* and the only question was whether the defendant's system met the plain terms of the statute. The court, however, framed the issue in terms of dialing, rather than

is discussed at greater length later in this section.

With respect to *capacity*, since *ACA* the Second and Third Circuits have held that capacity must mean present, rather than latent or potential capacity.[97]

Courts have interpreted *random number generation* to mean production of telephone numbers based on a random selection of ten digits and *sequential number generation* to mean production of telephone numbers that follow a sequential pattern "such as (111) 111-1111, (111) 111-1112, and so on."[98] For example, in the context of phone calls, a predictive dialer that randomly calls numbers from a database based on an algorithm that predicts when a consumer will answer (calling, for example, six numbers simultaneously on the assumption that only one will be answered), potentially may constitute an ATDS.[99]

To understand the current state of the law, and to put in

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number generation, stating that the issue in that case was whether the WorkAlert system, combined with third party aggregator mBlox, had the capacity to "randomly or sequentially dial or text phone numbers." *Id.* at *4.

[97]*See King v. Time Warner Cable Inc.,* 894 F.3d 473, 479-82 (2d Cir. 2018) (holding that "the term 'capacity' in the TCPA's definition of a qualifying autodialer should be interpreted to refer to a device's current functions, absent any modifications to the device's hardware or software."; "a device's 'capacity' refers to its current functions absent additional modifications, regardless of whether those functions were in use during the offending call."); *Dominguez v. Yahoo, Inc.,* 894 F.3d 116, 119 (3d Cir. 2018) (holding that *capacity* under the statute must mean present, rather than latent or potential capacity); *see also Gonzalez v. Ocwen Loan Servicing, LLC*, No. 5:18-cv-340-OC-30PRL, 2018 WL 4217065, at *6 (M.D. Fla. Sept. 5, 2018) (denying defendant's motion to dismiss, holding that "the definition of an ATDS would not include a predictive dialer that lacks the capacity to generate random or sequential telephone numbers and dial them; but it would include a predictive dialer that has that capacity. And because the D.C. Circuit determined that interpreting capacity to mean a device with a 'future possibility' of having those functions is too expansive, this Court considers a device to have the capacity to generate random or sequential telephone numbers only if the device has the 'present ability' to do so.").

[98]*Griffith v. Consumer Portfolio Services, Inc*., 838 F. Supp. 2d 723, 725 (N.D. Ill. 2011); *see also Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1292 (S.D. Cal. 2014) (citing this standard approvingly), *rev'd on other grounds,* 904 F.3d 1041 (9th Cir. 2018); *Gragg v. Orange Cab Co*., 995 F. Supp. 2d 1189, 1193 (W.D. Wash. 2014) (adopting the same analysis).

[99]*See, e.g.*, *Meyer v. Portfolio Recovery Associates, LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012) (affirming entry of a preliminary injunction based on

context literally hundreds of court opinions construing the TCPA (some of which continue to cite to standards that are no longer applicable), it is helpful to understand what some have argued about the scope of the definition of an ATDS in the recent past.

Since 2012, there has been an explosion of TCPA litigation seeking statutory damages for calls to mobile phone numbers and text messages. Although the definition of an ATDS, by the plain terms of the statute, only applies to technologies that have the capacity to generate numbers randomly or sequentially (and to dial those numbers), some plaintiffs' lawyers argued that an ATDS also included any equipment that could dial a number from a list without human intervention, regardless of whether it had the capacity to generate numbers randomly or sequentially, based on three paragraphs about predictive dialers from among 225 paragraphs in an FCC Report and Order from 2003,[100] which were repeated in *dicta* in 2008 in the context of predictive dialers[101] and then restated somewhat more broadly, and inartfully, in a footnote in a 2012 Order that addressed consent,

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allegations that defendants used an ATDS because their security filings showed that they used predictive dialers and defendants did not dispute that the predictive dialers could be used to "produce or store telephone numbers using a random or sequential number generator, or to dial those numbers"); *Hernandez v. Collection Bureau of America, Ltd.*, No. SACV 13-01626-CJC (DFMx), 2014 WL 4922379 (C.D. Cal. Apr. 16, 2014) (finding that a predictive dialer was an ATDS); *Nelson v. Santander Consumer USA, Inc*., 931 F. Supp. 2d 919 (W.D. Wis. Mar. 8, 2013) (finding that a predictive dialer which has the capacity to randomly or sequentially dial telephone numbers is an ATDS), *vacated pursuant to joint motion*, 2013 WL 5377280 (W.D. Wis. June 7, 2013); *Lee v. Credit Management LP*, 846 F. Supp. 2d 716, 729 (S.D. Tex. 2012); *Griffith v. Consumer Portfolio Services, Inc*., 838 F. Supp. 2d 723, 725-27 (N.D. Ill. 2011); *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991,* 18 FCC Rcd. 14014 (2003). After *ACA,* it is no longer the case that a predictive dialer necessarily constitutes an ATDS. Only a predictive dialer that meets the statutory definition would constitute an ATDS.

[100] *See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14091-93 ¶¶ 131-33 (2003). A *predictive dialer*, according to the FCC, is "an automated dialing system that uses a complex set of algorithms to automatically dial consumers' telephone numbers in a manner that 'predicts' the time when a consumer will answer the phone and a telemarketer will be available to take the call." *Id.* ¶ 8 n.31.

[101] *See In re Rules & Regulations Implementing the TCPA*, 23 FCC Rcd. 559, 566 (2008) ("affirm[ing] that a predictive dialer constitutes an automatic telephone dialing system and is subject to the TCPA's restric-

not the definition of an ATDS[102]—and prior to the FCC's 2015 declaratory rulings some district courts agreed with this view.[103] In its 2015 Order, however, the FCC clarified

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tions on the use of autodialers").

[102]*See In re Rules & Regulations Implementing the TCPA*, 27 FCC Rcd. 15391, 15392 n.5 (2012) (stating that the TCPA covered systems with the "capacity to store or produce and dial those numbers at random, in sequential order, or from a database of numbers.").

[103]*See, e.g.*, *Sterk v. Path, Inc.*, 46 F. Supp. 2d 813, 818–19 (N.D. Ill. 2014) (granting summary judgment for the plaintiff based on an expansive application of the FCC's 2003 Report and Order to a system that could send text messages to a list without human intervention, without evaluating capacity to generate numbers randomly or sequentially); *Legg v. Voice Media Grp., Inc.*, 20 F. Supp. 2d 1370, 1374-76 (S.D. Fla. 2014) (denying plaintiff summary judgment for failing to establish use of an ATDS; relying on a policy argument to expand the FCC's 2003 Report and Order beyond predictive dialers because the statutory requirement that a system must have the capacity to generate numbers randomly or sequentially "had become an anachronism" in view of new technology); *Fields v. Mobile Messengers Am. Inc.*, No. C 12–05160 WHA, 2013 WL 6774076 (N.D. Cal. Dec. 23, 2013) (denying summary judgment in a TCPA case by applying FCC commentary on predictive dialers expansively to a text message system that was not a predictive dialer); *Hickey v. Voxernet, LLC*, 887 F. Supp. 2d 1125, 1129-30 (W.D. Wash. 2012) (denying defendant's motion to dismiss where the court concluded that the FCC "broadened the definition of an ATDS beyond mere equipment that uses 'random or sequential number generators' " and holding that the issue of whether an ATDS was used could not be determined properly prior to discovery); *Griffith v. Consumer Portfolio Services, Inc.*, 838 F. Supp. 2d 723, 727 (N.D. Ill. 2011) (holding that a system that could dial from a list of numbers was an ATDS).

Some courts that had ruled this way held that the Hobbs Act, 28 U.S.C.A. § 2342, which is discussed later in this section, compelled this broader interpretation of an ATDS based on the FCC's 2003 ruling on predictive dialers (which, as clarified by the 2015 Order, had the capacity to generate numbers randomly or sequentially, but typically did not apply that functionality—the principle feature of a predictive dialer is a timing function). Relying on certain passages that assumed but did not expressly articulate that the Commission was relying on the *capacity* of a predictive dialer to generate numbers randomly or sequentially, to call and store those numbers and to dial them, even if the system did not in fact work that way, these courts extended the FCC's predictive dialer ruling to text message systems that were not predictive dialers and did not have the potential or latent ability or potential functionality (*i.e.*, capacity) to generate numbers randomly or sequentially but which, like predictive dialers, could dial from a list or a database (or, more typically, these courts focused only on the question of whether a system could dial from a list without evaluating if it had the *capacity* to generate numbers randomly or sequentially and to call those numbers—treating "dialing from a list" as an alternative criteria to the statutory definition).

that it had not purported to change the statutory definition of an ATDS and that "an autodialer must be able to store or produce numbers that *themselves* are randomly or sequentially generated 'even if [the autodialer is] not presently used for that purpose.' "[104] As the Third Circuit explained, the FCC, in its 2015 Order, did not "read out the 'random or sequential number generator' requirement" from the statute.[105] The D.C. Circuit, however, concluded that the

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Some, including this treatise, argued that this interpretation was belied by the FCC's 2015 Order, which gave a broad interpretation to the statutory term *capacity* but made clear that the FCC did not purport to change the statutory definition of an ATDS, which is a system that has the capacity to generate numbers randomly or sequentially (and store or produce those numbers) and the capacity to dial those numbers. *See Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 373 n.2 (3d Cir. 2015) (finding it unnecessary to reach the Hobbs Act issue because the FCC's 2015 Order made it clear that the plaintiff's assertion that the FCC had expanded the definition of ATDS to extend beyond the terms of the statute to a system that merely dials from a list was mistaken); *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7971-72 ¶ 10 (2015) (explaining the FCC's predictive dialer ruling in terms of *capacity*—that a predictive dialer met the statutory definition for an autodialer "because it has the capacity to store or produce, and dial random or sequential numbers (and thus meets the TCPA's definition of 'autodialer') even if it is not presently used for that purpose, including when the caller is calling a set list of consumers."); *see also Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1291 (S.D. Cal. 2014) (explaining that section 227(a) of the TCPA which defines ATDS, "in contrast to § 227(b) and (c), does not include a provision giving the FCC rulemaking authority," and "§ 227(b) and (c) expressly limit the aforementioned rulemaking authority to only those subsections" which made the plaintiff's argument that the FCC had purported to change the statutory definition of an ATDS implausible), *rev'd on other grounds*, 904 F.3d 1041 (9th Cir. 2018).

[104] *Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 373 (3d Cir. 2015) (italics in original), *quoting Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7972 ¶ 10 (2015).

[105] *Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 373 n.2 (3d Cir. 2015) (construing the 2015 Order). The FCC made clear that it had not purported to read "using a random or sequential number generator" out of the definition of ATDS established by Congress in 47 U.S.C.A. § 227(a)(1) or its own corresponding rule defining an ATDS at 47 C.F.R. § 64.1200. *See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7972-73 ¶ 12 & n.46 (2015) (reiterating its application of the statutory definition of ATDS 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" and, in accompanying footnote 46, the FCC's own consistent definition in 47 C.F.R. § 64.1200(f)(2) ("The terms *automatic telephone dialing system*

2015 Order (and the earlier 2003 and 2008 FCC Orders) created confusion and inconsistency on this point and thus were arbitrary and capricious and, hence, invalid.[106]

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and *autodialer* mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers")); *see also id.* at 7971-72 ¶ 10 (reaffirming that equipment that has such capacity under the TCPA constitutes an ATDS "even if it is not presently used for that purpose"), 8018-19 ¶ 111 ("Even assuming that the equipment does not actually use a random or sequential number generator, the capacity to do so would make it subject to the TCPA"). As noted earlier, the 2015 Order explains the FCC's earlier ruling that a predictive dialer is an ATDS because a predictive dialer meets the statutory definition of ATDS based on *capacity*, even if a predictive dialer in fact typically dials numbers from a list. *See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7971-72 ¶ 10 (2015) (explaining that a predictive dialer meets the statutory definition of an ATDS or autodialer "because it has the capacity to store or produce, and dial random or sequential numbers (and thus meets the TCPA's definition of 'autodialer') even if it is not presently used for that purpose, including when the caller is calling a set list of consumers.").

That the FCC upheld the statutory definition of ATDS and its own corresponding rule defining the term is not surprising because Congress's delegation of authority to the FCC did not extend to changing the statutory definition of ATDS. *See Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1291 (S.D. Cal. 2014) (explaining that section 227(a) of the TCPA which defines ATDS, "in contrast to § 227(b) and (c), does not include a provision giving the FCC rulemaking authority," and "§ 227(b) and (c) expressly limit the aforementioned rulemaking authority to only those subsections" which made the plaintiff's argument—that the FCC had purported to expand the statutory definition of an ATDS to encompass dialing from a list regardless of capacity to generate numbers randomly or sequentially—implausible), *rev'd on other grounds*, __ F.3d __, 2018 WL 4495553 (9th Cir. 2018). In delegating rulemaking authority under the TCPA to the FCC, Congress limited the FCC's role to prescribing regulations to implement (1) section 227(b)'s restrictions on the use of automated telephone equipment in seven specific circumstances involving use of artificial or prerecorded voice, unsolicited ads sent to fax machines, and simultaneous calls to multiple phone lines of a multi-line business; and (2) methods and procedures for protecting residential telephone subscribers' privacy rights as set forth in section 227(c).

[106] *See ACA Int'l v. FCC*, 855 F.3d 687, 701-03 (Fed. Cir. 2018). The D.C. Circuit concluded that while portions of the 2015 Order indicated that a device had to be able to generate and dial random or sequential numbers to meet the definition of an ATDS, it also suggested a competing view, based on its 2003 Order, that a device could be considered an ATDS (or autodialer) even if it had no capacity itself to generate random or sequential numbers (and instead could only dial from an externally supplied set of numbers). *Id.* at 702. The court held that the FCC could not "consistent with reasoned decisionmaking, espouse both competing

Prior to the FCC's 2015 Order, *capacity* had been construed by courts to mean "the system's *present*, not *potential*, capacity to store, produce, or call randomly or sequentially generated telephone numbers."[107] The FCC, however, clarified in its 2015 Order that *capacity* meant not just the "present ability" but also the *potential ability* or *potential functionalities* (or what the Third Circuit characterized as *latent capacity*) to store or produce numbers to be called, using a random or sequential number generator.[108] While the addition of

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interpretations in the same order." *Id.* at 703.

The D.C. Circuit also called out the FCC's statement that the "basic function" of an autodialer is the ability to dial numbers "without human intervention" even though the Commission declined a request to clarify that a dialer is not an autodialer unless it has the capacity to dial without human intervention. *Id.* The court did note in *dicta*, however, that this formulation "makes sense given that 'auto' in autodialer—or, equivalently, 'automatic' in 'automatic telephone dialing system, ' . . .—would seem to envision non-manual dialing of telephone numbers." *Id.* The appellate panel also criticized the FCC for stating that another basic function of an ATDS is to "dial thousands of numbers in a short period of time," but not elaborating on whether that was "a necessary condition, a sufficient condition, a relevant condition even if neither necessary nor sufficient, or something else." *Id.* In short, the D.C. Circuit ruled, "the Commission's ruling, in describing the functions a device must perform to qualify as an autodialer, fails to satisfy the requirement of reasoned decisionmaking." *Id.*

[107] *See, e.g.*, *Gragg v. Orange Cab Co.*, 995 F.Supp.2d 1189, 1193 (W.D. Wash. 2014) (emphasis in original); *see also Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1291-92 (S.D. Cal. 2014) (quoting and applying the *Orange Cab* standard), *rev'd on other grounds*, 904 F.3d 1041 (9th Cir. 2018); *Hunt v. 21st Century Mortgage Corp.*, No. 2:12-CV-2697-WMA, 2013 WL 5230061, at *4 (N.D. Ala. Sept. 17, 2013) (holding that *capacity* must mean present, not future capacity). As one court explained, in rejecting the argument that *capacity* should be read to include the potential capacity to be modified:

> The problem with this reasoning is that, in today's world, the possibilities of modification and alteration are virtually limitless. For example, it is virtually certain that software could be written, without much trouble, that would allow iPhones "to store or produce telephone numbers to be called, using a random or sequential number generator, and to call them." Are the roughly 20 million American iPhone users subject to the mandates of § 227(b)(1)(A) of the TCPA? More likely, only iPhone users who were to download this hypothetical "app" would be at risk.

Hunt v. 21st Century Mortgage Corp., No. 2:12-CV-2697-WMA, 2013 WL 5230061, at *4 (N.D. Ala. Sept. 17, 2013).

[108] *Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 372 (3d Cir. 2015) (construing the 2015 Order). The Third Circuit explained that "neither 'present ability' nor the use of a single piece of equipment is required. . . . [S]o long as the equipment is part of a 'system' that has the latent 'capa-

software to equipment could transform a system into an ATDS or autodialer in this view, "there must be more than a theoretical potential that the equipment could be modified to satisfy the 'autodialer' definition."[109]

The D.C. Circuit, however, struck down the expanded def-

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city' to place autodialed calls, the statutory definition is satisfied" (even if the equipment is " 'not presently used for that purpose' "). *Id., citing Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7974 ¶ 16 (2015) (explaining that "capacity" under the TCPA "is not limited to [the equipment's] current configuration but also includes potential functionalities."); *see also id.* at 7975-76 ¶¶ 18-19 (addressing *potential ability*). The FCC characterized *potential ability* as "the potential suitability for holding, storing, or accommodating." *Id.* at 7975 ¶ 19 (citations omitted).

[109] *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7975 ¶ 18 (2015). The Commission acknowledged that "there are outer limits to the capacity of equipment to be an autodialer." *Id.* It explained that "the outer contours of the definition of 'autodialer' do not extend to every piece of malleable and modifiable dialing equipment that conceivably could be considered to have some capacity, however small, to store and dial telephone numbers—otherwise, a handset with the mere addition of a speed dial button would be an autodialer." *Id.* In clarifying that *capacity* must involve "more than a theoretical potential" the Commission explained that:

> [A]lthough the Commission has found that a piece of equipment can possess the requisite "capacity" to satisfy the statutory definition of "autodialer" even if, for example, it requires the addition of software to actually perform the functions described in the definition, there must be more than a theoretical potential that the equipment could be modified to satisfy the "autodialer" definition. Thus, for example, it might be theoretically possible to modify a rotary-dial phone to such an extreme that it would satisfy the definition of "autodialer," but such a possibility is too attenuated for us to find that a rotary-dial phone has the requisite "capacity" and therefore is an autodialer.

Id.; *see also Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 372 (3d Cir. 2015) (construing the FCC's 2015 Order as requiring at least a "latent" capacity); *Dominguez v Yahoo, Inc.*, Civil Action No. 13-1887, 2017 WL 390267, at *12-22 (E.D. Pa. Jan. 27, 2017) (holding, on remand, that plaintiffs could not present evidence of latent capacity to generate numbers randomly or sequentially *and dial* those numbers and that modifications that would take four to five months to implement amounted to re-engineering, rather than a latent capacity), *aff'd*, 894 F.3d 116, 118-21 & n.23 (3d Cir. 2018). The majority, in responding to the criticism of a dissenting Commissioner that the majority's definition of *capacity* would mean an 80,000 seat stadium could be construed to have the capacity to hold 104,000, because you could always expand the size of a building, wrote that this was an inapt analogy because "modern dialing equipment can often be modified remotely without the effort and cost of adding physical space to an existing structure. Indeed, adding space to accommodate 25 percent more people to a building is the type of mere 'theoretical' modification that is insufficient to sweep it into our interpretation of

inition of *capacity* in the FCC's 2015 Order "given the Commission's unchallenged assumption that a call made with a device having the capacity to function as an autodialer can violate the statute even if autodialer features are not used to make a call."[110] The court found the labels "present" or "future" capacity to be less relevant than "considerations such as how much is required to enable the device to function as an autodialer: does it require the simple flipping of a switch, or does it require essentially a top-to-bottom reconstruction of the equipment?"[111]

In so ruling, the D.C. Circuit raised the concern that it was 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."[112] The appellate panel reasoned that if every smartphone qualified as an ATDS, the statute's restrictions on autodialer calls, subject to a minimum $500 penalty, assumed an "eye-popping sweep."[113]

Noting that the statute originally was intended to reach 30,000 businesses involved in telemarketing, the D.C. Circuit reasoned that it was "untenable to construe the term 'capacity' . . . in a manner that brings within the definition's fold the most ubiquitous type of phone equipment known, used countless times each day for routine communications by the vast majority of people in the country."[114]

Since *ACA,* the Second and Third Circuits have held that capacity must mean present, rather than latent or potential capacity.[115] The Second Circuit wrote that capacity refers to an ATDS's "current functions absent additional modifica-

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'capacity.' " *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7974 ¶ 16 (2015).

[110] *ACA Int'l v. FCC,* 855 F.3d 687, 695 (Fed. Cir. 2018).

[111] *ACA Int'l v. FCC,* 855 F.3d 687, 696 (Fed. Cir. 2018).

[112] *ACA Int'l v. FCC,* 855 F.3d 687, 696 (Fed. Cir. 2018).

[113] *ACA Int'l v. FCC,* 855 F.3d 687, 697 (Fed. Cir. 2018).

[114] *ACA Int'l v. FCC,* 855 F.3d 687, 698 (Fed. Cir. 2018).

[115] *See King v. Time Warner Cable Inc.,* 894 F.3d 473, 479-81 (2d Cir. 2018) (holding that "the term 'capacity' in the TCPA's definition of a qualifying autodialer should be interpreted to refer to a device's current functions, absent any modifications to the device's hardware or software."); *Dominguez v. Yahoo, Inc.,* 894 F.3d 116, 119 (3d Cir. 2018) (holding that *capacity* under the statute must mean present, rather than latent or potential capacity).

tions, regardless of whether those functions were in use during the offending call."[116]

The Third and the Ninth Circuit agree that, after *ACA*, the only relevant consideration for what constitutes an ATDS is the language of the statute. They disagree, however, on what the statutory definition means.[117] The better view, as applied by the Third Circuit in *Dominguez v. Yahoo*[118] (and, as noted earlier, a number of district courts[119]) is that an

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[116]*King v. Time Warner Cable Inc.,* 894 F.3d 473, 482 (2d Cir. 2018).

[117]*Compare Dominguez v. Yahoo, Inc.,* 894 F.3d 116, 121 (3d Cir. 2018) (holding that, after *ACA*, the "key" question under the TCPA is whether the equipment "had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers"); *with Marks v. Crunch San Diego, LLC,* 904 F.3d 1041, 1049-52 (9th Cir. 2018) (agreeing that after *ACA* "only the statutory definition of ATDS as set forth by Congress in 1991 remains . . . ," but disagreeing with the Third Circuit that number generation is required by the plain terms of the statute, and holding instead that the definition of an ATDS is ambiguous, and, based on Congress's failure to amend the TCPA to account for FCC regulations subsequently struck down in *ACA* as arbitrary and capricious, construing the statute to define an ATDS to include even equipment that merely has the capacity to dial from a list of stored numbers).

[118]*Dominguez v. Yahoo, Inc.,* 894 F.3d 116, 121 (3d Cir. 2018).

[119]*See, e.g., Gary v. TrueBlue, Inc.,* Case No. 17-cv-10544, 2018 WL 4931980, at *3-6 (E.D. Mich. Oct. 11, 2018) (granting defendant's motion for summary judgment based on the plain terms of the statute, holding that the TCPA did not prohibit the use of devices with automated features or "Internet-to-text" messages unless the device used was an ATDS, and ruling that defendant could not raise a genuine issue of fact over whether the WorkAlert system, combined with third party aggregator mBlox, had the capacity to "randomly or sequentially dial or text phone numbers."); *Fleming v. Associated Credit Services, Inc.,* Civ. No. 16-3382 (KM) (MAH), 2018 WL 4562460, at *9 (D.N.J. Sept. 21, 2018) (following *Dominguez* and *Pinkus* in holding that after *ACA,* a court must apply only the plain terms of the statute in evaluating what constitutes an ATDS and opining that "[t]he phrase 'using a random or sequential number generator,' . . . applies to the manner in which the numbers make their way onto the list—not to the manner in which the numbers are dialed once they are on the list . . ."); *Keyes v. Ocwen Loan Servicing, LLC,* Case No. 17-cv-11492, 2018 WL 3914707, at *7-8 (E.D. Mich. Aug. 16, 2018) (granting partial summary judgment for the defendant; "a device must be able to call and generate numbers randomly or sequentially to qualify as an ATDS. Put another way, simply calling from a set list is not enough for equipment to constitute an autodialer."); *Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 937-39 (N.D. Ill. 2018) (construing the statute as requiring number generation, consistent with *ACA*); *Lord v. Kisling, Nestico & Redick, LLC*, 1:17-CV-01739, 2018 WL 3391941, at *2-3 (N.D. Ohio July 12, 2018)

ATDS must have the capacity for number generation. The Ninth Circuit, in an opinion for which a petition for certiorari will be filed with the U.S. Supreme Court, concluded that an ATDS is a system that requires the capacity to either (1) store numbers or (2) produce numbers using a random or sequential dialing system (and in either case, to dial those numbers). In defining an ATDS in terms of capacity to dial from a stored list or database, the Ninth Circuit effectively revived, through ostensible statutory interpretation, part of the FCC regulations invalidated by *ACA* as arbitrary and capricious, and adopted a construction of *automatic telephone dialing system* that is inconsistent with the plain terms of the statute, and its legislative intent, which violates principles of statutory construction (by rendering the statutory term "random or sequential generator" meaningless and redundant), and which conflicts with the Third Circuit's interpretation of an ATDS in *Dominguez*. It is also inconsistent with the D.C. Circuit's holding in *ACA* inasmuch as the D.C. Circuit rejected an expansive interpretation of the term *automatic telephone dialing system* that would "render every smartphone an ATDS."[120] Yet, each of the more than 300 million smartphones in use in the United States in 2018 had the capacity to dial numbers that were stored, such in an address book.

In *Marks,* the Ninth Circuit held that the definition of an ATDS was ambiguous[121] — notwithstanding an earlier Ninth Circuit ruling that deemed the definition to be "clear and unambiguous . . . ."[122] Accordingly, the Ninth Circuit construed its meaning based on what it considered to be relevant legislative intent—specifically Congress's failure to reverse by statute ostensibly ambiguous FCC regulations that

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(dismissing plaintiff's claim; "For the telephone system KNR allegedly uses to constitute a violation of the TCPA, Plaintiffs' claim must allege plausible facts that KNR's system has the ability to store or produce telephone numbers using a random or sequential number generator."); *Marshall v. CBE Group, Inc.,* Case No.: 2:16–cv–02406–GMN–NJK, 2018 WL 1567852, at *5 (D. Nev. Mar. 30, 2018) (holding that in light of *ACA,* the court was required to apply only the statutory language, in granting summary judgment for the defendant; holding that the system at issue was not an ATDS).

[120] *ACA Int'l v. FCC*, 885 F.3d 687, 697-98 (D.C. Cir. 2018).

[121] *Marks v. Crunch San Diego, LLC,* 904 F.3d 1041, 1050-52 (9th Cir. 2018).

[122] *See Satterfield v. Simon & Schuster, Inc*., 569 F.3d 946, 951, 953 (9th Cir. 2009).

ultimately were invalidated by the D.C. Circuit in *ACA* as arbitrary and capricious. In so ruling, the panel violated basic principles of statutory construction[123] and read the statutory definition of an ATDS in a way that is impossible to reconcile with its plain terms.

The TCPA defines an ATDS 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; . . .[124]

In *Marks v. Crunch,* however, the Ninth Circuit panel "read § 227(a)(1) to provide that the term automatic telephone dialing system means equipment which 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."[125]

This effective revision is inconsistent with rules of statutory construction and English grammar. Under the TCPA, the phrase "using a random or sequential number generator" must be read as modifying ***either*** "store" ***or*** "produce" in the preceding phrase. "A dependent clause that precedes a main clause should be followed by a comma."[126] Thus, the phrase "to store or produce telephone numbers to be called" muse be read as dependent on the main clause, "using a random or sequential number generator; . . ." In other words, the main clause—"using a random or sequential number generator"—modifies either term in the dependent clause, "to store or produce telephone numbers to be called . . . ." Any argument to the contrary reads the provision as though there were a comma after "store" before "or produce" when there is none.[127]

The Ninth Circuit's construction of "using a random or

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[123]*See, e.g., U.S. v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' ").

[124]47 U.S.C.A. § 227(a)(1).

[125]*Marks v. Crunch San Diego, LLC,* 904 F.3d 1041, 1052 (9th Cir. 2018).

[126]The Chicago Manual of Style § 6.30 (16th ed. 2010).

[127]As the Ninth Circuit had pointed out in an earlier case, "both we and our sister courts have recognized the punctuation canon, under which a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one where the phrase is separated from the antecedents by a comma." *Yang v. Majestic Blue Fisheries, LLC,* 876 F.3d

sequential number generator" as modifying only "produce" but not "store" is also inconsistent with the Supreme Court's instruction that a "natural reading" of "or" in a sentence "covers any combination of its nouns, gerunds, and objects."[128] Thus, the use of the disjunctive in the phrase preceding the comma compels reading the statute as requiring that an ATDS must have the capacity to either "store" phone numbers "using a random or sequential number generator," or "produce" phone numbers "using a random or sequential number generator."[129]

By contrast, the interpretation adopted by the Ninth Circuit would require revising the statute's punctuation so that it reads "equipment which has the capacity (A) to store[,] or produce telephone numbers to be called [no comma] using a random or sequential number generator; and (B) to dial such numbers; . . ." or changing the syntax with added words and subsections (such as "equipment which has the capacity (A) to [i] store [telephone numbers to be called] or [ii] produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers). This interpretation was advanced by plaintiffs in other cases and rejected as grammatically implausible by at least one district court, which explained

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996, 1000 (9th Cir. 2017).

[128]*Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018). *Encino Motorcars* involved a statutory exemption to overtime-pay requirements that applies to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles" under 29 U.S.C. § 213(b)(10)(A). In holding that service advisors constitute "salesmen," and overruling this Court's construction that the exemption does not apply to salesman " 'primarily engaged in . . . servicing automobiles," the Supreme Court ruled that the "use of 'or' to join 'selling' and 'servicing' suggests that the exemption covers a salesman primarily engaged in either activity." *Id.* at 1141.

[129]The panel in *Marks v. Crunch* suggested that "using a random or sequential number generator" could not be read as modifying both "store" and "produce" without the insertion of "additional words," such that it would read: "equipment which has the capacity (A) to store [telephone numbers *produced* using a random or sequential number generator]; or [to] produce telephone numbers to be called, using a random or sequential number generator . . . ." *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1051 (9th Cir. 2018) (italics added). But this conclusion ignores both rules of grammar and common sense. The noun "generator" already implies that numbers will be "generated"; adding "produced" would be redundant; "Generate" is synonymous with "produce." *See, e.g.*, *The Oxford Encyclopedic English Dictionary* 586 (1991).

the issue cogently.[130]

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[130]*See Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 937-39 (N.D. Ill. 2018) (rejecting a statutory reading of § 227(a)(1)(A), which "would [only] be convincing if subsection [227](a)(1)(A) were rearranged to read: 'to store or, *using a random or sequential number generator*, to produce telephone numbers to be called.' Rearranging the text in that manner would make it clear that 'using a random or sequential number generator' modified only 'produce' and not 'store.' But it is an unconvincing reading of the statute that Congress in fact drafted, with the adverbial phrase following both verbs."). In *Pinkus,* Judge Gary Feinerman explained:

> Like "produce," "store" is a transitive verb, and so requires an object. *See* Merriam-Webster (2018), https://www.merriam-webster.com/dictionary/store; Oxford English Dictionary (2018), http://www.oed.com/view/Entry/190929?rskey=pdyROA&result=2#eid. And the object of the verbs "store" and "produce" is "telephone numbers to be called." As a result, despite the disjunctive "or" linking "store" and "produce," "store" is not a grammatical orphan, rather, like "produce," it is tied to the object, "telephone numbers to be called." The TCPA thus defines as an ATDS a device that has the capacity "[1] to store or produce [2] telephone numbers to be called" and then "to dial such numbers." 47 U.S.C. § 227(a)(1).
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> But what kinds of numbers? Given its placement immediately after "telephone numbers to be called," the phrase "using a random or sequential number generator" is best read to modify "telephone numbers to be called," describing a quality of the numbers an ATDS must have the capacity to store or produce. Had Congress meant "using a random or sequential number generator" to modify the verbs "store" and "produce," Congress would have placed the phrase immediately after those verbs and before "telephone numbers to be called"—with subsection (a)(1)(A) reading, "to store or produce, using a random or sequential number generator, telephone numbers to be called." Indeed, it would be odd to read the phrase "using a random or sequential number generator" as modifying "store" and "produce." The comma separating "using a random or sequential number generator" from the rest of subsection (a)(1)(A) makes it grammatically unlikely that the phrase modifies only "produce" and not "store," *see Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 1000 (9th Cir. 2017) ("[B]oth we and our sister circuits have recognized the punctuation canon, under which a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one where the phrase is separated from the antecedents by a comma.") (brackets and internal quotation marks omitted) (citing decisions from the Second, Third, Eleventh, and Federal Circuits), and yet it is hard to see how a number generator could be used to "store" telephone numbers.
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> Because the phrase "using a random or sequential number generator" refers to the kinds of "telephone numbers to be called" that an ATDS must have the capacity to store or produce, it follows that that phrase is best understood to describe the process by which those numbers are generated in the first place. True, the statute does not use the verb "generate." But the phrase "using a random or sequential number generator" indicates that a number generator must be used to do something relevant to the "telephone numbers to be called"—most naturally, either to generate the numbers themselves, or to generate the order in which they will be called.
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> The latter possibility is highly unlikely for at least two reasons. For one, as *ACA International* recognized, numbers must necessarily "be called in some order—either in a random or some other sequence." 885 F.3d at 702. As a result, were the phrase "using a random or sequential number generator" understood

The Ninth Circuit's redefinition of an ATDS in *Marks* also violates rules of statutory construction by essentially reading the phrase "using a random or sequential number generator" out of the statute. As the Ninth Circuit panel in *Marks* explained, "a piece of equipment qualifies as an ATDS if it has the capacity to store telephone numbers and then dial them."[131] Yet, any system with the capacity to produce numbers randomly or sequentially generated and to dial those numbers necessarily would also have the capacity to dial from a stored list or database of numbers. As construed by the Ninth Circuit, the statutory requirement for random or sequential number generation is thus superfluous, even though case law, including in the Ninth Circuit, makes clear that courts must interpret statutory terms by " 'giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.' "[132]

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to refer to how numbers are called rather than to how they are generated, it would be superfluous, as it would simply encompass the universe of possible orders in which numbers could be dialed. For another, if "using a random or sequential number generator" referred to the order in which numbers are dialed and not the process of generating them, the phrase would have followed, rather than preceded, "dial such numbers" in section (a)(1)(B). That is, the statute would have read: "to store or produce telephone numbers to be called; and to dial such numbers, using a random or sequential number generator"—which it does not.

So, the phrase "using a random or sequential number generator" necessarily conveys that an ATDS must have the capacity to generate telephone phone numbers, either randomly or sequentially, and then to dial those numbers. *See Dominguez v. Yahoo, Inc*., 629 F. App'x 369, 372 (3d Cir. 2015) (holding that " 'random or sequential' number generation . . . refers to the numbers themselves rather than the manner in which they are dialed"). This interpretation finds support in the FCC's pre-2003 understanding of the statutory term ATDS. The 1992 Order expressed the view that "[t]he prohibitions of § 227(b)(1)"—which, as noted, make it unlawful to use an ATDS under certain conditions—"clearly do not apply to functions like 'speed dialing,' 'call forwarding,' or public telephone delayed message services (PTDMS), because the numbers called are not generated in a random or sequential fashion." 7 FCC Rcd. 8752, 8776 ¶ 47. And in a follow-on 1995 ruling, the Commission described "calls dialed to numbers generated randomly or in sequence" as "autodialed." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 10 FCC Rcd. 12391, 12400 ¶ 19 (1995). The FCC's pre-2003 understanding of § 227(a)(1) thus reinforces what its plain text shows—that equipment qualifies as an ATDS only if it has the capacity to "function . . . by generating random or sequential telephone numbers and dialing those numbers." *Dominguez v. Yahoo, Inc*., 894 F.3d 116, 121 (3d Cir. 2018).

Pinkus, 319 F. Supp. 3d at 937-39.

[131] *Marks v. Crunch San Diego, LLC,* 904 F.3d 1041, 1050 (9th Cir. 2018).

[132] *U.S. v. Neal*, 776 F.3d 645, 652 (9th Cir. 2015).

Marks is also inconsistent with the D.C. Circuit's admonition in *ACA* that Congress did not intend to reach so broadly that every smartphone would constitute an ATDS and that any such construction would be "impermissible."[133] Yet, by construing the definition of an ATDS to not require number generation and merely have the capacity to dial from a list of stored numbers (such as address book or contact list), the Ninth Circuit's redefinition would subject the subscribers and customary users of each of the more than 300 million smartphones in use in the United States as of 2018 to the TCPA's restrictions and potentially to statutory damage awards.

In ruling as it did, the Ninth Circuit disagreed with the Third Circuit's decision in *Dominguez,* referring to its holding that a device must be able to generate random or sequential numbers to qualify as an ATDS as an "unreasoned assumption" because it was unexplained and "failed to resolve the linguistic problem it identified in an unpublished opinion in the same case, where it acknowledged that 'it is unclear how a number can be stored (as opposed to produced) using 'a random or sequential number generator.' "[134]

In fact, the Third Circuit's construction of the statute in two separate opinions in *Dominguez* was not unreasoned—it based on the plain terms of the statute.[135] And the so-called *linguistic problem* raised in the first *Dominguez* opinion was effectively answered in its second opinion where the Third

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[133]*See ACA Int'l v. FCC,* 855 F.3d 687, 697-98 (Fed. Cir. 2018) (invalidating ATDS regulations as arbitrary and capricious because they impermissibly would "render every smartphone an ATDS.").

[134]*Marks v. Crunch San Diego, LLC,* 904 F.3d 1041, 1052 n.8 (9th Cir. 2018).

[135]The Third Circuit analyzed "the statute itself" and concluded that "[t]he statute's reference to a 'random or sequential number generator' reflects that, when the statute was enacted in 1992, telemarketers typically used autodialing equipment that either called numbers in large sequential blocks or dialed random 10-digit strings. Thus, the FCC initially interpreted the statute as specifically targeting equipment that placed a high volume of calls by randomly or sequentially generating the numbers to be dialed." *Dominguez*, 629 F. App'x. at 372-73. Accordingly, "the statutory definition does in fact include such a requirement," and "is explicit that the autodialing equipment may have the capacity to store or produce the randomly or sequentially generated numbers to be dialed." *Id.* at 372 & n.1. In construing the statute, legislative history, and FCC orders, *Dominguez* held that an ATDS "must be able to store or produce numbers that themselves are randomly or sequentially generated." 629 F. App'x. at 373 n.2. These determinations were affirmed post-*ACA*. 894 F.3d at 119.

Circuit held that the statute requires that the numbers themselves be generated randomly or sequentially—not stored or produced randomly or sequentially.[136] In other words, it is the numbers themselves that must be generated randomly or sequentially, and then stored or produced for dialing.

The Ninth Circuit justified its contrary interpretation based on Congress's failure to amend the definition of an ATDS when it narrowly amended the TCPA to exempt debt collection calls made on behalf of the U.S. government, at a time when the invalidated 2015 FCC regulations were in force and arguably permitted dialing from a list. But resort to subsequent legislative history is disfavored[137] and cannot

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[136]*See, e.g., Dominguez v. Yahoo, Inc.,* 894 F.3d 116, 121 (3d Cir. 2018) (holding that, after *ACA*, the "key" question under the TCPA is whether the equipment "had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers"); *Dominguez v. Yahoo, Inc.,* 629 F. App'x 369, 372 n.1 (3d Cir. 2015) ("the statutory definition is explicit that the autodialing equipment may have the capacity to store or to produce the randomly or sequentially generated numbers to be dialed."); *see also Satterfield v. Simon & Schuster, Inc.,* 569 F.3d 946, 951 (9th Cir. 2009) (describing *capacity,* for purposes of the definition of an ATDS, in terms of storage or production of numbers to be called that are randomly or sequentially generated; "a system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do so.").

[137]Post-legislative policies and inaction cannot serve as a premise for re-writing the statute. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). The ambiguity identified by the Ninth Circuit did not arise from the statute's plain terms but from potentially conflicting FCC interpretations, which the D.C. Circuit in *ACA* invalidated as arbitrary and capricious. The panel reasoned that Congress ratified the FCC's broader interpretation by leaving the statutory definition unchanged. *Marks v. Crunch San Diego, LLC,* 904 F.3d 1041, 1052 (9th Cir. 2018), *citing Lorillard v. Pons,* 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."). But Congress did not re-enact the TCPA and it could hardly have given its "tacit approval" to one of several alternative potential interpretations of FCC regulations by doing nothing in the wake of various challenges to the FCC orders. The Supreme Court has long held that "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction," and Ninth Circuit authority is in accord. *Central Bank*, 511 U.S. at 187; *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."); *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886–87 (9th Cir. 2016) ("Congressional inaction in the face of a judicial statutory interpretation

trump the original legislative intent. Moreover, it is far from clear that the FCC considered that merely having the capacity to dial store numbers qualified equipment as an ATDS at the time of the narrow debt collection amendment. The Third Circuit, which was the only Circuit to construe the definition of an ATDS under the FCC's 2015 Order prior to *ACA,* had held that a plaintiff could *not* establish a factual dispute over use of an ATDS by presenting evidence of dialing from a stored list, and instead had to establish that a system met the statutory definition by having the capacity for number generation.[138] Indeed, the D.C. Circuit, in *ACA,* expressly found that the Order supported conflicting interpretations—not that it expressly permitted storage without number generation.[139] And the D.C. Circuit court challenge in *ACA* to the 2015 Order was pending at the same time. It thus is not reasonable to conclude that Congress intended to ratify the interpretation reached by the Ninth Circuit in *Marks*.

By contrast, the legislative history confirms that when the statute was first enacted, as the panel readily acknowledged, Congress was unambiguously "focused on regulating the use

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. . . carries almost no weight."). Thus, inferences based on congressional silence in this instance cannot support the panel's interpretation.

FCC policy also cannot trump original legislative intent confirming that "Congress focused on regulating the use of equipment that dialed blocks of sequential or randomly generated numbers—a common technology at that time." *Marks v. Crunch San Diego, LLC,* 904 F.3d 1041, 1051 (9th Cir. 2018); *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991) ("The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning."). Congress specifically targeted "machines [that] could be programmed to call numbers in large sequential blocks or dial random 10-digit strings of numbers." 904 F.3d at 1044, *quoting* H.R. Rep. No. 102-317, at 10. Calls to randomly and sequentially generated numbers was a concern because they "resulted in calls hitting hospitals and emergency care providers" which could prevent them from addressing real emergencies and potentially even be rendered "inoperable, and 'dangerously preventing those lines from being utilized to receive calls from those needing emergency services' . . . ." *Id.* Restricting dialers that merely called stored numbers would not address this concern.

[138]*See Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 372-73 & nn. 1, 2 (3d Cir. 2015) ("we agree with the District Court's definition of "random or sequential" number generation (i.e., the phrase refers to the numbers themselves rather than the manner in which they are dialed) and its holding that the statutory definition does in fact include such a requirement . . . .").

[139]*See ACA Int'l v. FCC,* 855 F.3d 687 (Fed. Cir. 2018).

of equipment that dialed blocks of sequential or randomly generated numbers—a common technology at that time."[140] Congress specifically targeted "machines [that] could be programmed to call numbers in large sequential blocks or dial random 10-digit strings of numbers," because they "resulted in calls hitting hospitals and emergency care providers."[141] The legislative history reveals concern for calls to randomly and sequentially generated telephone numbers, not calls to stored numbers.[142]

Following the Ninth Circuit's decision in *Marks v. Crunch,* the FCC requested additional comments about what constitutes an ATDS.[143]

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[140]*Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1051 (9th Cir. 2018).

[141]*Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1044 (9th Cir. 2018).

[142]*See* H.R. Rep. No. 101-633, at 3, 10 (1990) (automatic dialers call "sequential blocks of telephone numbers"); S. Rep. No. 102-178, at 2 (1991) ("Having an unlisted number does not prevent those telemarketers that call numbers randomly or sequentially"); 137 Cong. Rec. 30,818 (Nov. 7, 1991) ("Due to advances in autodialer technology, machines can be programmed to deliver a prerecorded message to thousands of sequential phone numbers," creating "a real hazard"); 137 Cong. Rec. H11307-01 (Nov. 26, 1991) at 11310 ("automatic dialing machines place calls randomly, meaning they sometimes call unlisted numbers, or numbers of hospitals, police and fire stations, causing public safety problems").

This is also how the FCC initially defined an ATDS. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 8752, 8773 (1992) ("autodialer calls" were "*dialed using a random or sequential number generator*"), 8776 (stating the prohibitions of § 227(b)(1) *do not apply* to functions like "speed dialing" and "call forwarding," because numbers are "*not generated in a random or sequential fashion*") (emphasis added).

[143]*See* FCC Public Notice, Consumer and Governmental Affairs Bureau Seeks Further Comment on Interruption of the Telephone Consumer Protection Act in Light of the Ninth Circuit's *Marks v. Crunch San Diego, LLC* Decision (Oct. 3, 2018), https://docs.fcc.gov/public/attachments/DA-18-1014A1.pdf. Specifically, the Commission sought

> further comment on one issue related to interpretation and implementation of the Telephone Consumer Protection Act (TCPA), following the recent decision of the U.S. Court of Appeals for the Ninth Circuit in *Marks v. Crunch San Diego, LLC*. We seek comment here to supplement the record developed in response to our prior Public Notice seeking comment on the U.S. Court of Appeals for the D.C. Circuit's opinion in *ACA International v. FCC*.
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> Specifically, we seek further comment on what constitutes an "automatic telephone dialing system." The TCPA defines an automatic telephone dialing system 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)

The FCC, ultimately, is likely to weigh in on the meaning of an ATDS in or by 2019, in response to its 2018 request for comments.[144]

The FCC also will address whether a system is not an ATDS if it requires "human intervention" to place calls. Courts have held that, even if a system otherwise could qualify as an ATDS because it has the capacity to generate numbers randomly or sequentially, the system is not an ATDS if a text message in fact cannot be sent without "human intervention."[145] This body of judge-made case law arose because the FCC, in its 2003 Report and Order, interpreted

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to dial such numbers." The *Marks* court declared "the statutory language ambiguous on its face" as to the question of whether the phrase "using a random or sequential number generator" modifies both "store" and "produce." The *Marks* court then read the phrase "using a random or sequential number generator" not to apply to equipment that has the capacity "to store numbers to be called." In other words, the court interpreted the statutory language expansively so that an "automatic telephone dialing system" is "not limited to devices with the capacity to call numbers produced by a 'random or sequential number generator,' but also includes devices with the capacity to store numbers and to dial stored numbers automatically." The *ACA* court, however, held that the TCPA unambiguously foreclosed any interpretation that "would appear to subject ordinary calls from any conventional smartphone to the Act's coverage."

We seek further comment on how to interpret and apply the statutory definition of automatic telephone dialing system, including the phrase "using a random or sequential number generator," in light of the recent decision in *Marks*, as well as how that decision might bear on the analysis set forth in *ACA International*. To the extent the statutory definition is ambiguous, how should the Commission exercise its discretion to interpret such ambiguities here? Does the interpretation of the *Marks* court mean that any device with the capacity to dial stored numbers automatically is an automatic telephone dialing system? What devices have the capacity to store numbers? Do smartphones have such capacity? What devices that can store numbers also have the capacity to automatically dial such numbers? Do smartphones have such capacity? In short, how should the Commission address these two court holdings? We also seek comment on any other issues addressed in the *Marks* decision that the Commission should consider in interpreting the definition of an "automatic telephone dialing system."

Id. (footnotes omitted).

[144]*See* FCC, *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision,* 83 Fed. Reg. 26284, 26285 (June 5, 2018). The issues raised with respect to capacity are enumerated earlier in this section.

[145]*See, e.g., Derby v. AOL, Inc.*, No. 15–cv–00452–RM W, 2015 WL 3477658, at *4 (N.D. Cal. June 1, 2015) (dismissing plaintiff's TCPA complaint, holding that a system that converted users' instant messages to text messages was not an ATDS because "extensive human intervention" was required to send text messages through defendant's instant messaging service; "had an AIM user not inputted plaintiff's mobile phone number, composed a text message, and directed AIM to send it to plaintiff,

he would not have received the text messages at issue."); *Modica v. Green Tree Servicing, LLC*, No. 14 C 3308, 2015 WL 1943222, at *3 (N.D. Ill. Apr. 29, 2015) (granting summary judgment to Green Tree Servicing because its representative could not have used its equipment to call plaintiffs without "human intervention"; although "the additional step of logging into the [ATDS] is minimal," it was nonetheless sufficient "human intervention" to foreclose a finding that the service was an ATDS); *Glauser v. GroupMe, Inc.*, No. C 11-2584 PJH, 2015 WL 475111, at *6 (N.D. Cal. Feb. 4, 2015) (granting summary judgment for the defendant where the messages at issue were "triggered" by a human and the system did not "have the capacity to send messages without human intervention."); *McKenna v. WhisperText*, No. 5:14-cv-00424-PSG, 2015 WL 428728, at *3-4 (N.D. Cal. Jan. 30, 2015) (dismissing plaintiff's TCPA complaint for failing to allege a lack of human intervention where plaintiff had alleged that WhisperText violated the statute by inviting a user's contacts to download the App because the allegations "ma[d]e clear that the Whisper App can send SMS invitations only at the user's affirmative direction to recipients selected by the user."); *Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189, 1191-94 (W.D. Wash. 2014) (granting summary judgment for Orange Cab because the application it used to send dispatch notifications via text to its customers—TaxiMagic—could only send messages after (1) a customer provided "some amount of information to the dispatcher," (2) the dispatcher "pressed 'enter' to transmit that information to both the TaxiMagic program and the . . . driver," and (3) the driver "pressed 'accept' "); *see also Wilcox v. Green Tree Servicing, LLC*, No. 8:14-CV-1681-T-24, 2015 WL 2092671, at *5 (M.D. Fla. May 5, 2015) (granting summary judgment for the defendant and holding, in a case involving phone calls, that "[i]f the agent selects the number to be called, then the call would be made as a result of human intervention, and the call would not be made using an ATDS."); *Smith v. Securus Techs., Inc.*, No. 15-CV-550-SRN, 2015 WL 4636696, at *7 n.3 (D. Minn. Aug. 4, 2015) (holding, in a case involving phone calls, that "[p]recisely because an inmate must initiate the chain of events, by dialing Plaintiffs' phone numbers, [defendant's] system is *not* an automatic telephone dialing system that 'dial[s] numbers without human intervention.' ") (citation omitted); *Gaza v. LTD Fin. Servs., L.P.,* No. 8:14-CV-1012-T-30JSS, 2015 WL 5009741, at *1, 4 (M.D. Fla. Aug. 24, 2015) (granting summary judgment for the defendant in a TCPA case involving phone calls where "the agent pulled up the subject account from a database and then used his mouse to manually click on the phone number associated with the account to launch the call," because "the agent selected the number to be called and the calls were [thus] made as a result of human intervention"). *But see, e.g.*, *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018) (reversing summary judgment for the defendant on the issue of human intervention, rejecting the notion that "a device cannot qualify as an ATDS unless it is fully automatic, meaning that it must operate without any human intervention whatsoever . . . [because c]ommon sense indicates that human intervention of some sort is required before an autodialer can begin making calls, whether turning on the machine or initiating its functions[,]"and construing the human intervention test narrowly—without reference to any case law—to be inapplicable if dialing is done automatically, rather than manually;

the definition of an ATDS to include "predictive dialers" which had the latent capacity to generate numbers randomly or sequentially, but in fact operated "without human intervention."[146] In its 2015 Order, the FCC acknowledged the line of cases holding that particular systems did not constitute ATDSs where *human intervention* was required, but declined to articulate precisely what level of human involvement was needed, instead leaving it to the courts to determine the statute's applicability to given systems on a "case-by-case basis."[147] In *ACA Int'l*, the D.C. Circuit cited the Commission's statement that the "basic function" of an autodialer is the ability to dial numbers "without human intervention"—which the court said made sense given that 'auto' in autodialer—or, equivalently, 'automatic' in 'automatic telephone dialing system, ' . . .—would seem to envision non-manual dialing of telephone numbers"—but noted that the FCC had failed to explain what this means and

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holding that the system at issue "dials numbers automatically, and therefore it has the automatic dialing function necessary to qualify as an ATDS, even though humans, rather than machines, are needed to add phone numbers to the Textmunication platform."); *Sterk v. Path, Inc.*, 46 F. Supp. 3d 813, 819-20 (N.D. Ill. 2014) (granting the plaintiff partial summary judgment on the issue of whether the defendant's system was an ATDS where the court found that it automatically downloaded from a customer's cellular phone the customer's entire contact list and automatically sent messages to each of those contacts without the customer's instruction or involvement).

[146]*See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14092 ¶ 132 (2003). In a subsequent ruling in 2008, the FCC characterized as the defining feature of an ATDS—or an *autodialer,* in the FCC's alternative terminology—"the capacity to dial numbers without human intervention." *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 FCC Rcd. 559, 566 (2008).

[147]*Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7975 ¶ 17 (2015). In declining to define what constitutes *human intervention*, the FCC explained that "[h]ow the human intervention element applies to a particular piece of equipment is specific to each individual piece of equipment, based on how the equipment functions and depends on human intervention, and is therefore a case-by-case determination." FCC Ruling ¶ 17. Dissenting Commissioner Michael O'Reilly criticized the majority for failing to provide definition and instead leaving the issue to the courts to resolve. FCC Ruling at 129-30 (O'Reilly, Comm'r, dissenting). Since "human intervention" doesn't appear in the statutory definition of an ATDS, and the FCC has not purported to change the statutory definition, it is not entirely clear how "human intervention" should be applied except as a characteristic of an ATDS, which could evidence whether a system does or does not have the *capacity* to generate numbers randomly or sequentially and to dial those numbers.

declined a request to clarify that a dialer is not an autodialer unless it has the capacity to dial without human intervention.[148]

Since the time of the FCC's July 2015 Order, courts have granted summary judgment for defendants,[149] denied

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[148]*See ACA Int'l v. FCC*, 855 F.3d 687, 703 (Fed. Cir. 2018).

[149]*See, e.g., Hatuey v. IC System, Inc.*, Civil Action 1:16-cv-12542-DPW, 2018 WL 5982020 (D. Mass. Nov. 14, 2018) (granting summary judgment for the defendant because the LiveVox HCI system, which used a "clicker agent," required human intervention); *Gaza v. Auto Glass America, LLC*, Case No: 8:17-cv-1811-T-27AEP, 2018 WL 5775915 (M.D. Fla. Nov. 2, 2018) (granting summary judgment for the defendant based on human intervention); *Gary v. TrueBlue, Inc.*, Case No. 17-cv-10544, 2018 WL 4931980, at *4-5 (E.D. Mich. Oct. 11, 2018) (granting defendant's motion for summary judgment based on the plain terms of the statute and concluding that the "human intervention" test did not survive *ACA*, but ruling, in the alternative, that merely having automated features does not make a system an ATDS); *Glasser v. Hilton Grand Vacations*, No. 16-cv-00952, 2018 WL 4565751, at *5 (M.D. Fla. Sept. 24, 2018) (granting defendant's motion for summary judgment, holding that the dialer, which required an agent to manually select whom to place calls to, scrubbing land lines, creating a list of numbers to call, and deciding when to place a call was not an ATDS based on the level of required human intervention); *Fleming v. Associated Credit Services, Inc.*, Civ. No. 16-3382 (KM) (MAH), 2018 WL 4562460, at *11 (D.N.J. Sept. 21, 2018) (granting summary judgment for the defendant because the plaintiff had not shown that the "clicker agent" system employed by ACS was "so lacking in human intervention that it would qualify as an ATDS. The 'clicker agent'—a person—is the one who initiates the call; calls are never placed by completely automatic, electronic means."); *Ramos v. Hopele of Fort Lauderdale, LLC*, __ F. Supp. 3d __, 2018 WL 4568428 (S.D. Fla. 2018) (granting summary judgment for defendants because the EZ-Texting platform, a web-based software application that was owned and controlled by CallFire, required human intervention to send text messages); *Maddox v. CBE Group*, Civil Action No. 1:17-CV-1909-SCJ, 2018 WL 2327037, at *5 (N.D. Ga. May 22, 2018) (granting summary judgment for the defendant based on the FCC's 2003 regulations and a finding of human intervention; "The FCC's interpretation requires 'human intervention,' not that agents dial all ten digits of a phone number manually. *See* 18 F.C.C. Rcd. at 14092. Under Plaintiff's sweeping interpretation, any phone with a speed-dial feature—i.e. nearly all phones—would qualify as an ATDS. This is the very kind of "unreasonably, and impermissibly, expansive" interpretation that led the *ACA Int'l* Court to overturn the FCC's 2015 Order. *See* 885 F.3d at 696–700. The focus is on whether the system can automatically dial a phone number, not whether the system makes it easier for a person to dial the number. *See* 18 F.C.C. Rcd. at 14092."); *Herrick v. GoDaddy.com*, LLC, 312 F. Supp. 3d 792, 801-03 (D. Ariz. 2018) (applying the human intervention test in granting summary judgment for the defendant in a case decided after *ACA*, on the theory that the D.C. Circuit's rejection of

the FCC's refusal to expressly adopt the human intervention test meant that the district court was not precluded from applying it); *Ferrer v. Bayview Loan Servicing*, No. 15-cv-20877, 2018 WL 582584, at *6 (S.D. Fla. Jan. 26, 2018) (granting summary judgment for the defendant because of unrefuted evidence that the Avaya X1 Platform, which permitted a user to dial phone calls using a computer keyboard and mouse, only allowed calls to be manually dialed; "the Avaya Platform cannot place calls without human input, and it is not able to dial predictively, store, or produce telephone numbers independently."); *Arora v. Transworld Systems Inc.*, No. 15-CV-4941, 2017 WL 3620742, at *1, *3 (N.D. Ill. Aug. 23, 2017) (granting defendant's motion for summary judgment because Live Vox's Human Call Initiator, "a human initiated and human controlled dialing system[,] was not an ATDS because it requires a TSI agent to manually initiate every call" by a "clicker agent" who is "responsible for confirming that the number to be called is the correct number, and after doing so, launching the call by physically clicking the number" by "clicking on a dialogue box to confirm the launching of a call to a particular telephone number"; "[t]hus, every call made using the Human Call Initiator requires direct human intervention to initiate"); *Schlusselberg v. Receivables Performance Management, LLC*, No. 15-7572 (FLW), 2017 WL 2812884, at *2-3 (D.N.J. June 29, 2017) (granting summary judgment for the defendant because its calling system, the LiveVox Human Call Initiator, required human intervention to make phone calls and was therefore not an ATDS); *Ung v. Universal Acceptance Corp.*, No. 15-127 (RHK/FLN), 2017 WL 1288378, at *2-3 (D. Minn. Apr. 6, 2017) (granting summary judgment for the defendant where "a live human was required to place calls" by either manually entering a phone number on a handset telephone or "using a computer web application that required copying and pasting (or manually typing) the [phone number stored in database] into the application, which would then dial the number and connect the call to the employee's [handset] phone," stating "[w]ithout the capacity to dial on its own, telephone equipment simply cannot be an ATDS" under the FCC's human intervention requirement); *Smith v. Stellar Recovery, Inc.*, No. 15-cv-11717, 2017 WL 1336075, at *5-7 (E.D. Mich. Feb. 7, 2017) (granting defendant's summary judgment motion because the HCI system "is configured in a way that it *cannot* dial phone numbers without the clicker agents initiating the call, and therefore the system, while clearly an advanced and efficient method of contacting debtors, is not an autodialer."), *report and recommendation approved,* 2017 WL 955128, at *3 (E.D. Mich. Mar. 13, 2017) (holding expressly that "the HCI system is characterized by one key factor that separates it from autodialers: it requires human intervention—the clicker agent—to launch an outgoing call."); *Wesley v. Universal Recovery Corp.*, No. ED CV 16-00130-AB (KKx), 2016 WL 9138057, at *2 (C.D. Cal. Oct. 12, 2016) (granting defendant summary judgment because the system at issue was not an ATDS because "[a] person must manually program a line to correspond to a particular phone number, and to use the feature to place a call, the user must press the auto dial button" which "merely allows the user to program a phone's button with a certain number, and to dial that number by pressing a button" but "does not amount to the telephone system itself 'generat[ing] and dial-[ing] [numbers] without human intervention,' for it involves human

plaintiff's motion for summary judgment,[150] or dismissed

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intervention to both program the phone and to dial the number"); *Pozo v. Stellar Recovery Collection Agency, Inc.*, No. 8:15-cv-929-T-AEP, 2016 WL 7851415, at *3-6 (M.D. Fla. Sept. 2, 2016) (granting summary judgment "because Stellar's HCI system required its representatives to manually dial all calls and was not capable of making any calls without human intervention . . ."; "Dialing systems which require an agent to manually initiate calls do not qualify as autodialers under the TCPA. . . . Furthermore, dialing systems which require agents to use an electronic 'point and click' function to initiate calls are not autodialers because human intervention is required to initiate the calls."); *Jenkins v. Mgage, LLC*, No. 14-2791, 2016 WL 4263937, at *5-7 (N.D. Ga. Aug. 12, 2016) (granting summary judgment for the defendant based on human intervention where an Opera employee had to: (i) navigate to a website; (ii) log into the Platform; (iii) determine the content of the text message; (iv) type the content of the text message into the Platform; (v) determine whether to send the text message immediately or to schedule a later date to send the message; (vi) either click "send" to send the message immediately, or take action to select a later date and time to send the message by using a drop-down calendar function; and where Opera also determined the telephone numbers to which text messages were sent by an employee choosing a particular list of numbers and uploading the list to mGage's Platform as a CSV file); *Martin v. Allied Interstate, LLC,* 192 F. Supp. 3d 1296, 1308-09 (S.D. Fla. 2016) (granting summary judgment for the defendant where calls were placed manually); *Goad v. Censeo Health, LLC,* No. 3:15CV00197 JLH, 2016 WL 2944658, at *2-3 (E.D. Ark. May 19, 2016) (granting summary judgment for the defendant where uncontroverted evidence established that Censeo Health's employees manually dialed each call by pressing a button for each digit in the telephone number, the computer system prompted the employees to dial certain numbers which were displayed to the employee, and the computer system had no dialing mechanism through which it could place telephone calls and was entirely separate from the telephone system used to place calls); *Estrella v. Ltd Financial Services, LP*, No. 14-2624, 2015 WL 6742062, at *3 (M.D. Fla. Nov. 2, 2015) (granting summary judgment for the defendant where "the evidence demonstrates, at most, that the calls were placed manually with the use of human intervention through a 'point and click function.' "); *Gaza v. LTD Financial Services, L.P.*, No. 14-1012, 2015 WL 5009741, at *4 (M.D. Fla. Aug. 24, 2015) (granting summary judgment for the defendant where unrefuted evidence established that the calls were placed manually); *Luna v. Shac, LLC,* 122 F. Supp. 3d 936, 940-41 (N.D. Cal. 2015) (granting summary judgment for the defendant where the text message at issue was sent as a result of human intervention "in several stages of the process prior to Plaintiff's receipt of the text message, and was not limited to the act of uploading the telephone number to the CallFire database . . . . [H]uman intervention was involved in drafting the message, determining the timing of the message, and clicking 'send' on the website to transmit the message to Plaintiff.").

[150] *See, e.g.*, *Gary v. TrueBlue, Inc.*, Case No. 17-cv-10544, 2018 WL 3647046, at *7-8 (E.D. Mich. Aug. 1, 2018) (denying plaintiff's motion for summary judgment and granting defendant's request for discovery because

plaintiff's claims,[151] under the judicial "human intervention" formulation for determining if a system is not an ATDS (although courts in some other cases found that human intervention had not been established[152] or was disputed[153] or was refuted by the allegations as pled, in connection with a

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"multiple steps of human intervention" were required to send a text, including editing the list, crafting the outgoing text, and clicking certain keys).

[151]*See, e.g., Derby v. AOL, Inc*., No. 5:15-CV-00452-RMW, 2015 WL 5316403, at *4 (N.D. Cal. Sept. 11, 2015) (dismissing plaintiff's amended complaint with prejudice, holding that "The FCC's [2015] order does not suggest that a system that never operates without human intervention constitutes an ATDS under the statute."); *McKenna v. WhisperText, LLC*, No. 5:14-cv-00424-PSG, 2015 WL 5264750, at *3 (N.D. Cal. Sept. 9, 2015) (dismissing with prejudice plaintiff's fourth amended complaint, holding that the system at issue was not an ATDS because selecting telephone numbers to which text messages were to be sent constituted human intervention); *Derby v. AOL, Inc.*, 5:15–cv–00452–RMW, 2015 WL 5316403, at *3-4 (N.D. Cal. Sept. 11, 2015) (holding that a user changing his or her status or "send[ing] a text message back to defendant's . . . system" triggering a text message constituted human intervention).

[152]*See, e.g.*, *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018) (reversing summary judgment for the defendant on the issue of human intervention, and construing the human intervention test narrowly—without reference to any case law—to be inapplicable if dialing is done automatically, rather than manually; holding that the system at issue "dials numbers automatically, and therefore it has the automatic dialing function necessary to qualify as an ATDS, even though humans, rather than machines, are needed to add phone numbers to the Textmunication platform."); *Manuel v. NRA Group, LLC*, 200 F. Supp. 3d 495, 501-02 (M.D. Pa. 2016) (granting in part plaintiff's motion for summary judgment, holding that the defendant's Mercury Dialer was a predictive dialer, capable of dialing without human intervention), *aff'd on other grounds,* 722 F. App'x 141 (3d Cir. 2018) (affirming the entry of summary judgment for the plaintiff where the issue of what constitutes an ATDS was not properly preserved for appeal).

[153]*See, e.g., Blow v. Bijora, Inc.,* 855 F.3d 793 (7th Cir. 2017) (affirming summary judgment for defendant on the basis of consent but holding that the issue of whether Opt It's software platform was an ATDS was disputed because human involvement was required "at nearly every step in the platform's text message transmission process . . . " but was not present "at the precise point of action barred by the TCPA: using technology to 'push' the texts to an aggregator that sends the messages out simultaneously to hundreds or thousands of cell phone users at a predetermined date or time"); *Pinchem v. Regal Medical Group, Inc.,* 228 F. Supp. 3d 992, 998-99 (C.D. Cal. 2017) (denying defendant's motion for summary judgment where a fax system was used to mistakenly dial plaintiff's cell phone number to transmit letters, despite that letters were subject to human review and there was "human involvement in the preparation of the letter and initial decision to fax the letter to a specific medical provider . . . ,"

motion to dismiss, where plaintiffs plausibly pled use of an ATDS based on the contents of the message, the context in which the message was received, and the existence of similar messages.[154]).

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summary judgment was inappropriate because there were "substantial additional automated steps required to complete the fax transmission," including computer programs that operated to store the fax number, decide whether to fax or mail the letter, select the number for transmission from a database of numbers, decide when to fax the letter, whether a fax attempt was successful, whether to reattempt the fax, and how many attempts to make); *Zeidel v. A&M (2015) LLC,* No. 13-CV-6989, 2017 WL 1178150, at *8-11 (N.D. Ill. Mar. 30, 2017) (denying defendant's motion for summary judgment, relying on cases pre-dating the FCC's 2015 Order which applied a definition of ATDS much broader than the statutory definition which the FCC made clear in 2015 must be applied, and ruling that the human intervention inquiry is focused on human involvement at the time of dialing, not in the inputting of phone numbers or programming of the system; citing *Morse v. Allied Interstate, LLC,* 65 F. Supp. 3d 407, 410 (M.D. Pa. 2014) and *Johnson v. Yahoo!, Inc.,* Nos. 14 CV 2028, 14 CV 2753, 2014 WL 7005102, at *5 (N.D. Ill. Dec. 11, 2014) ("Every ATDS requires some initial act of human agency—be it turning on the machine or pressing 'Go.' It does not follow, however, that every subsequent call the machine dials—or message it sends—is a product of that human intervention.")); *Mey v. Venture Data, LLC,* 245 F. Supp. 3d 771,789-92 (N.D.W. Va. 2017) (denying defendant's motion for summary judgment on human intervention where, among other things, the defendant's telephone operator admitted that the relevant call was made using an autodialer and volunteered that it dialed random phone numbers); *Daubert v. NRA Group, LLC,* 189 F. Supp. 3d 442, 460-64 (M.D. Pa. 2016) (granting plaintiff's motion for partial summary judgment on its TCPA claim where undisputed evidence established that the defendant's system operated without human intervention at the point in time that calls were placed), *aff'd on other grounds,* 861 F.3d 382 (3d Cir. 2017) (affirming the entry of summary judgment for the plaintiff where he did not provide prior express consent); *In re Collecto, Inc.,* Master No. 14-MD-2513-RGS, 2016 WL 552459, at *4 (D. Mass. Feb. 10, 2016) (denying defendant's motion for summary judgment based on human intervention because "the FCC's definition of an ATDS is based on the capacity of a dialer to operate without human intervention, and not whether *some* act of human agency occurs at some point in the process.").

[154]*See, e.g., Holt v. Facebook, Inc.,* 240 F. Supp. 3d 1021, 1026-31 (N.D. Cal. 2017); *Brickman v. Facebook, Inc.,* 230 F. Supp. 3d 1036, 1040-43 (N.D. Cal. 2017); *see also Brickman v. Facebook, Inc.,* Case No. 16-cv-00751-TEH, 2017 WL 1508719 (N.D. Cal. Apr. 27, 2017) (certifying the court's order denying Facebook's motion to dismiss for interlocutory appeal and staying the case); *see also Wick v. Twilio Inc.*, No. C16-00914RSL, 2017 WL 2964855, at *2 (W.D. Wash. July 12, 2017) (granting Twilio's motion to dismiss based on consent but holding that plaintiff had adequately alleged use of an ATDS and dialing without human intervention for purposes of stating a claim at the outset of the case where he alleged that

While some courts have narrowly focused on whether human intervention is involved in only the dialing function,[155] others have broadly construed the "human intervention" test to also consider additional aspects of human involvement in the use of a platform. These cases have found that selecting telephone numbers to receive a message, drafting a message, determining the timing of a message, and clicking 'send' to transmit a message each constituted sufficient human intervention to defeat a TCPA claim.[156] Since all text mes-

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"Twilio's platform can generate a list of numbers to dial" and "has the potential ability to automatically send a pre-recorded message to thousands of numbers in a short period of time").

[155]*See, e.g.*, *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018) (reversing summary judgment for the defendant on the issue of human intervention, rejecting the notion that "a device cannot qualify as an ATDS unless it is fully automatic, meaning that it must operate without any human intervention whatsoever . . . [because c]ommon sense indicates that human intervention of some sort is required before an autodialer can begin making calls, whether turning on the machine or initiating its functions[,]"and construing the human intervention test narrowly—without reference to any case law—to be inapplicable if dialing is done automatically, rather than manually; holding that the system at issue "dials numbers automatically, and therefore it has the automatic dialing function necessary to qualify as an ATDS, even though humans, rather than machines, are needed to add phone numbers to the Textmunication platform.").

[156]*See, e.g., Hatuey v. IC System, Inc.*, Civil Action 1:16-cv-12542-DPW, 2018 WL 5982020 (D. Mass. Nov. 14, 2018) (granting summary judgment for the defendant because the LiveVox HCI system, which used a "clicker agent," required human intervention); *Derby v. AOL, Inc.*, Case No. 5:15-cv-00452-RMW, 2015 WL 5316403, at *3-4 (N.D. Cal. Sept. 11, 2015) (holding that a user changing his or her status or "send[ing] a text message back to defendant's . . . system" triggering a text message constituted human intervention); *McKenna v. WhisperText, LLC*, No. 5:14-cv-00424-PSG, 2015 WL 5264750, at *3 (N.D. Cal. Sept. 9, 2015) (holding the system at issue was not an ATDS because selecting telephone numbers to which messages were to be sent constituted human intervention); *Luna v. Shac, LLC,* 122 F. Supp. 3d 936, 940-41 (N.D. Cal. 2015) (holding that the system at issue was not an ATDS because "drafting the message, determining the timing of the message, and clicking 'send' on the website to transmit the message to Plaintiff" constituted "human intervention"); *see also Modica v. Green Tree Servicing, LLC*, No. 14 C 3308, 2015 WL 1943222, at *3 (N.D. Ill. Apr. 29, 2015) (entering summary judgment for the defendant, finding that its representative could not have used a computer program to call plaintiffs without human intervention, where defendant's representative could only access the equipment by logging into the program; although "the additional step of logging into the [system] is minimal," it was nonetheless sufficient human intervention)); *Glauser v. GroupMe, Inc*., No. C 11-2584 PJH, 2015 WL 475111, at *6 (N.D. Cal. Feb. 4, 2015) (finding hu-

sages, by definition, are sent electronically, courts that look narrowly only at the point of transmission are not applying the "human intervention" test correctly. Indeed, if merely sending a text message via electronic means could trigger liability under the TCPA, there would be no need for the "case-by-case" analysis of human intervention called for by the FCC[157] because all texting platforms and devices use computerized and "automated" processes to send text messages and thus no system (or virtually no system) could meet that standard.

For purposes of pleading a claim, some courts have even suggested that a plaintiff must affirmatively negate *human intervention* to state a claim under the TCPA.[158] Other courts have held that plaintiffs failed to state a claim for a TCPA violation where their own allegations suggested "direct targeting that is inconsistent with the sort of random or sequential number generation required for an ATDS . . . ."[159] Needless to say, the standard for pleading the existence of an ATDS is much lower for purposes of stating a

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man intervention was involved in using the GroupMe application where "Welcome Texts" that were automatically triggered by a user action "were sent to plaintiff as a direct response to the intervention of . . . the . . . group creator" when he added plaintiff to the group); *Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189, 1191 (W.D. Wash. 2014) (granting defendant summary judgment because the application it used to send dispatch text message notifications to its customers could only send those messages after individuals participated in the dispatch system that relayed information to the application).

[157]*See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7975 ¶ 17 (2015).

[158]*See, e.g.*, *Mata v. Veros Credit, LLC*, No. SA CV 16-98-DOC (JCGx), 2017 WL 2644633, at *2-3 (C.D. Cal. Jan. 20, 2017) (stating in dicta that "to properly allege use of an ATDS, a lack of human intervention must also be allege[d] . . . . ," but declining to reach the issue of human intervention where the plaintiff could not support a claim for relief "on the basis of calls made using [an] ATDS . . . ."); *McKenna v. WhisperText*, No. 5:14-cv-00424-PSG, 2015 WL 428728, at *2-3 (N.D. Cal. Jan. 30, 2015) (holding that plaintiff's failure to allege a lack of human intervention doomed his TCPA claims at the pleadings stage).

[159]*Weisberg v. Stripe, Inc.,* Case No. 16-cv-00584-JST, 2016 WL 3971296, at *3-4 (N.D. Cal. July 25, 2016); *Duguid v. Facebook, Inc.,* No. 15-cv-00985-JST, 2016 WL 1169365, at *5 (N.D. Cal. Mar. 24, 2016). *But see Flores v. Adir Int'l, LLC,* 685 F. App'x 553 (9th Cir. 2017) (reversing the lower court's order dismissing plaintiff's complaint, where the trial court found "direct targeting that is inconsistent with the sort of random or sequential number generation required for an ATDS . . . ," because, the appellate panel held, actual dialing capacity alone did not determine

claim at the outset of the case than it is for proving the capabilities of the underlying technology, when disputed, at trial[160] or on motion for summary judgment, with some courts accepting allegations which suggest messages plausibly may have been sent automatically.[161]

The FCC ultimately is likely to weigh in on the significance of human intervention to the determination of whether a system or technology constitutes an ATDS by rulemaking expected in or before 2019.

The Role of the FCC in TCPA Regulation

The FCC's authority to promulgate regulations under the TCPA comes from the statute itself. Congress delegated specific authority to the Federal Communications Commission to adopt rules and regulations implementing certain aspects of the TCPA.[162] The Agency may not vary the plain terms of the statute, however. In evaluating whether a court is bound by FCC interpretations of the TCPA, a court must engage in a two-step process laid out in the U.S. Supreme Court's decision in *Chevron v. Natural Resources Defense Council, Inc*.[163] First, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed

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whether a particular system is an ATDS, which must be evaluated in terms of its *capacity*).

[160]Relatively few putative TCPA class action suits actually go to trial because of the potential for large statutory damage awards in cases where the defendant could not prevail on motion practice and a class has been certified or, for individual claims, because of the high cost of a trial relative to the small amount at issue in most cases. Where a case does proceed to trial, a defendant may seek, by motion *in limine*, to exclude potentially pejorative terms from being used at trial in the presence of the jury. *See, e.g.*, *Barnes v. Conn Appliances, Inc.*, No. 3:16-CV-413-HTW-LRA, 2018 WL 4100943, at *5 (S.D. Miss. Aug. 28, 2018) (excluding the terms "autodialer" and "robocall" as "unfairly prejudicial" and "carry[ing] significant negative connotations.").

[161]*See, e.g.*, *Sessions v. Barclays Bank Del.*, 317 F. Supp. 3d 1208, 1213-14 (N.D. Ga. 2018) (holding that plaintiff stated a claim by alleging calls sent to a cellular number using an ATDS); *Reichman v. Poshmark, Inc.*, 267 F. Supp. 3d 1278, 1285-86 (S.D. Cal. 2017) (denying motion to dismiss and ruling that "whether Defendant actually used an ATDS, *i.e.*, equipment with the capacity to dial numbers without human intervention, is an issue that should be decided after discovery . . . . ").

[162]*See* 47 U.S.C.A. § 227(b)(2).

[163]*Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

intent of Congress."[164] Second, if a statute is silent or ambiguous with respect to an issue, a court then must defer to the agency provided its analysis "is based on a permissible construction of the statute."[165]

The FCC's construction of the TCPA in a given administrative case is subject to administrative review under a deferential standard that assumes it is permissible unless "arbitrary, capricious, or manifestly contrary to the statute."[166]

Conversely, where a case raises an issue under the statute that is within the FCC's jurisdiction to interpret, federal courts may refer a question of interpretation to the FCC pursuant to the primary jurisdiction doctrine.[167]

In evaluating TCPA cases, district courts are bound by the Hobbs Act[168] to apply FCC rulings that are on point.[169] Where an FCC determination is not on point, of course, a district

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[164]*Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also Swallows Holding, Ltd. v. C.I.R.*, 515 F.3d 162, 170 (3d Cir. 2008) ("Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), if the statutory language is clear and unambiguous, our inquiry ends and the plain meaning of the statute governs the action."); *Satterfield v. Simon and Schuster, Inc.*, 569 F.3d 946, 951, 953 (9th Cir. 2009) (holding that the definition of an ATDS is unambiguously set forth in the statute, and that therefore, under *Chevron*, because "Congress spoke clearly, we need not look to the FCC's interpretations . . . .").

[165]*Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); *see also Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 878 (9th Cir. 2014) (applying *Chevron* deference to an FCC ruling on vicarious liability "[b]ecause Congress has not spoken directly to this issue and because the FCC's interpretation was included in a fully adjudicated declaratory ruling . . . ."), *aff'd on other grounds*, 136 S. Ct. 663 (2016).

[166]*Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

[167]*See, e.g.*, *Charvat v. EchoStar Satellite, LLC*, 630 F3d 459, 466 (6th Cir. 2010) (referring a question to the FCC in the interest of promoting uniformity on an issue over which the agency had discretion and unique expertise in construing the statute, where the legal issue turned on the interpretation of several provisions of the TCPA and its implementing regulations). The doctrine of primary jurisdiction "allows courts to refer a matter to the relevant agency 'whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body . . . .'" *Id., quoting U.S. v. Western Pacific Railroad Co.*, 352 U.S. 59, 63-64 (1956).

[168]28 U.S.C.A. §§ 2341 to 2353.

[169]*See, e.g.*, *Carleton & Harris Chiropractic, Inc. v. PDR Network,*

court need not apply it.[170]

LLC, 883 F.3d 459, 464-65 (4th Cir. 2018) (holding that the district court was obligated, by the Hobbs Act, to apply the FCC determination that faxes that offered free goods and services are "advertisements" under the TCPA; "When Chevron meets Hobbs, consideration of the merits must yield to jurisdictional constraints."), *cert. granted*, __ S. Ct. __, 2018 WL 3127423 (2018); *Imhoff Inv., L.L.C. v. Alfoccino, Inc.*, 792 F.3d 627, 637 (6th Cir. 2015) ("[T]he Hobbs Act confers jurisdiction on Courts of Appeal to review FCC regulations only by direct appeal from the FCC."); *CE Design, Ltd. v. Prism Busin. Media, Inc.*, 606 F.3d 443, 446-50 (7th Cir. 2010); *Baird v. Sabre, Inc.*, 636 F. App'x 715, 716 (9th Cir. 2016) (holding that the plaintiff was bound by the FCC's interpretation of "prior express consent" and could not, by virtue of the Hobbs Act, challenge the FCC's interpretation except by a direct appeal from the FCC's original order); *Roberts v. PayPal, Inc.*, 612 F. App'x 478, 478-79 (9th Cir. 2015) ("The FCC's interpretation of 'prior express consent' may not be challenged in the context of this appeal. . . . The Hobbs Act vests the courts of appeals with exclusive jurisdiction to 'enjoin, set aside, suspend (in whole or in part), or to determine the validity of' FCC orders in actions naming the United States as a party. 28 U.S.C. § 2342 . . . . Because this suit was not brought pursuant to the Hobbs Act, the FCC's 1992 interpretation of 'prior express consent' must be presumed valid."); *Murphy v. DCI Biologicals Orlando, LLC*, 797 F.3d 1302, 1306-07 (11th Cir. 2015) ("The Hobbs Act provides the federal courts of appeals with 'exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity' of FCC orders. 28 U.S.C. § 2342(1). District courts may not determine the validity of FCC orders, including by refusing to enforce an FCC interpretation . . . . If the Hobbs Act applies, a district court must afford FCC final orders deference and may only consider whether the alleged action violates FCC rules or regulations."); *Mais v. Gulf Coast Collection Bureau*, 768 F.3d 1110, 1120-21 (11th Cir. 2014) (holding that the Hobbs Act compelled application of FCC rulemaking on consent; "Deeming agency action invalid or ineffective is precisely the sort of review the Hobbs Act delegates to the courts of appeals in cases challenging final FCC orders.").

[170]*See, e.g. Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 373 n.2 (3d Cir. 2015) ("Because we reject Dominguez's claim that the FCC has interpreted the autodialer definition to read out the 'random or sequential number generator' requirement, we need not reach his argument regarding the Hobbs Act . . . ."); *Leyse v. Clear Channel Broad., Inc.*, 545 F. App'x 444, 447-48, 452-53 (6th Cir. 2013) (explaining that the court need "only reach the question of the Hobbs Act and its jurisdictional restrictions" if an FCC rule was applicable, holding that "both the district court and this court . . . have subject-matter jurisdiction to consider whether . . ." an FCC rule applies); *Mais v. Gulf Coast Collection Bureau*, 768 F.3d 1110, 1121 (11th Cir. 2014) ("Although the district court lacked the power to review the validity of the FCC's interpretation of prior express consent, we are obliged to address . . . whether the facts and circumstances of this case somehow fall outside the scope of the 2008 FCC Ruling."); *Thrasher-Lyon v. CCS Commercial, LLC*, No. 11 C 04473, 2012 WL 3835089, at *3 (N.D. Ill. Sept. 4, 2012) (holding that the Hobbs Act did not prevent the court

By contrast, the Ninth Circuit has held that fully adjudicated FCC rulings must be applied to an issue where Congress is silent and has delegated rulemaking authority to the FCC[171] but FCC pronouncements are not entitled to deference on issues that the statute expressly addresses.[172]

The proper scope of Hobbs Act deference will be addressed by the U.S. Supreme Court in 2019 in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc*.[173]

TCPA Litigation and Standing to Sue

A suit under the TCPA may be brought in either state or federal court.[174] TCPA claims are sometimes joined with parallel state law claims, but state anti-texting statutes typically are more narrowly drawn[175] and therefore more difficult

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from ruling that an FCC order exempting liability for calls in a creditor-debtor relationship did not apply in a robocall case).

[171] *See Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014) (applying *Chevron* deference to an FCC ruling on vicarious liability "[b]ecause Congress has not spoken directly to this issue and because the FCC's interpretation was included in a fully adjudicated declaratory ruling . . . ."), *aff'd on other grounds*, 136 S. Ct. 663 (2016); *see also Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913, 918 (9th Cir. 2012) (deferring to an FCC report and order prohibiting "dual purpose" calls where neither party argued that the interpretation set forth in the report and order was "unreasonable or otherwise not entitled to this court's deference.").

[172] *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951, 953 (9th Cir. 2009).

[173] *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, __ S. Ct. __, 2018 WL 3127423 (2018) (granting *certiorari* on the question of whether the Hobbs Act required the district court in that case to accept the FCC's legal interpretation of the Telephone Consumer Protection Act).

[174] *Mims v. Arrow Financial Services, LLC*, 565 U.S. 368, 385-86 (2012).

[175] *See, e.g.,* Cal. Bus. & Prof. Code § 17538.41 (prohibiting text message advertisements to California residents under certain circumstances, but excluding, among others, messages sent (1) by "a business, candidate or political committee that has an existing relationship with the subscriber if the subscriber is offered an option not to receive text messages from that business, candidate or political committee," (2) by an affiliated entity of a business where the business obtained consent, or (3) via email and then forwarded as SMS messages without the knowledge of the sender); *Van Patten v. Vertical Fitness Group, LLC,* 847 F.3d 1037, 1048-49 (9th Cir. 2017) (affirming summary judgment for the defendant on plaintiff's claim under sections 17538.41 and 17200 (California's Unfair Competition Law) because the plaintiff could not meet the statutory standing requirement under both statutes to show economic injury in the form of lost money or property where he had an unlimited texting plan and therefore was not charged for unwanted messages).

to assert in litigation or are construed co-extensively with the TCPA.[176]

Courts to date have upheld the constitutionality of the TCPA against facial and as-applied challenges under the First Amendment.[177]

The Sixth Circuit, in a case of first impression, has held that a TCPA claim survives a plaintiff's death.[178]

In recent years, there has been a flood of TCPA putative class action suits over ostensibly unsolicited text messages. In the words of one FCC Commissioner, the TCPA has "become the poster child for lawsuit abuse, with the number of TCPA cases filed each year skyrocketing from 14 in 2008 to 1,908 in the first nine months of 2014."[179] And the pace of litigation has only has increased in the succeeding years. By

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[176]*See, e.g.,* Wash. Rev. Code Ann. § 19.190.060(1) (Washington's Commercial Electronic Mail Act, which provides that "[n]o person conducting business in the state may initiate or assist in the transmission of an electronic commercial text message to a telephone number assigned to a Washington resident for cellular telephone or pager service . . . ."); Wash. Rev. Code Ann. § 19.190.010(3) (defining "commercial electronic text message" as a message "sent to promote real property, goods, or services for sale or lease."); *Wick v. Twilio Inc.*, No. C16-00914RSL, 2017 WL 2964855, at *5 (W.D. Wash. July 12, 2017) (dismissing plaintiff's CEMA claim on the same grounds as plaintiff's TCPA claim; "Because the TCPA's prohibition against unsolicited communications advertising property, goods, or services is substantially similar to the CEMA prohibition, the Court applies the federal interpretations of the TCPA when considering this claim. . . . For all of the reasons set forth above, the Court finds that the text message plaintiff received was not sent to promote the purchase of goods outside the negotiation plaintiff had already initiated. Plaintiff has therefore failed to plead a CEMA claim.").

[177]*See, e.g., Mejia v. Time Warner Cable Inc.,* 15-CV-6445 (JPO), 2017 WL 3278926, at *12-17 (S.D.N.Y. Aug. 1, 2017); *Holt v. Facebook, Inc.,* 240 F. Supp. 3d 1021, 1032-35 (N.D. Cal. 2017) (denying defendant's motion to dismiss); *Mey v. Venture Data, LLC,* 245 F. Supp. 3d 771, 792-93 (N.D.W. Va. 2017) (denying summary judgment in a case involving a phone call where the defendant argued that the TCPA violated the First Amendment as applied to political speech); *Brickman v. Facebook, Inc.,* 230 F. Supp. 3d 1036, 1043-46 (N.D. Cal. 2017) (holding the TCPA was narrowly tailored to achieve a compelling government interest in promoting residential privacy); *see also Brickman v. Facebook, Inc.,* Case No. 16-cv-00751-TEH, 2017 WL 1508719 (N.D. Cal. Apr. 27, 2017) (certifying the court's order denying Facebook's motion to dismiss for interlocutory appeal and staying the case).

[178]*See Parchman v. SLM Corp.*, 896 F.3d 728, 738-42 (6th Cir. 2018).

[179]*Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 8073 (2015) (Pai, Comm'r, dissenting).

one calculation, there were only 44 new TCPA cases filed in 2009 and 354 in 2010, but new TCPA case filings increased to 831 in 2011, 1,136 in 2012, 2,220 in 2013, 3,052 in 2014, 3,687 in 2015, and 4,860 in 2016,[180] and then decreased slightly to 4,392 in 2017.[181]

In litigation, as addressed at greater length earlier in this section, a prevailing plaintiff may recover injunctive relief plus the greater of actual damages or $500 per violation, increased up to three times the amount of an award if the court finds that the defendant "willfully or knowingly" violated the statute or its implementing regulations.[182]

TCPA texting cases typically turn on issues such as standing to sue in federal court (where the plaintiff has incurred no actual loss), consent, whether an ATDS was used, whether the plaintiff stipulated to arbitrate disputes in a binding contract with the defendant[183] (or otherwise may be

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[180]*See* Web Recon LLC, *2016 Year in Review: FDCPA Down, FCRA & TCPA Up* (Jan. 2017), https://webrecon.com/2016-year-in-review-fdcpa-down-fcra-tcpa-up/

[181]*See WebRecon LLC, WebRecon Stats for Dec 2017 & Year In Review*, https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review/.

[182]47 U.S.C.A. § 227(b)(3).

[183]*See, e.g., Andermann v. Sprint Spectrum L.P.,* 785 F.3d 1157 (7th Cir. 2015) (compelling arbitration of a TCPA dispute); *Greenberg v. Doctors Associates, Inc.*, __ F. Supp. 3d __, 2018 WL 4927910 (S.D. Fla. 2018) (compelling arbitration of a TCPA putative class action suit where the plaintiff acknowledged that he was presented with an offer for a free 6-inch sub and accepted the terms by opting in to receive text messages from Subway "after seeing Subway's call to action" by texting "Offers2" to 78929 "to join Subway's text club" and plaintiff admitted that the Subway offer contained a "disclaimer" stating that Terms and Conditions (which included an arbitration provision) "would be found at subway.com/subwayroot/TermsOfUse.aspx."; and rejecting the argument that the notice was not conspicuous where "[t]he offer quoted in the Complaint plainly state[d] "By clicking 'Sign me up' you agree to receive email promotions and other general email messages from Subway Group. In addition you agree to the Subway Group Privacy Statement and Terms of Use."); *Johnson v. Uber Technologies, Inc.*, 16 C 5468, 2018 WL 4503938 (N.D. Ill. Sept. 18, 2018) (dismissing plaintiff's class allegations without prejudice, staying the case, and compelling arbitration of plaintiff's TCPA claim); *Leon v. Credit One Bank, N.A.*, Civil Action No. 3:17-CV-2150, 2018 WL 571936 (M.D. Pa. Jan. 26, 2018) (compelling arbitration of plaintiff's TCPA claim, based on the terms of two cardholder agreements with the plaintiff); *Cubria v. Uber Technologies, Inc.*, 242 F. Supp. 3d 541, 548 (W.D. Tex. 2017) (compelling arbitration of plaintiff's TCPA claim based on inquiry notice where "[t]he placement of the phrase 'By creating an Uber account,

bound by the terms of a third party arbitration agreement[184])

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you agree to the Terms of Service & Privacy Policy' on the final screen of the account registration process was prominent enough to put a reasonable user on notice of the terms of the Agreement."); *Lozada v. Progressive Leasing*, 15-cv-2812 (KAM)(JO), 2016 WL 3620756 (E.D.N.Y. June 28, 2016) (compelling arbitration of plaintiff's TCPA claim, rejecting plaintiff's argument that her TCPA claim was not arbitrable because the arbitration provision at issue only applied to disputes that "pertain to the contract"); *Carr v. Citibank*, N.A., 15–cv–6993 (SAS), 2015 WL 9598797, at *2-3 (S.D.N.Y. Dec. 23, 2015) (noting that "[m]ultiple courts in this Circuit have held that TCPA claims are arbitrable pursuant to arbitration provisions contained in a variety of agreements"). *But see, e.g.*, *A.D. v. Credit One Bank, N.A.*, 885 F.3d 1054, 1060-65 (7th Cir. 2018) (holding that a bank could not compel arbitration of a TCPA claim brought by a minor who received unwanted collection calls on her mobile phone from the bank because her mom had once used her daughter's phone to contact the bank and therefore its caller ID software had identified and captured the daughter's phone number and associated it with the mom's account, where the minor was not bound by the contract, and as a minor disavowed it, and equitable estoppel would not be applied because the contract was relevant to the defendant's affirmative defense of consent but not the minor's affirmative TCPA claim); *Gamble v. New England Auto Finance, Inc.*, 735 F. App'x 664 (11th Cir. 2018) (affirming denial of defendant's motion to compel arbitration where the borrower's TCPA claim did not arise out of contract containing an arbitration provision).

[184]To avoid being bound by arbitration provisions, class action lawyers sometimes bring TCPA cases in the name of a spouse or other close family member who may be the subscriber or customary user of a phone number on which collection or other calls or texts were received, if the family member was not also a party to the arbitration agreement. In such cases, courts may compel arbitration based on equitable estoppel. *See, e.g.*, *Thomas v. Progressive Leasing*, Civil Action No.: RDB-17-1249, 2017 WL 4805235 (D. Md. Oct. 25, 2017) (compelling arbitration of plaintiff's TCPA putative class action suit, based on equitable estoppel, where the plaintiff's wife had entered into a lease with the defendant containing an arbitration provision, because the plaintiff "ostensibly shared access to the leased property," "voluntarily made payment arrangements" with the defendant, and requested that the defendant call him directly, "presumably to prevent repossession of the leased property and to ameliorate" his wife's credit, and where the TCPA claim was derived from the lease, because the claim was premised on Progressive Leasing calling him to collect payment under the lease); *Bridge v. Credit One Financial*, No. 2:14-cv-1512-LDG-NJK, 2016 WL 1298712 (D. Nev. Mar 31, 2016) (applying equitable estoppel in compelling arbitration of plaintiff's TCPA claim based on the plaintiff's mother's assent to Credit One's arbitration agreement, where the plaintiff received collection calls about the account after entering his mother's validation information to gain access to her account information, because the TCPA claim arose from and directly related to the duties imposed on Credit One under the cardholder agreement and the plaintiff had benefitted from the agreement by calling Credit One, inputting his mother's validation information, and gaining access to his mother's financial infor-

and class certification.[185] What constitutes consent and an ATDS are separately addressed earlier in this section.

In litigation, a plaintiff typically selects the venue where cases are brought, at least in the first instance. The explo-

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mation); *see generally infra* § 56.03 (analyzing arbitration provisions in general, including enforcement through equitable estoppel).

[185]As noted earlier in connection with the discussion of consent, where consent is an issue, the complexity associated with evaluating whether individual members of a putative class have provided or revoked consent may make it more difficult for a plaintiff to certify a class action in a TCPA case if individual questions of whether consent was provided and by whom (the subscriber or the user, if different), or reasonably revoked, and if so by whom, could predominate over class questions (and in some cases, as a consequence, the composition of the class could also be unascertainable). *See, e.g.*, *True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 931-33 (9th Cir. 2018) (finding common questions predominant in a TCPA case based on unsolicited fax advertisements, with respect to consent based on the provision of fax numbers on product registration forms or by entering into defendant's end-user license agreement (EULA), but affirming denial of class certification of a proposed subclass whose members asserted consent based on individual communications and personal messages); *Sherman v. Yahoo! Inc.*, No. 13cv0041–GPC–WVG, 2015 WL 5604400, at *9-11 & n.18 (S.D. Cal. Sept. 23, 2015) (denying class certification in a TCPA texting case in part because the proposed class was subject to different website or mobile Terms of Service, depending on when putative class members first registered with Yahoo and whether and under what circumstances they subsequently assented to various different versions); *see generally* Ian C. Ballon, Lori Chang, Nina Boyajian & Justin Barton, *A "Silver Linings Playbook" for Defending TCPA Class Actions,* Class Action Litigation Reporter (BNA July 1, 2016); *supra* § 25.07[2] (analyzing class certification case law).

Class certification may also be denied where there are inadequate records or means of proof available to identify who is a member of a putative class. *See, e.g., Leyse v. Lifetime Entertainment Services, LLC*, 679 F. App'x 44, 47 (2d Cir. 2017) (affirming denial of certification in a putative TCPA class action for lack of ascertainability where the plaintiff proposed to identify class members by soliciting individual affidavits certifying receipt of a prerecorded call accompanied by telephone bills but adduced no evidence that this method employed objective criteria, was administratively feasible, or permitted ready identification of members; holding that the proposed class was unascertainable because (1) no list of the called numbers existed, (2) no such list was likely to emerge, and (3) proposed class members could not realistically be expected to recall a brief phone call received six years earlier or retain any concrete documentation of such a call); *Sandusky Wellness Center, LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 466-67, 471-73 (6th Cir. 2017) (affirming denial of class certification for lack of superiority where (1) fax logs no longer existed, (2) they were not likely to emerge, and (3) Prolia fax recipients were not realistically expected to remember receiving a one-page fax sent seven years earlier).

sion of TCPA cases largely started in San Diego, in the Southern District of California. Chicago, in the Northern District of Illinois, also quickly became a favored venue. Fast track TCPA rules in the Southern District of Florida, which took effect in 2018, have made Miami an increasingly favored venue for TCPA putative class action suits. Needless to say, if the chosen venue is improper or if the defendant has agreed to a forum selection clause requiring litigation in a different district, the case may be transferred pursuant to a motion to change venue.[186]

Where a plaintiff has incurred no harm, standing to sue in federal court may be challenged. In TCPA texting cases there is a strong argument to be made that Congress did *not* intend to create an independent basis for Article III standing in a texting case by enacting the TCPA (at a time when text messages did not even exist), although it is an argument that no court had yet considered as of the date of this writing.

To have standing to sue in federal court, merely stating a claim under the TCPA is not sufficient because "Article III standing requires a concrete injury even in the context of a statutory violation."[187] To establish standing, a plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable decision.[188] In *Spokeo*, the U.S. Supreme Court, in an opinion written by Justice Alito, emphasized that an "injury in fact" requires both a "concrete" and a "particularized" harm, which must be "actual or imminent, not conjectural or hypothetical."[189] "For an injury to be 'particularized,' it must affect the plaintiff in

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[186]*See, e.g.*, *Manopla v. Raymours Furniture Co.*, Civil Action No. 3:17-cv-7649-BRM-LHG, 2018 WL 3201800 (D.N.J. June 29, 2018) (enforcing a venue selection clause contained in a "clickwrap agreement" and transferring a TCPA putative class action suit to the Northern District of New York).

[187]*Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016); *see generally supra* § 27.07 (analyzing *Spokeo* in greater detail).

[188]*Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), *citing Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 180-81 (2000).

[189]*Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016), *quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

a personal and individual way."[190] A "concrete" injury "must be 'de facto'; that is, it must actually exist."[191]

A "concrete" injury, however, can be intangible. In determining whether an intangible harm constitutes injury in fact, "both history and the judgment of Congress play important roles."[192] With respect to history, "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[193] Congress's "judgment is also instructive and important. . . . Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.' "[194] Nevertheless, "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right."[195] For example, the Court explained that "a bare procedural violation, divorced from any concrete harm, . . ." cannot satisfy the injury-in-fact requirement of Article III.[196] Similarly, Justice Alito opined that if the defendant had maintained an incorrect zip code for the plaintiff, "[i]t is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm."[197] On the other hand, "the risk of real harm" can satisfy the requirement of concreteness and, in some circumstances, even "the violation of a procedural right granted by statute can be sufficient . . . ."[198]

TCPA texting cases differ from faxing cases, where a

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[190]*Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quotation marks omitted).

[191]*Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) ("When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.' ") (citations omitted).

[192]*Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

[193]*Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

[194]*Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)*, quoting Lujan v. Defenders of Wildlife,* 504 U.S. 555, 578 (1992).

[195]*Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

[196]*Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016), *citing Summers v. Earth Island Institute,* 555 U.S. 488, 496 (2009).

[197]*Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016).

[198]*Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

plaintiff may allege harm in the form of lost toner, printer ink or fax paper from unwanted messages,[199] or suits involving a phone call where a plaintiff is interrupted and has to spend time addressing an unwanted call (especially if the number called previously had been placed on the National Do-Not-Call registry).

In a typical TCPA texting case, however, a plaintiff does not incur any monetary harm and any alleged intangible harm amounts to receipt of a message that—in contrast to a phone call which is answered—typically does not interrupt or interfere with a user's enjoyment of his or her phone (and which often is merely ignored). This is especially true where the plaintiff is a user, not the subscriber, of the assigned number, or has an unlimited texting plan, or otherwise incurs no cost. It is also equally true where the plaintiff is the subscriber, and never even received the message, assuming that the subscriber is not separately charged for incoming text messages on the user's phone.[200]

A TCPA texting claim is not one "grounded in historical practice" and does not have a close relationship to a harm regarded as a basis for a lawsuit under anglo-American law; it is purely a statutory creation. Further, Congress, in the TCPA, could not have evidenced an intent to elevate texting as a harm that would on its own justify standing. Indeed, Congress never contemplated that the TCPA—which was enacted in 1991—would prohibit text messages. The statute nowhere identifies text messages, which did not even exist at that time of the TCPA's enactment. As the Sixth Circuit noted, "[i]t is clear that Congress did not address, or even intend to address, the treatment of text messages when considering and passing the TCPA. In fact, the first text message was not sent until December 3, 1992, almost a full year *after* the December 20, 1991, enactment of the TCPA."[201]

The problem that Congress sought to address with the

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[199] *See, e.g., Sandusky Wellness Center, LLC v. MedTox Scientific, Inc.,* 250 F. Supp. 3d 354, 358 (D. Minn. 2017).

[200] As noted earlier, the FCC's 2015 Order makes clear that either users or subscribers may consent to receive text messages sent from an ATDS for a given phone line and revoke that consent. *See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 8000-01 ¶¶ 73-74 (2015).

[201] *See, e.g., Keating v. Peterson's Nelnet, LLC,* 615 F. App'x 365, 370 (6th Cir. 2015) (emphasis in original).

TCPA was the increase in unwanted telemarketing phone calls to landline phones.[202] The TCPA applies to text messaging *only* because the FCC—not Congress—determined in 2003 that text messages should be treated as "calls" for purposes of the TCPA.[203]

Any argument that Congress intended to confer Article III standing is further undermined by the fact that the TCPA's drafters assumed that TCPA claims could be brought in state, not federal court, including small claims court.[204] Indeed, for almost two decades after the statute was enacted, it was not even clear that a TCPA claim *could* be brought in federal court.[205] Congressional intent in creating the TCPA thus does not support the inference that Congress intended to elevate to a "legally cognizable injury," based on the mere receipt of a text message, without more.

While standing has been found in a number of TCPA cases, no court has considered the specific argument raised here about standing in a texting case based on the TCPA and its legislative history.

Standing has been found in TCPA cases involving prerecorded phone calls[206] or "robocalls" to a cellular phone,[207] and

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[202]Pub. L. 102-243, § 2, 105 Stat. 2394 (1991); *see also* 137 Cong. Rec. 30,821-30,822 (1991) (comment by Senator Hollings, TCPA sponsor, stating: "Computerized calls are the scourge of modern civilization. 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.").

[203]*See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14115 ¶ 165 (2003).

[204]*See* 137 Cong. Rec. 30,821-30,822 (stating that the TCPA contains a private right of action that "would allow consumers to bring an action in State court . . . preferably in small claims court").

[205]*See Mims v. Arrow Financial Services*, 565 U.S. 368 (2012) (resolving a split among federal circuits and holding that the TCPA does not vest exclusive jurisdiction in state courts).

[206]*See, e.g., Leyse v. Lifetime Entertainment Services, LLC*, 679 F. App'x 44 (2d Cir. 2017) (holding that the allegation that a defendant left a prerecorded message that the plaintiff later listened to was sufficient to establish standing); *Susinno v. Work Out World Inc.,* 862 F.3d 346, 350-52 (3d Cir. 2017) (holding that the plaintiff had standing to sue over her receipt of a prerecorded phone call, writing that "Congress was not inventing a new theory of injury when it enacted the TCPA. Rather it elevated a harm that, while 'previously inadequate in law,' was of the same character of previously existing 'legally cognizable injuries.' "); *Mays v. Credit One*

faxes,[208] as well as in texting cases that did not take account of the fact that Congress did not even address texting or clearly confer federal jurisdiction to sue for violations, when it enacted the TCPA[209] (or worse, which actually articulate the mistaken view that Congress in 1991 sought to prohibit unsolicited texts).[210]

Bank, N.A., Case No. 1:16-cv-01151-TWP-DML, 2017 WL 3838687, at *2-3 (S.D. Ind. Sept. 1, 2017) (finding standing in a TCPA case where the plaintiff received 24 automated calls because, even if the plaintiff sued over a mere procedural violation, he alleged "emotional distress in the form of frustration, annoyance, aggravation and anxiety."); *Mey v. Got Warranty, Inc*., 193 F. Supp. 3d 641 (N.D.W. Va. 2016) (holding that the plaintiff had standing under *Spokeo* to sue on a TCPA claim involving pre-recorded calls to a cell phone and an alleged violation of the Do-Not-Call List regulations).

[207]*See, e.g.*, *Manuel v. NRA Group, LLC*, 722 F. App'x 141, 145-46 (3d Cir. 2018); *Romero v. Dep't Stores Nat'l Bank*, 725 F. App'x 537 (9th Cir. 2018), *rev'g*, 199 F. Supp. 3d 1256, 1263-65 (S.D. Cal. 2016) (reversing the lower court's order dismissing plaintiff's TCPA suit for lack of standing based on calls she did not know she received, calls she heard ring but did not answer, and two calls she did answer where she could not "connect her claimed 'lost time, aggravation, and distress' with Defendants' use of an ATDS . . . ."); *Mejia v. Time Warner Cable Inc.*, 15-CV-6445 (JPO), 2017 WL 3278926, at *7 (S.D.N.Y. Aug. 1, 2017) (holding that plaintiffs had standing where they alleged they received calls from an IVR calling system which they answered and which were disruptive and which, for one plaintiff, invaded her privacy, even causing her to miss important calls, and for the other, diminished her use and enjoyment of her cellular telephone and caused her irritation); *Abante Rooter & Plumbing, Inc. v. Pivotal Payments, Inc.,* Case No. 16-cv-05486-JCS, 2017 WL 733123, at *7 (N.D. Cal. Feb. 24, 2017) (holding, in a case alleging robocalls to a cellular phone number, that "a violation of the TCPA is sufficient to satisfy the concrete injury requirement where intangible harms are alleged . . . .").

[208]*See Florence Endocrine Clinic, PLLC v. Arriva Medical, LLC*, 858 F.3d 1362, 1365-66 (11th Cir. 2017) (holding that the plaintiff suffered an injury-in-fact, but dismissing the case because the unsolicited faxes received by the clinic were not advertisements).

[209]*See, e.g., Melito v. American Eagle Outfitters, Inc.,* 14-CV-2440 (VEC), 2017 WL 3995619, at*3-7 (S.D.N.Y. Sept. 11, 2017); *Wick v. Twilio Inc.*, No. C16-00914RSL, 2017 WL 2964855, at *2-3 (W.D. Wash. July 12, 2017) (holding that receipt of a text message attributed to the defendant satisfied standing requirements).

[210]*See Van Patten v. Vertical Fitness Group, LLC,* 847 F.3d 1037, 1042-43 (9th Cir. 2017) (finding standing because "[a]ctions to remedy defendants' invasions of privacy, intrusion upon seclusion, and nuisance have long been heard by American courts, and the right of privacy is recognized by most states" and by mistakenly attributing Congressional intent about text messages to a statute enacted before text messaging existed and holding that the plaintiff had alleged sufficient harm because

Standing, on the other hand, has been found lacking in a number of cases.[211]

Standing also may be found lacking in a case brought by a serial litigant who can't plausibly allege any privacy violation or injury-in-fact where she intentionally sought out a text message to trigger a lawsuit.[212] But short of that type of evidence, the mere fact that the plaintiff is a sophisticated or experienced litigant would not alone defeat standing.[213]

Congress, in enacting the TCPA, established "the substantive right to be free from certain types of phone calls and text messages absent consumer consent.").

[211]*See, e.g.*, *St. Louis Heart Center, Inc. v. Nomax, Inc.*, 899 F.3d 500, 503-05 (8th Cir. 2018) (finding no Article III standing in a fax advertising case, but remanding, rather than dismissing the case, which previously had been removed to federal court); *Winner v. Kohl's Department Stores, Inc.*, Civil Action No. 16-1541, 2017 WL 3535038 (E.D. Pa. Aug. 17, 2017) (holding that plaintiffs did not have standing in a TCPA texting case where they had provided consent to receive marketing text messages and did not ask Kohl's to stop sending messages during the relevant time period); *Osgood v. Main Streat Marketing, LLC*, Case No. 16cv2415-GPC(BGS), 2017 WL 131829, at *6 (S.D. Cal. Jan. 13, 2017) (dismissing plaintiff's TCPA claim for unwanted phone calls for failure to allege concrete harm); *Ewing v. SQM US, Inc*., No. 3:16-CV-1609-CAB-JLB, 2016 WL 5846494, at *2 (S.D. Cal. Sept. 29, 2016) ("Plaintiff does not, and cannot, allege that Defendants' use of an ATDS to dial his number caused him to incur a charge that he would not have incurred had Defendants manually dialed his number, which would not have violated the TCPA. Therefore, Plaintiff did not suffer an injury in fact traceable to Defendants' violation of the TCPA and lacks standing to make a claim for the TCPA violation here.").

[212]*See Telephone Science Corp. v. Asset Recovery Solutions, LLC,* No. 15-CV-5182, 2016 WL 4179150, at *1, 16 (N.D. Ill. Aug. 8, 2016) (holding that the plaintiff, a company that operated a service to help consumers avoid incoming ATDS calls, did not have standing to sue under the TCPA for calls directed to a "honeypot" of numbers maintained by the plaintiff, which it used to analyze calls with an algorithm that could detect "robocallers," where the plaintiff, if it determined that a call was placed by a robocaller, would answer the call, because the plaintiff did not fall within the TCPA's "zone of interest" because it did not suffer the injury contemplated by the TCPA—an invasion of privacy or general nuisance.); *Stoops v. Wells Fargo, N.A.,* 197 F. Supp. 3d 782, 798-800 (W.D. Pa. 2016) (holding that a plaintiff who purchased 35 mobile phones to be able to trigger TCPA lawsuits did not have standing).

[213]*See, e.g., Cunningham v. Rapid Response Monitoring Services, Inc.,* 251 F. Supp. 3d 1187, 1194-96 (M.D. Tenn. 2017) (holding that the plaintiff sufficiently alleged standing in a TCPA case, nothing that "[n]othing in the Constitution . . . requires a plaintiff to be a naïf. Litigation is not college athletics: there is no 'amateurs only' rule."); *Mey v. Venture Data,*

Owner and Officer Liability

The owner of a company or a corporate officer may be held personally liable under the TCPA only if he or she had direct personal participation in or personally authorized the conduct found to have violated the statute.[214] Personal liability must be based on active oversight of, or control over, the conduct that violated that TCPA, rather than merely tangential involvement.[215]

Vicarious Liability

The TCPA does not provide expressly for vicarious liability but has been construed to allow for vicarious liability to the extent that the conduct of an employee or agent or third-party telemarketer, acting within the scope of authority, may be attributed to a company.[216] In a case involving telephone calls to residential telephone lines using prere-

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LLC, 245 F. Supp. 3d 771, 783-84 (N.D.W. Va. 2017) (holding that plaintiff had standing where she had filed prior TCPA cases and had purchased equipment to document calls, but did nothing to seek out or attract the calls and her telephone number was listed on the National Do-Not-Call Registry); *Morris v. UnitedHealthcare Insurance Co.,* Civil Action No. 4:15-CV-00638-ALM-CAN, 2016 WL 7115973, at *6 (E.D. Tex. Nov. 9, 2016) (holding that the plaintiff had standing where there was no evidence that the number called was maintained purely to trigger TCPA lawsuits, but noting that the plaintiff had filed prior TCPA suits, and cautioning that "TCPA suits have, in many instances, been abused by serial litigants; and going forward each such case merits close scrutiny on the issue of standing in light of *Spokeo*."), *recommendation and report adopted,* Civil Action No. 4:15-CV-638, WL 7104091 (N.D. Tex. Dec. 6, 2016).

[214]*See City Select Auto Sales Inc. v. David Randall Associates, Inc.*, 885 F.3d 154, 162 (3d Cir. 2018) (affirming the lower court's finding that the co-owner of the defendant entity, which had been held liable for sending faxes in violation of the TCPA, was not personally liable).

[215]*City Select Auto Sales Inc. v. David Randall Associates, Inc.*, 885 F.3d 154, 162 (3d Cir. 2018).

[216]*See, e.g.*, *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 674 (2016) (holding that a government contractor potentially could be held vicariously liable under the TCPA, based on federal common law principles, for the conduct of its subcontractor in transmitting text message advertisements promoting the Navy to users who had not consented to receive them), *citing Matter of Joint Petition Filed by DISH Network, LLC*, 28 FCC Rcd. 6574 (2013).

Prior to the FCC's *DISH Network* ruling, various courts had allowed claims for vicarious liability under the TCPA under varying standards. *See, e.g.*, *In re: Jiffy Lube Int'l, Inc. Text Spam Litig.*, 847 F. Supp. 2d 1253, 1257 (S.D. Cal. 2012) (holding that the plaintiff had stated a claim for vicarious liability under section 227(b)(1)(A) where the defendant hired the entity that sent the text message at issue in the case); *Hickey v.*

corded messages, the FCC has ruled that an advertiser (or "seller" in the terminology of the FCC), which generally is *not* directly liable for any TCPA violations unless it initiates a call, potentially could be held vicariously liable for advertisements sent out on its behalf, but only if agency can be established under federal common law principles.[217] In a footnote, the FCC also suggested that vicarious liability could be established through evidence of a formal agency relationship, apparent authority or ratification.[218] Although an argument could be made that this ruling should not apply to text messages sent using an ATDS,[219] the Ninth Circuit has held that it is entitled to *Chevron* deference and potentially may be applied both to hold a merchant liable for outsourced

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Voxernet LLC, 887 F. Supp. 2d 1125, 1129 (W.D. Wash. 2012) (holding that a defendant may be liable for the transmission of messages that it did not physically send where the defendant "controlled sending the message."); *Accounting Outsourcing LLC v. Verizon Wireless Personal Communications, L.P.*, 329 F. Supp. 2d 789, 806 (M.D. La. 2004) (holding that TCPA liability could extend to advertisers hired to send unsolicited messages and holding that "congressional tort actions . . . implicitly include the doctrine of vicarious liability, whereby employers are liable for the acts of their agents and employees."), *citing Meyer v. Holley*, 357 U.S. 280, 285 (2003).

[217]*See Matter of Joint Petition Filed by DISH Network, LLC*, 28 FCC Rcd. 6574 (2013); *see also id.* at 6582–83 (concluding that a seller is not directly liable for a violation of the TCPA unless it "initiates" a call, and "a person or entity 'initiates' a telephone call when it takes the steps necessary to physically place a telephone call, and generally does not include persons or entities, such as third-party retailers, that might merely have some role, however minor, in the causal chain that results in the making of a telephone call.").

[218]*See Matter of Joint Petition Filed by DISH Network, LLC*, 28 FCC Rcd. 6574, 6590 n.124 (2013). Apparent authority requires "proof of something said or done by the [alleged principal], on which [the plaintiff] reasonably relied." *Thomas v. Taco Bell Corp.*, 582 F. App'x 678, 679 (9th Cir. 2014) (citation and internal quotation marks omitted); Restatement (Second) of Agency § 265 comment a (1958) ("Apparent authority exists only as to those to whom the principal has manifested that an agent is authorized.").

[219]The prohibition on using an ATDS is set forth in 47 U.S.C.A. § 227(b)(1)(A)(iii). The FCC's ruling in *DISH Network* involved cases brought under a different provision of the TCPA, sections 227(b)(1)(B) and 227(c)(5), which afford a private cause of action for a person who has received more than one call to a residential telephone line using a prerecorded message from the same entity. There is no equivalent provision governing the use of an ATDS. This argument appears not to have been raised in any cases and courts have applied *DISH Network* to TCPA text message cases.

telemarketing (as contemplated by the FCC ruling) and hold to a third-party marketing consultant vicariously liable.[220] According to the FCC ruling, vicarious liability under the TCPA is governed by the federal common law of agency, including principles of apparent authority and ratification.[221]

Needless to say, vicarious liability is often difficult to prove because of the need to establish agency or apparent authority and ratification.[222]

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[220]*Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), *aff'd on other grounds*, 136 S. Ct. 663 (2016).

[221]*See, e.g.*, *Hodgin v. UTC Fire & Security Americas Corp.*, 885 F.3d 243, 251-52 (4th Cir. 2018), *citing Matter of Joint Petition Filed by DISH Network, LLC*, 28 FCC Rcd. 6574, 6584 (2013); *Kristensen v. Credit Payment Services, Inc.*, 879 F.3d 1010, 1013-14 (9th Cir. 2018) (holding that vicarious liability under the TCPA is to be determined by federal common law and the Restatement of Agency Law).

[222]*See, e.g.*, *Thomas v. Taco Bell Corp.*, 582 F. App'x 678 (9th Cir. 2014) (holding that Taco Bell could not be held vicariously liable for a text message sent by the Chicago Area Taco Bell Local Owner's Advertising Association where the association and the entities that sent out the text message were not acting as agents for Taco Bell, Thomas could not establish reliance on any apparent authority with which these entities may have been cloaked, and Taco Bell did not ratify the text message); *see also, e.g.*, *Hodgin v. UTC Fire & Security Americas Corp.*, 885 F.3d 243, 251-54 (4th Cir. 2018) (affirming summary judgment for sellers, holding that the sellers could not be vicariously liable, under ratification theory, where they repudiated the telemarketers' alleged TCPA violations, received no benefit, and had no knowledge of illegal calls made to plaintiffs whose phone numbers were on the Do-Not-Call list); *Keating v. Peterson's Nelnet, LLC*, 615 F. App'x 365, 371-75 (6th Cir. 2015) (affirming the lower court's holding that an advertiser was neither directly nor vicariously liable for a TCPA violation based on agency, in a case where there was also no evidence that the plaintiff believed that the defendant's subcontractor had apparent authority to send the texts); *Jones v. Royal Administration Services, Inc.*, 887 F.3d 443, 448-53 (9th Cir. 2018) (affirming summary judgment for the seller of after-warranty vehicle service contracts for calls made to numbers on the national do-not-call registry where the telemarketer did not act with actual authority when it placed the calls and the seller did not have sufficient authority to control the telemarketer to be held vicariously liable under the TCPA); *Kristensen v. Credit Payment Services, Inc.*, 879 F.3d 1010, 1013-15 (9th Cir. 2018) (applying federal common law agency principles and the Restatement (Third) of Agency in affirming summary judgment for third party defendants because (a) ratification requires actual or apparent agency, and (b) a principal is not bound by ratification made without either actual knowledge that the agent was sending out text messages in violation of the TCPA or knowledge of facts that would have led a reasonable person to investigate further); *Lary v. VSB Financial Consulting, Inc.*, 910 So. 2d 1280, 1293 (Ala. App. 2005)

The TCPA does not provide for aiding and abetting liability.[223] The Supreme Court has explained in a different context that "when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors."[224]

While the federal government is immune from liability under the TCPA, government contractors are not.[225] Similarly, while liability may be imposed on users of telecommunications services, carriers typically may not be held liable unless they were "so involved in placing the call as to be

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(holding that a defendant who exercised no direct control and played no part in any decision to send unsolicited advertisements was not liable under the TCPA); *Charvat v. Farmers Insurance Columbus, Inc.*, 178 Ohio App. 3d 118, 132 (2008) (granting summary judgment for the defendant, holding that TCPA liability could not be imposed where the plaintiff could not show any agency relationship between the defendant and the third party that sent the text message at issue in the case). *But see Mey v. Venture Data, LLC*, 245 F. Supp. 3d 771, 788-89 (N.D.W. Va. 2017) (denying defendant's motion for summary judgment in a TCPA calling case were the plaintiff presented evidence that created a jury question over whether "POS ratified, and is therefore liable for, Venture Data's conduct.").

[223] *See* 47 U.S.C.A. § 227(b)(1)(A); *Baltimore-Washington Tel. Co. v. Hot Leads Co., LLC*, 584 F. Supp. 2d 736, 746 (D. Md. 2008); *see also Matter of Joint Petition Filed by DISH Network, LLC*, 28 FCC Rcd. 6574, 6585-86 (2013) (declining to expand responsibility under the TCPA beyond direct or vicarious liability to circumstances where a call aids or benefits a seller).

[224] *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994) (holding that a federal securities statute did not allow claims for aiding and abetting a primary violation because the statute was silent and Congress "knew how to impose aiding and abetting liability when it chose to do so.").

[225] *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672-74 (2016) (holding that a government contractor could be held vicariously liable for the conduct of its subcontractor in transmitting text message advertisements promoting the Navy to users who had not consented to receive them). By contrast, where a government contractor's actions are authorized by the U.S. government, the contractor may be entitled to derivative sovereign immunity under *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18, 20-21 (1940). *See Cunningham v. General Dynamics Information Technology, Inc.*, 888 F.3d 640 (4th Cir. 2018) (affirming dismissal of plaintiff's TCPA suit brought against a government contractor based on autodialed, pre-recorded calls advertising the availability of health insurance, where the government authorized the contractor's actions and the authorization was validly conferred).

deemed to have initiated it."[226] When a text messaging service drafts a message and sends that message automatically to phone numbers that were not specifically selected by the service's customer, then the service is deemed to initiate the message and may not avoid liability by claiming that is merely a carrier. By contrast, when a text messaging service requires its customers to determine the content, timing, and recipients of a text message, then the service has not initiated the message and is merely serving as a carrier.[227]

For interactive computer services[228] that generate text messages from computers or HTTP applications, a provision of the Telecommunications Act potentially could insulate a business from liability under the TCPA for sending text messages that make available the technical means to restrict access to further messages that a recipient deems objectionable.[229] The Communications Decency Act,[230] which is codified in the Telecommunications Act at 47 U.S.C. § 230(c)(2)(B), provides that no provider or user of an interactive computer service shall be held liable on account of "any action taken to enable or make available to . . . others the technical means to restrict access to" harassing, or otherwise objectionable material.[231] Section 230(c)(2)(B), therefore, "covers actions taken to enable or make available to others the technical means to restrict access to objectionable

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[226]*Kauffman v. CallFire, Inc.*, 141 F. Supp. 3d 1044, 1047 (S.D. Cal. 2015), *quoting Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7980 (2015).

[227]*Kauffman v. CallFire, Inc.*, 141 F. Supp. 3d 1044, 1047-48 (S.D. Cal. 2015), *citing Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7982-84 (2015). In *CallFire*, the defendant was held to be the carrier, not the initiator of the message. *See* 141 F. Supp. 3d at 1049-50.

[228]An *interactive computer service* is broadly defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet." 47 U.S.C.A. § 230(f)(2). Companies that provide computer-to-text or similar services should fit within this definition.

[229]*See* 47 U.S.C.A. § 230(c)(2)(B); *see generally infra* § 37.05[4] (analyzing the provision in greater detail).

[230]The applicability of the CDA to unsolicited emails is separately addressed in section 29.08.

[231]*See* 47 U.S.C.A. § 230(c)(2)(B).

material."[232] A business that qualifies as an interactive computer service and sends text messages that make available the technical means to restrict access to further messages that a recipient deems objectionable therefore potentially may be insulated from liability.[233]

Businesses intending to send commercial text messages

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[232]*Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1174–75 (9th Cir. 2009) (finding that section 230(c)(2)(B) extended protection to a distributor of Internet security software that filtered adware and malware); *see also Pallorium, Inc. v. Jared*, Case No. G036124, 2007 WL 80955 (Cal. Ct. App. Jan. 11, 2007) (finding that section 230(c)(2)(B) extended protection to the creator of a website-based system through which third parties could identify the source of unwanted e-mails and block future e-mails from that source); *see generally infra* § 37.05[4].

[233]*See, e.g.*, *Holomaxx Technologies v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1104 (N.D. Cal. 2011) (finding that it was reasonable for Microsoft to conclude that plaintiff's SPAM e-mails were "harassing" and thus "otherwise objectionable" and granting immunity for filtering the SPAM under section 230(c)(2)(A) of the CDA); *Holomaxx Technologies v. Yahoo!, Inc.*, CV-10-4926-JF, 2011 WL 865794 at *5 (N.D. Cal. Mar. 11, 2011) (ruling the same way in evaluating a virtually identical complaint against Yahoo!). *But see Sherman v. Yahoo!, Inc.*, 997 F. Supp. 2d 1129, 1137-38 (S.D. Cal. 2014) (holding section 230(c)(2) inapplicable in a TCPA texting case based on a narrow definition of content that could be deemed *otherwise objectionable* under the statute); *see generally infra* § 37.05[4][C] (analyzing the term *otherwise objectionable* and criticizing the narrow construction given that term in *Sherman*).

In *Nunes v. Twitter, Inc.*, 194 F. Supp. 3d 959 (N.D. Cal. 2016), Judge Vince Chhabria rejected Twitter's argument that plaintiff's TCPA suit was barred by a different provision of the CDA, 47 U.S.C.A. § 230(c)(1), which immunizes providers of interactive computer services from suits that seek to hold them liable for republishing third party content. In rejecting the argument that Twitter, in allowing users to send Tweets as text messages, was merely being sued for publishing information that originated with its users, Judge Chhabria explained:

> To analogize to a more traditional publishing platform, if someone delivers newspapers containing false gossip, and the person who is the subject of the gossip sues the delivery person for defamation, that lawsuit seeks to treat the delivery person as a publisher. But if the delivery person throws an unwanted newspaper noisily at a door early in the morning, and the homeowner sues the delivery person for nuisance, that suit doesn't seek to treat the delivery person as a publisher. The suit doesn't care whether the delivery person is throwing a newspaper or a rock, and the suit certainly doesn't care about the content of the newspaper. It does not involve the delivery person's "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Barnes*, 570 F.3d at 1102. Nor is the lawsuit asking a court to impose "liability arising from content." *Roommate.com*, 521 F.3d at 1162. It merely seeks to stop the nuisance. The same is true of this lawsuit regarding unwanted tweets sent by text to the owners of recycled numbers.

194 F. Supp. 3d at 967; *see generally infra* § 37.05 (analyzing the CDA).

may wish to review the Mobile Marketing Association guidelines on best practices,[234] in addition to strictly complying with the TCPA and its implementing regulations. Among other things, a best practice that many companies employ is the "double opt-in" process, which requires a consumer to first send a text message in response to a call-to-action or sign up to receive messages in person or via a web form, and then confirm that consent to receive text messages by a reply text to an initial message asking for confirmation (such as a message asking the recipient to reply Y for yes to begin receiving marketing messages).[235] This process is intended to ensure that people whose number was incorrectly input by a third party or whose number was provided by someone else without their permission will not receive marketing texts.

This is currently a time of transition, following the D.C. Circuit's ruling in *ACA* and the FCC's request for input pending what will likely be a new declaratory ruling issued in or before 2019.

Given the changing regulatory landscape and current volume of litigation, companies so may wish to defer new texting campaigns in the short term or consider email marketing as an alternative. The CAN-SPAM Act allows senders to proceed with a campaign based on opt-out, rather than opt-in consent, and the statute provides relatively clear guidelines on permissible practices and does not allow for a private cause of action by individuals who receive unsolicited commercial messages (only Internet access services and various government agencies may sue and many potential state law claims are preempted by the CAN-SPAM Act).[236]

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[234] *See* http://www.mmaglobal.com/bestpractice

[235] *See, e.g.*, Mobile Marketing Association, *Consumer Best Practices Guidelines for Cross-Carrier Mobile Content Programs (United States)* (Jan. 8, 2009); *see also* https://www.mmaglobal.com/wiki/double-opt.

[236] *See generally supra* § 29.03.