

# PUBLICATION

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## TCPA Litigation in the Post-ACA World: How Federal Courts are Shaping the Issues

Authors: Robert F. Tom

February 2019

**In a long-awaited and highly publicized opinion in March of 2018, the Court of Appeals for the D.C. Circuit decided the case of *ACA International v. FCC*, which addressed the FCC's 2015 Declaratory Ruling and Order interpreting various provisions of the Telephone Consumer Protection Act (TCPA). Among other things, the ACA court vacated the FCC's definition of an "autodialer," or "ATDS," and also confirmed parties' ability to agree on specific procedures for revocation of consent to be called by an ATDS. Recent federal court decisions have offered further clarity on these two issues and consequently have begun to shape the post-ACA world of TCPA litigation.**

When the ACA court invalidated the FCC's expansive definition of an ATDS, it did not offer its own definition. Absent guidance from the FCC, a number of district courts have shifted their focus to the narrower statutory definition of an ATDS and found that equipment, which dials telephone numbers from a stored list as opposed to numbers that are randomly or sequentially generated, does not constitute an ATDS. On July 26, 2018 in *Pinkus v. Sirius XM Radio, Inc.*, the U.S. District Court for the Northern District of Illinois relied on the plain language of the TCPA and ruled that an ATDS must have the capacity to generate telephone numbers, either randomly or sequentially, and then to dial those numbers. The court reasoned that absent such features, equipment does not meet the statutory definition of an ATDS and therefore does not result in liability under the TCPA. In a similar case, *Gary v. TrueBlue, Inc.*, the U.S. District Court for the Eastern District of Michigan found that the equipment in question was not an ATDS because it sent messages to a set list created by human intervention rather than randomly or sequentially. Most recently, in *Fleming v. Assoc. Credit Servs., Inc.*, the U.S. District Court for the District of New Jersey concluded that a system that dials numbers from a list that was not randomly or sequentially generated when the list was created does not qualify as an ATDS. These cases may provide additional grounds for defending against TCPA claims and also offer guidance when using dialing systems.

As for revocation of consent, the ACA court upheld the permissibility of revocation by "any reasonable means," but it also specifically recognized that parties can agree to certain procedures for revocation of consent. Districts courts in both the Sixth and Eleventh Circuits have subsequently addressed this issue and found that revocation of consent was invalid where agreed upon procedures are not followed. These decisions embrace the Second Circuit's 2017 reasoning in *Reyes v. Lincoln Automotive Financial Services* regarding contractual limitations on consent, a case previously viewed by many as an outlier. On April 30, 2018, in *Barton v. Credit One Financial*, the U.S. District Court of the Northern District of Ohio considered a case in which the customer had signed a credit card agreement expressly authorizing ATDS calls and requiring revocation of consent to be in writing. Based on this contractual provision, the court held that the customer could not orally revoke consent. More recently, in *Few v. Receivables Performance Mgmt.*, the U.S. District Court for the Northern District of Alabama relied on the "common law concept of consent" and found that a party could not unilaterally revoke consent provided in a bilateral contract. Because the plaintiff in that case had offered consent "as part of a bargained-for exchange and not merely gratuitously," the customer could not unilaterally revoke that consent. In *Medley v. Dish Network, LLC*, the U.S. District Court for the Middle District of Florida also applied similar principles and concluded that the plaintiff's unilateral revocation of consent was invalid where the plaintiff had provided prior express consent in a written contract.

The FCC has requested public comments and is ultimately expected to issue a new order clarifying certain provisions of the TCPA in light of the ACA decision. In the interim, these cases offer useful guidance on the TCPA, and may very well impact the FCC's forthcoming order.