DEFENDING TCPA CLASS ACTION SUITS AND THE REQUIREMENTS OF THE TELEPHONE CONSUMER PROTECTION ACT

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CYBER BOOT CAMP: DATA SECURITY AT THE INTERSECTION OF LAW AND BUSINESS

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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, which did not exist at the time of the TCPA's enactment in 1991.[6] 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*, 132 S. Ct. 740, 744 (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 and Regulations Implementing the Telephone Consumer Protection 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).

Order that the FCC issued on July 10, 2015, which addressed nineteen separate petitions and renders moot some court rulings that predate it (or which don't take account of it).[8]

The TCPA makes it unlawful to "initiate" a call using an artificial or prerecorded voice to a home phone number[9] 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."[10] 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 message—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."[11] In evaluating whether a party is the *intiator* 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."[12]

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[8] *See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961 (2015). These regulations are the subject of a legal challenge that was pending in the D.C. Circuit as of October 2016. *See ACA Int'l v. F.C.C.*, Case No. 15-1211 (D.C. Cir. 2015). Some courts have stayed TCPA cases that could turn on issues addressed by that legal challenge, pending a final determination. *See, e.g., Small v. G.E. Capital, Inc.*, Case No. EDCV 15-2479 JGB (DTBx), 2016 WL 4502460 (C.D. Cal. June 9, 2016).

[9] 47 U.S.C.A. § 227(b)(1)(B).

[10] 47 U.S.C.A. § 227(b)(1)(A).

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

[12] *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

Like the CAN-SPAM Act,[13] 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.[14] However, when an *automatic telephone dialing system* or *ATDS* is used to call or send text messages, calls

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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 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).

[13]15 U.S.C.A. §§ 7701 to 7713; *supra* § 29.03.

[14]*See* 15 U.S.C.A. §§ 6101 *et seq.* (the Do-Not-Call Implementation Act); 47 U.S.C.A. § 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 on behalf of the same entity" in violation of FCC regulations

or texts may only be directed to wireless recipients who have consented to receive them. For text messages 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.[15] Even where consent has been provided, it may be withdrawn at any time.[16] Indeed, the FCC clarified in 2015 that "[c]onsumers have a right to revoke consent, using any reasonable method including orally or in writing."[17] 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."[18] 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.[19] Further, companies may not purport to restrict what constitutes a *reasonable method* (such as, for example, requiring that consent be withdrawn by texting "stop" or

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promulgated under that section); 47 C.F.R. §§ 64.1200(c) (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).

[15]*See Rules and Regulations Implementing the Telephone Consumer Protection 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.

[16]*See Gager v. Dell Financial Services, LLC*, 727 F.3d 265, 270–72 (3d Cir. 2013).

[17]*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.

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

[19]*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 him to continue the particular conduct.")).

emailing the company at a particular address).[20]

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.[21] For a given phone number, the subscriber and customary user often are different people.[22]

Hence, companies may have difficulty keeping track of when consent is revoked, where revocation 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 known* about the revocation.[23]

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[20]*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.

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

[22]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.

[23]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., 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 on this basis). 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); *see generally* Ian C. Ballon, Lori Chang, Nina Boyajian & Justin

In this regard, the FCC has clarified that "the caller's intent does not bear on liability . . . ."[24]

Prior express consent may be established by various means, including evidence that a person provided his cellular telephone number to the person or entity who sent a text message.[25] Verbal consent is also a permissible means of

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Barton, *A "Silver Linings Playbook" for Defending TCPA Class Actions,* Class Action Litigation Reporter (BNA July 1, 2016).

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

[25]*See, e.g., 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."); *Aderhold v. Car2go N.A., LLC,* _ F. App'x _, 2016 WL 4709873 (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); *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, (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"); *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,* 23 FCC Rcd. 559, 564-65 (2008) (clarifying that "autodialed and prerecorded message calls to wireless

obtaining prior express consent.[26]

Consent also potentially can be obtained in some instances through an intermediary as long as the intermediary has actually obtained consent.[27] In a declaratory ruling involving GroupMe (and subsequently in its omnibus 2015 Order), the FCC ruled that a texting platform has consent to send a text message to an individual when that individual provided his or her number to a third party user of the texting platform.[28] 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.[29] 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 instruc-

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numbers provided by the called party in connection with an existing debt are made with the 'prior express consent' of the called party").

[26]*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.").

[27]*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. It also 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.

[28]*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).

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

tions to the contrary, by giving his or her wireless number to the person initiating the autodialed or prerecorded call.[30]

For any text message that "includes or introduces an advertisement[31] or constitutes telemarketing,[32]" the FCC requires *prior express written consent*[33] of the "called party" (*i.e.,* the recipient), which must be signed by the consumer (including an electronic signature "using any medium or

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[30]*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.

[31]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).

[32]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).

[33]*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).

format permitted by the E-SIGN Act[34] . . ."[35]) and be sufficient to show that he or she:

- received "clear and conspicuous disclosure"[36] 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.[37]

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."[38]

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[39]).

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

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[34]15 U.S.C.A. §§ 7001 *et seq.*; *see generally supra* § 15.02.

[35]*Rules and Regulations Implementing the Telephone Consumer Protection 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).

[36]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).

[37]47 C.F.R. § 64.1200(a)(2); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 27 FCC Rcd. 1830, 1884 (2012).

[38]*Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 27 FCC Rcd. 1830, 1884 (2012).

[39]15 U.S.C.A. §§ 7001 *et seq.*; *see generally supra* § 15.02[2].

may wish to receive.[40]

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[41]).[42]

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 and limits on how many calls may be made.[43] These exceptions apply to messages intended to prevent fraudulent transactions or identity theft by providing security breach notices[44] 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

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[40]*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 communications 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.").

[41]45 C.F.R. § 160.103.

[42]47 C.F.R. § 64.1200(a)(2).

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

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

minutes of delivery.[45]

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.[46] And, of course, emergency calls or texts are expressly permitted under the statute.[47]

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."[48] 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 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[49]), 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

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

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

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

[48]*Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 27 FCC Rcd. 1830, 1884 (2012).

[49]*Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 27 FCC Rcd. 1830, 1875 (2012) (Statement of FCC Chairman Julius Genachowski) (providing examples of "informational" calls).

wireline consumers).[50] 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.[51] 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.[52]

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.[53] In *Ibey v. Taco Bell Corp.*,[54] 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 . . . ."[55] She explained that "[t]o impose liability under the TCPA for a single, confirmatory text message would contravene public policy and the spirit of the statute—prevention of unsolicited

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

[51]*Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 27 FCC Rcd. 1830, 1840 (2012).

[52]*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.

[53]*Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, SoundBite Communications, Inc.*, 27 FCC Rcd. 15391 (2012).

[54]*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).

[55]*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). *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.

telemarketing in a bulk format."[56]

Where a message contains both information and an advertisement, the FCC considers the communication to be a telemarketing communication.[57]

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 "for emergency purposes . . ."[58]).

Despite best efforts, companies may nonetheless run afoul of FCC regulations when sending text messages using an ATDS when a number has been reassigned. The TCPA requires "consent not of the intended recipient of a call, but of the current subscriber (or non-subscriber customary user

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[56]*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).

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

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

of the phone) . . . ."[59] The FCC created a very narrow safe harbor that allows a one-call exception to a reassigned number, when the current subscriber or customary user of the number has not consented, if the caller does not have actual or constructive knowledge of the reassignment.[60] As a practical matter, consumers have little or no incentive to notify a company that has placed a call or sent a text to a reassigned number to advise of the reassignment (and indeed a subscriber or customary user may have a disincentive to do so, in order to potentially benefit from statutory damages upon receipt of a second call or text). 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.[61]

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

[60] *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.

[61] If, for example, a service provides notice of reassignments every 30 days, a marketer could only benefit from the narrow safe harbor for calls to reassigned numbers if it limited its calls or texts to a given phone number once every 30 days. The FCC has acknowledged that there is 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).

The FCC has suggested that callers could ask consumers to notify them when they switch 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, however, 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

Like the CAN-SPAM Act,[62] the TCPA does not comprehensively regulate all text messages or even all unsolicited text 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"[63] or, for marketing messages, prior express written consent[64]) 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.[65] 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.[66]

Also unlike the CAN-SPAM Act which only authorizes suits by *Internet access services* or government agencies,[67] 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

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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).

[62]15 U.S.C.A. §§ 7701 to 7713; *supra* § 29.03.

[63]*See* 47 U.S.C.A. § 227(b)(1)(A).

[64]*See Rules and Regulations Implementing the Telephone Consumer Protection 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.

[65]*See supra* § 29.03.

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

[67]*See supra* § 29.03[7].

up to $500 per violation[68] (potentially increased as high as $1,500 per violation, in the discretion of the court, if a defendant "willfully or knowingly" violated the statute),[69] 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.

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[68]*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* 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)).

[69]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).

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 any automatic telephone dialing system or an artificial or prerecorded voice . . .
>
> (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call . . . .[70]

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."[71] Unless a text message is sent by a machine or technology that has the capacity to send messages to randomly or sequentially generated numbers, the message will not be actionable because it cannot have been sent by an ATDS.[72] Indeed, "courts broadly recognize that not every text message or call constitutes an actionable offense."[73]

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

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[70]47 U.S.C.A. § 227 (b)(1)(A).

[71]47 U.S.C.A. § 227(a)(1).

[72]*See, e.g.*, *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); *Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1291 (S.D. Cal. 2014) ("If Defendant's system is not an ATDS, the TCPA does not apply . . . ."); *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), *appeal dismissed*, Docket No. 12-56482 (9th Cir. Nov. 28, 2012).

[73]*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).

. . . ."[74] Some plaintiffs' lawyers nevertheless have argued that notwithstanding the statutory definition, an ATDS also includes any equipment that could dial a number from a list without human intervention, regardless of whether it met the statutory definition of an ATDS, based on three paragraphs about predictive dialers out of 225 paragraphs in an FCC Report and Order from 2003[75]—and prior to the FCC's 2015 regulations some district courts agreed with this view.[76]

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

[75]*See Rules and Regulations Implementing the Telephone Consumer Protection 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.

[76]*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

In its 2015 Order, however, the FCC clarified 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.' "[77] Contrary to arguments advanced by plaintiff's counsel over several years, 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.[78]

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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).

It is now clear that these cases were wrongly decided, and the argument that the FCC expanded the definition of an ATDS to include systems that merely dial from a list regardless of whether they have the requisite capacity specified by the statute, is now moot in light of the FCC's 2015 Order, which shed new light on the meaning of *capacity* and 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."). Indeed, in light of the FCC's 2015 Order, any attempt by a court to expand the definition of an ATDS beyond the statutory definition arguably would itself be precluded by the Hobbs Act.

[77] *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).

[78] *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)

The 2015 Order makes clear that the FCC never purported to expand the statutory definition of ATDS to include systems that could dial from a list or database but did not

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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* 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*, 55 F. Supp. 3d at 1291 (finding 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"). 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). The FCC does not have statutory authority to modify the definition of an ATDS set forth in section 227(a). *Compare* 47 U.S.C.A. § 227(a) *with* 47 U.S.C.A. §§ 227(b), 227(c); *see also Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1291 (S.D. Cal. 2014) (rejecting a plaintiff's argument that the FCC had purported to expand the definition of an ATDS in pre-2015 rulings, noting that the TCPA did not delegate rulemaking authority to the FCC to change the statutory definition of ATDS).

have the capacity to generate numbers randomly or sequentially, store or produce those numbers and call them. If a system dials from a database or list, it is only an ATDS if it has the *capacity* to generate numbers randomly and sequentially and to dial those numbers. In determining that a predictive dialer—which is technology that dials multiple numbers simultaneously from a list or database based on calculations about how quickly people will answer their phones and how many numbers may be called to reach a single live person—could constitute an ATDS in its 2003 Report and Order, the FCC sought to address a technology that met the statutory definition of an ATDS—not to expand the statutory definition.[79] While the 2003 Report and Order stated that a party could not circumvent TCPA liability by

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[79]*See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14093 (2003) (concluding that "a predictive dialer falls within the meaning and statutory definition of 'automatic telephone dialing equipment' and the intent of Congress."). According to the FCC, "a predictive dialer is equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls. The hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers." *Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14091 (2003). In its 2015 Order, the FCC made clear that it did not mean by this language that an ATDS could *either* meet the statutory definition *or* dial from a database of numbers. *See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7971-72 ¶ 10 (2015) ("We reaffirm our previous statements that dialing equipment generally 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. We also reiterate that predictive dialers, as previously described by the Commission, satisfy the TCPA's definition of 'autodialer' for the same reason."); *see also id. at* 7973 ¶ 14 (explaining the FCC's prior ruling that a predictive dialer constituted an ATDS based on the capacity of a predictive dialer; "The Commission concluded that the TCPA's unqualified use of the term 'capacity' was intended to prevent circumvention of the restriction on making autodialed calls to wireless phones and emergency numbers and found that 'a predictive dialer falls within the meaning and statutory definition of 'automatic telephone dialing equipment' and the intent of Congress.' "); *id.* at 7974 ¶ 15 (reiterating that the FCC had "twice addressed the issue in 2003 and 2008, stating that autodialers need only have the 'capacity' to dial random and sequential numbers, rather than the 'present ability' to do so. Hence, any equipment that has the requisite 'capacity' is an autodialer and is therefore subject to the TCPA."); *id.* at 8019 ¶ 111 (explaining, in a different context, that "[e]ven assuming that the equipment does not actually use a random or

using a predictive dialer, and within that context added that "[t]he basic function of such equipment . . . [is] the capacity to dial numbers without human intervention," the FCC never ruled that such equipment did not need not meet the statutory definition of an ATDS or that any equipment that merely had the capacity to make a call without human intervention was an ATDS even if it did not have the capacity to generate numbers randomly or sequentially, to produce or store those numbers and to dial them.[80] The FCC

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sequential number generator, the capacity to do so would make it subject to the TCPA."). A predictive dialer thus is technology that may allow its owners to dial from a list or database but, whether operational or latent, has the *capacity* to generate numbers randomly or sequentially. As one court explained:

> Predictive dialers use an algorithm to "predict" *when* a telemarketer will become available to take a call, effectively queueing callers for the telemarketer. They are neither the database storing the numbers nor a number generator creating an ephemeral queue of numbers. However, database or number generator software is frequently attached to automatic dialers, thereby creating the "potential capacity" to become an ATDS.

Marks v. Crunch San Diego, LLC, 55 F. Supp. 3d 1288, 1293 (S.D. Cal. 2014) (emphasis in the original).

[80]*See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14091- 14093 (2003) (explaining that "to exclude from these restrictions equipment that use predictive dialing software from the definition of 'automated telephone dialing equipment' simply because it relies on a given set of numbers would lead to an unintended result."). In support of a looser definition of ATDS, plaintiffs' class action lawyers, prior to the FCC's 2015 Order, also sometimes cited to a footnote in an unrelated order addressing prior express consent or a 2008 report and order on prerecorded debt collection phone calls as evidence that the FCC has expanded the statutory definition of an ATDS to no longer require that an ATDS have the capacity to generate numbers randomly or sequentially. *See Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, SoundBite Communications, Inc.*, 27 F.C.C. Rcd. 15391, 15392 n.5 (2012) (referring to an ATDS, in a footnote in a ruling clarifying the requirements for prior express consent, as "any equipment that has the specified *capacity* to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists."; emphasis in original); *Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Request of ACA Int'l for Clarification and Declaratory Ruling*, 23 F.C.C. Rcd. 559, 566 (2008) (clarifying that prerecorded message calls to wireless numbers that are provided by the called party to a creditor in connection with an existing debt are permissible as calls made with the "prior express consent" of the called party). Both of these references, however, refer back to the 2003 FCC Report and Order addressing predictive dialers, which the FCC has clarified constitute ATDSs because, even if they dial from a list, they have the capacity to

made this point clear in the 2015 Order,[81] but it should never have been in doubt. The Final Rules attached as Appendix A to the 2003 Report and Order show no changes to 47 C.F.R. § 64.1200(f)(2). The FCC Rule defining ATDS included in the 2003 Report and Order (which has not been modified in the intervening time) tracks the statutory definition and does not include dialing from a list without human intervention as an alternative definition of ATDS.[82]

Hence, as explained by the FCC's 2015 Order, if a technol-

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generate numbers randomly or sequentially, store or produce the numbers and dial them. Indeed, the 2008 Report stated expressly that the 2003 Report and Order "found that . . . a predictive dialer falls within the meaning and statutory definition of 'automatic telephone dialing equipment' and the intent of Congress"—making clear that it applied only to predictive dialers that met the statutory definition of an ATDS. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, *Request of ACA International for Clarification and Declaratory Ruling*, 23 F.C.C. Rcd. 559, 556 ¶ 13 (2008); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14093 (2003) (concluding that "a predictive dialer falls within the meaning and statutory definition of 'automatic telephone dialing equipment' and the intent of Congress.").

Misunderstanding about what the Commission meant reflected a failure to adequately consider not just a system's current operation (*i.e.*, whether, as a predictive dialer, it dialed from a list of numbers or a database or could dial without human intervention) but its potential functionalities, or *capacity* (*i.e.*, whether it had the capacity to generate numbers randomly or sequentially, to produce or store those numbers, and to dial them).

[81] *See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7971-72 ¶ 10 (2015) ("We reaffirm our previous statements that dialing equipment generally 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. We also reiterate that predictive dialers, as previously described by the Commission, satisfy the TCPA's definition of 'autodialer' for the same reason."); *see also id.* at 7973 ¶ 14 (explaining the FCC's prior ruling that a predictive dialer constituted an ATDS based on the capacity of a predictive dialer; "The Commission concluded that the TCPA's unqualified use of the term 'capacity' was intended to prevent circumvention of the restriction on making autodialed calls to wireless phones and emergency numbers and found that 'a predictive dialer falls within the meaning and statutory definition of 'automatic telephone dialing equipment' and the intent of Congress.' ").

[82] 47 C.F.R. § 64.1200(f)(2) ("The terms automatic telephone dialing system 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.").

ogy or system dials from a list or a database like a predictive dialer it is only an ATDS if, like a predictive dialer, the system has the potential ability, latent capacity or potential functionalities (*i.e., capacity*) to generate numbers randomly or sequentially (and to store or to produce the randomly or sequentially generated numbers) and the capacity to dial those numbers. Dialing from a list or database without human intervention cannot, on its own, be a substitute for meeting the statutory criteria that a system at least have the *capacity* to generate numbers randomly or sequentially, store or produce those numbers, and dial them. These are characteristics of systems that often meet the statutory definition—they are not substitutes for it.

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."[83] 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.[84]

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[83]*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); *Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189, 1193 (W.D. Wash. 2014) (adopting the same analysis).

[84]*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 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 Am., 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 and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 18 FCC Rcd. 14014 (2003).

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."[85] The FCC, however, clarified in its 2015 Order that *capacity* means 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.[86] While the addition of software to equipment may transform a system into an ATDS or autodialer, "there must be more than a theoretical potential that the equipment could be modified to satisfy the

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[85]*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); *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). As discussed below in the text and in the following footnotes, the FCC addressed this concern in part by defining *capacity* to mean potential ability or functionalities (or in the words of the Third Circuit, *latent capacity*), but cautioned that for these purposes *capacity* could not be merely theoretical.

[86]*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 'capacity' 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).

'autodialer' definition."[87]

Thus, to constitute an ATDS, a system must have the *potential ability, potential functionalities* or *latent capacity* to generate numbers randomly or sequentially (and store or produce those randomly or sequentially generated numbers) and to dial those numbers; merely being able to dial from a list or a database is not sufficient. The capacity to generate numbers randomly or sequentially would not make a system an ATDS unless it also had the capacity to store or produce those numbers and the capacity to call them. Conversely, if functionality to generate numbers randomly or sequentially and to dial those numbers is not latent in a system and would have to be bolted on through significant effort, the system would not qualify as an ATDS.

Where ownership of different components of a dialing equipment work in concert to constitute an ATDS but owner-

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[87]*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 2015 Ruling as requiring at least a "latent" capacity). 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 'capacity.' " *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7974 ¶ 16 (2015).

ship of the components is divided among different people or entities, those people or entities collectively are responsible for complying with the TCPA.[88]

Even if a system otherwise could qualify as an ATDS because it has the capacity to generate numbers randomly or sequentially, courts have held that a system is not an ATDS if a text message in fact cannot be sent without "human intervention."[89] This body of judge-made case law arose

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[88]*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.

[89]*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."); *Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1292 (S.D. Cal. 2014) (granting summary judgment for the defendant because, among other reasons, "[n]umbers only enter the system through one of . . . three methods . . . , and all three methods require human curation and intervention."); *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-

because the FCC, in its 2003 Report and Order, interpreted 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."[90] 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."[91] Since the time of the FCC's July 2015 Order, several courts have exercised that authority and

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24, 2015 WL 2092671, at *5 (M.D. Fla. May 5, 2015) (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., 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).

[90]*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).

[91]*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,

granted dispositive motions for defendants under the alternative "human intervention" formulation for determining if a system is not an ATDS.[92]

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.

[92]*See, e.g., 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,* _ F. Supp. 3d _, 2016 WL 3619684, at *9 (S.D. Fla. June 17, 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); *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); *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

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.[93] 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*.[94] 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 intent of Congress."[95] Second, if a statute is silent or ambiguous with

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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."); *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). *But see Manual v. NRA Group, LLC,* _ F. Supp. 3d _, 2016 WL 4158797, at *4-5 (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); *Daubert v. NRA Group, LLC,* _ F. Supp. 3d _, 2016 WL 3027826, at *14-15 (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); *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.").

[93]*See* 47 U.S.C.A. § 227(b)(2).

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

[95]*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 interpreta-

respect to an issue, a court then must defer to the agency provided its analysis "is based on a permissible construction of the statute."[96]

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."[97]

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.[98]

In evaluating TCPA cases, district courts are bound by the Hobbs Act[99] to apply FCC rulings that are on point.[100] Where

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tions . . . .").

[96]*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).

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

[98]*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).

[99]28 U.S.C.A. §§ 2341 to 2353.

[100]*See, e.g.*, *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

an FCC determination is not on point, of course, a district court need not apply it.[101]

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[102] but FCC pronouncements are not entitled to

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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.").

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

[102] *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.").

deference on issues that the statute expressly addresses.[103]

A suit under the TCPA may be brought in either state or federal court.[104]

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."[105]

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 it's implementing regulations.[106]

TCPA texting cases typically turn on issues such as consent, whether an ATDS was used, whether the plaintiff stipulated to arbitrate disputes in a binding contract with the defendant[107] and class certification.[108] Where a plaintiff has incurred no harm, standing to sue in federal court also

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

[104]*Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740, 753 (2012).

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

[106]47 U.S.C.A. § 227(b)(3).

[107]*See, e.g., Andermann v. Sprint Spectrum L.P.,* 785 F.3d 1157 (7th Cir. 2015) (compelling arbitration of a TCPA dispute).

[108]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., 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 on this basis); *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).

may be challenged.[109]

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[109]To have standing to sue in federal court, merely alleging a "statutory violation" is not sufficient because "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016); *see generally supra* § 27.07 (analyzing *Spokeo* in greater detail). In *Spokeo*, which was a 6-2 decision, the 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." *Spokeo*, 136 S. Ct. at 1548, *quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "For an injury to be 'particularized,' it must affect the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548 (quotation marks omitted). A "concrete" injury "must be 'de facto'; that is, it must actually exist." *Id*. ("When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.' ") (citations omitted).

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." *Id.* at 1549. 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." *Id.* 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.' " *Id., quoting Lujan v. Defenders of Wildlife,* 504 U.S. 555, 578 (1992). 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." *Spokeo,* 136 S. Ct. at 1549. 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. *Spokeo,* 136 S. Ct. at 1549, *citing Summers v. Earth Island Institute,* 555 U.S. 488, 496 (2009). Similarly, Justice Alito offered 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." *Spokeo,* 136 S. Ct. at 1550. 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 . . . ." *Id.* at 1549.

In a typical TCPA texting case, a plaintiff does not incur any monetary harm and any alleged intangible harm amounts to receipt of a message that 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, and incurs no cost, or where the plaintiff is the subscriber, and never even received the message, and is not separately charged for incoming text messages on the user's phone.

A TCPA 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, it is

The TCPA does not provide expressly for vicarious liability

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not a statute where Congress 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. *See, e.g., Keating v. Peterson's Nelnet, LLC,* 615 F. App'x 365, 370 (6th Cir. 2015) ("It 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."; emphasis in original). The problem that Congress sought to address with the TCPA was the increase in unwanted telemarketing phone calls to landline phones. 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."). The application of the TCPA to text messaging, telemarking or otherwise, exists *only* because the FCC—not Congress—determined in 2003 that text messages should be treated as "calls" for purposes of the TCPA. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14115 ¶ 165 (2003). 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. *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"). 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. *See Mims v. Arrow Financial Services*, 132 S. Ct. 740, 751 (2012) (resolving a split among federal circuits and holding that the TCPA does not vest exclusive jurisdiction in state courts). 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 (especially if the message is merely informational).

While these specific issues about the TCPA and its legislative history have yet to be considered, standing has been found lacking in at least some TCPA cases where the plaintiff could not allege injury-in-fact. *See, e.g., Romero v. Dep't Stores Nat'l Bank*, _ F. Supp. 3d _, 2016 WL 4184099, at *4-6 (S.D. Cal. 2016) (dismissing plaintiff's TCPA suit for lack of standing because "[i]f the defendant's actions would not have caused a concrete, or de facto, injury in the absence of a statute, the existence of the statute does not automatically give a Plaintiff standing"). *But see Mey v. Got Warranty, Inc.,* _ F. Supp. 3d _, 2016 WL 3645195 (N.D.W. Va. 2016) (holding that the plaintiff had standing under *Spokeo* in a TCPA case involving pre-recorded calls to a cell phone and an alleged violation of the Do Not Call List regulations).

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

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.[110] In the context of telephone calls to residential telephone lines using prerecorded 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.[111] In a footnote, the FCC also suggested that vicarious liability could be established through evidence of a formal agency relationship, apparent authority or ratification.[112] Although an argument could be made that this ruling should not apply to text

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where she intentionally sought out a text message to trigger a lawsuit. *See Stoops v. Wells Fargo, N.A.,* _ F. Supp. 3d _, 2016 WL 3566266, at *11-13 (W.D. Pa. 2016).

[110]*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. 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).

[111]*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.").

[112]*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.").

messages sent using an ATDS,[113] 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 telemarketing (as contemplated by the FCC ruling) and hold to a third-party marketing consultant vicariously liable.[114]

Needless to say, vicarious liability is often difficult to prove because of the need to establish agency or apparent authority and ratification.[115]

The TCPA does not provide for aiding and abetting liability.[116] 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,

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[113]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.

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

[115]*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., 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); *Lary v. VSB Financial Consulting, Inc.*, 910 So. 2d 1280, 1293 (Ala. App. 2005) (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).

[116]*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).

there is no general presumption that the plaintiff may also sue aiders and abettors."[117]

While the federal government is immune from liability under the TCPA, government contractors are not.[118] 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 deemed to have initiated it."[119] 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.[120]

For interactive computer services[121] 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

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[117]*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.").

[118]*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).

[119]*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).

[120]*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.

[121]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.

objectionable.[122] The Communications Decency Act,[123] 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.[124] Section 230(c)(2)(B), therefore, "covers actions taken to enable or make available to others the technical means to restrict access to objectionable material."[125] 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.[126]

Businesses intending to send commercial text messages

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

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

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

[125]*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].

[126]*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.*, _ F. Supp. 3d _, 2016 WL 3660526 (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

may wish to review the Mobile Marketing Association guidelines on best practices,[127] in addition to strictly complying with the TCPA and its implementing regulations. Given the current volume of litigation, companies also may wish to 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).[128]

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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.

Id. at *8; *see generally infra* § 37.05 (analyzing the CDA).

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

[128] *See generally supra* § 29.03.

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SUMMARY OF CONTENTS

"Should be on the desk of every lawyer who deals with cutting edge legal issues involving computers or the Internet."
Jay Monahan
General Counsel, ResearchGate

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