

First Trial Court In Fourth Circuit Holds ATDS Requires Random or Sequential Number Generation

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For well over a year now since the D.C. Circuit's opinion in *ACA International v. FCC*, the pendulum has swung back and forth amongst federal courts on the definition of an automatic telephone dialing system (ATDS) at whiplash-inducing velocity. And whichever way that pendulum has swung (and for whatever reasons sent it in one direction or another), the issue boils down the following million-dollar question: must an ATDS have the capacity to randomly or sequentially generate numbers to be dialed?

Numerous intermediate and lower courts across many jurisdictions have taken a side on the issue. However, the lower courts within the Fourth Circuit, and the Fourth Circuit Court of Appeal have been silent on the big ATDS question. And this is due to no lack of important TCPA developments within the Fourth Circuit, including the Fourth Circuit's recent [severance of the government-backed debt exemption](#) from the TCPA, or [affirmance of the \\$61,000,000 judgment against Dish Network for willful TCPA violations](#).

The silence has been broken however, with the first decision within the Fourth Circuit coming from the United States District Court for the Eastern District of North Carolina, Western Division.

The court's answer to the million-dollar question is yes—random or sequential generation is required for a device to be considered an ATDS.

Snow v. General Electric Company, et al., No. 5:18-CV-511-FL, 2019 U.S. Dist. LEXIS 99760 involved a reassigned number TCPA claim in which Plaintiff alleged the Defendants had sent her text messages with an ATDS intended for the prior subscriber of the cellular telephone line, a former GE technician who received work-related alerts on his phone. GE challenged Plaintiff's complaint on the basis she had failed to plausibly allege the Defendants sent the texts with an ATDS. The court granted the motion, and held that Plaintiff had failed to alleged "facts permitting an inference that defendants call her with equipment that has the capacity to store or produce numbers using a random or sequential number generator."

The court's ruling answered these now all-too-familiar questions in reaching its holding:

- **Did *ACA International* invalidate all the FCC's prior ATDS rulings?** The court answered yes, pointing to the fact that "[a]lthough the Fourth Circuit has not addressed the impact of *ACA International* on prior FCC interpretations on the definition of ATDS, other circuits uniformly have held that *ACA International* set aside the FCC's interpretation of the definition of ATDS, and that the court must return the interpreting the statutory definition of ATDS without that FCC guidance."
- **Does the Statutory Definition of ATDS Require Random or Sequential Number Generation?** Once again, the court answered yes, turning down the Plaintiff's invitation to follow the Ninth Circuit's opinion in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1050 (9th Cir. 2018). The court found a "significant," number of courts have "rejected the reasoning of *Marks*," and the Third Circuit "adopted a contrary approach," in *Dominguez v. Yahoo!*, 894 D.3d 116, 119 (3d Cir. 2018). With respect to the different



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positions taken by the Ninth and Third Circuits on the issue, the court concluded that the Third Circuit's approach "better comports with the plain language of the statute," which "unambiguously incorporates a 'random or sequential number generator' into the definition of an ATDS."

Based upon the court's holding, it articulated the following pleading standard that Plaintiff was required to meet in order to successfully plead a TCPA claim:

[P]laintiff must allege facts permitting an inference that defendants called her with equipment that has the capacity to store or produce numbers using a random or sequential number generator.

The court not only found that Plaintiff had failed to meet this standard, but that this defect in her complaint could not be cured by amendment because Plaintiff's factual allegations "foreclose[d]," her claims because "Plaintiff alleges that the text messages did not reach her randomly, but rather reached her because she was assigned a telephone number previously assigned to an individual who received technical alerts as part of a job function."

The court's ruling in *Snow* was a positive one for defendants. The court not only came out favorably on the ATDS issue, but also found that a plaintiff is effectively foreclosed from alleging that a message was sent using a random or sequential number generator when the message was targeted to a specific person or phone number. And in doing so, the ruling serves as an effective roadmap to show why the dismissal of a TCPA case is appropriate at the pleading stage when a statutorily-faithful interpretation of the ATDS definition is applied.

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