# What Is an Automatic Telephone Dialing System?
# The New Battleground in TCPA Litigation Since The FCC's Declaratory Ruling

**By Joshua H. Threadcraft**

The world of Telephone Consumer Protection Act (TCPA) litigation is constantly changing. With this evolution, new issues arise on almost a daily basis, challenging those prosecuting and defending these claims. A recent and increasingly litigated issue that both Plaintiff's and Defense counsel agree will likely serve as the next battleground of TCPA litigation is whether calls are made using an Automatic Telephone Dialing System, and particularly:

(1) What constitutes "capacity" as the term is used in the TCPA; and

(2) The level of human intervention necessary to remove a call from the scope of TCPA liability.

**Brief Overview of the TCPA**

The Telephone Consumer Protection Act,[1] was enacted in 1991 to protect privacy interests. It provides for injunctive relief, as well as the greater recovery of actual damages or a $500 per call statutory penalty. The TCPA also vests trial courts with discretion to treble damages when violations are willful or knowing.[2] Thus, for example, where statutory damages are ultimately claimed (which is generally the case), defendants face exposure of up to $1,500 per call if they are deemed to have willfully or knowingly violated the TCPA. Notably, even unwitting violations of the Act can create exposure reaching into the hundreds of millions of dollars. For example, in 2011, the U.S. Court of Appeals for the Seventh Circuit recognized the monetary significance of class certification in a case as ranging from between $250 million ($500 per alleged violation) to $750 million ($1,500 per violation).[3]

Most lawsuits involving the TCPA place at issue its prohibition against calls to cellular telephones using artificial and prerecorded voices or Automatic Telephone Dialing Systems without prior express consent of the called party.[4] The TCPA defines an "Automatic Telephone Dialing System" (ATDS) as equipment that has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator to dial the numbers.[5] Over the years, the Federal Communications Commission (FCC) has issued various Declaratory Rulings addressing what constitutes an ATDS, the most recent of which occurred on June 18, 2015, in a ruling that was released July 10, 2015 (the 2015 Declaratory Ruling or the Ruling).[6]

**The 2015 Declaratory Ruling as it Relates to What Constitutes an Automatic Telephone Dialing System**

The 2015 Declaratory Ruling addressed 21 Petitions and spoke on various topics, including:

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[1] 47 U.S.C. § 227.

[2] *See* 47 U.S.C. § 227(b)(3).

[3] *See* CE Design Limited v. King Architectural Metals, Inc., 637 F.3d 721, 724 (7th Cir. 2011).

[4] *See* 47 U.S.C. § 227(b).

[5] *See* 47 U.S.C. § 227(a)(1).

[6] *See* In re the Matter of Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991, 30 FCC Rcd 7961 (2015).

(1) What constitutes "capacity" as the term is used in the TCPA; and

(2) The significance of "human intervention" when determining whether calls are made using an ATDS.

Purporting to rely on previous Rulings, the sharply divided 3-2 2015 Declaratory Ruling stated that the term "capacity" as used in the TCPA includes equipment that does not have the "present ability" to dial randomly or sequentially but refused to explain exactly what this means.[7] While the Ruling did acknowledge "outer limits to the capacity of equipment to be an autodialer," it simply proclaimed that "there must be more than a theoretical potential that [ ] equipment could be modified to satisfy the 'autodialer definition,'" stating that while a rotary dial phone can theoretically be modified to such an extreme to be deemed an "auto dialer," "such a possibility is too attenuated" to satisfy the requirements of capacity.[8]

These statements drew sharp criticism including from dissenting Commissioner Ajit Pai. Commissioner Pai's disagreement is perhaps best encapsulated in the following illustration set forth in his dissent:

> No one would say that a one-gallon bucket has the "potential or suitability for holding, storing or accommodating" two gallons of water just because it could be modified to hold two gallons. Nor would anyone argue that Lambeau Field in Green Bay, Wisconsin, which can seat 80,000 people, has the capacity (,i.e., the "potential suitability") to seat 104,000 Green Bay residents just because it could be modified to have that much seating. The question of a things' capacity is whether it can do something presently, not whether it could be modified to do something later.[9]

While the Declaratory Ruling spoke to the issue of "capacity," it demurred when asked to adopt a bright line rule regarding the level of human intervention necessary to remove calls from the scope of TCPA liability, simply "clarifying that a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention," adding that:

> The basic functions of an autodialer are to "dial numbers without human intervention" and to "dial thousands of numbers in a short period of time." How 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. [10]

If anything, these statements regarding the human intervention element create more confusion than guidance as noted by FCC Commissioner Michael O'Rielly in his partial dissent to the Ruling:

> the Commission previously clarified that to be considered "automatic", an autodialer must function "without human intervention". Therefore, it should be clear that non-de minimis human intervention would disqualify it from being an autodialer. This is important because there is litigation around the country regarding the level of human intervention. Yet the order refuses to provide any additional clarity, claiming that this must be done through a case-by-case determination. In fact, the order increases confusion by implying that calls that are manually dialed from equipment that could be used as an autodialer would still count as autodialed calls because the equipment has the potential to be an autodialer -- even though the calls would not have been made absent that human intervention (i.e., the manual dialing).[11]

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[7] *See id.* at 7975, ¶ 15.

[8] *Id*. at 7976, ¶ 18.

[9] *Id.* at 8075 (Pai dissenting).

[10] *Id.* at 7975-76, ¶¶ 17, 20.

[11] *Id.* at 8089-90 (O'Rielly dissenting in part).

Not surprisingly, various appeals of the 2015 Declaratory Ruling have been filed. During the little more than a year since the Ruling, and while these appeals remain pending, federal district courts have been called upon to address the issues of what constitutes an ATDS, and particularly the issues of "capacity," and "human intervention."

**A Year of Rulings as to What Constitutes an ATDS Since the 2015 Declaratory Ruling**

*Stays Pending Appeal of the Declaratory Ruling*

A frequent issue arising since the 2015 Declaratory Ruling, particularly relating to the issue of "capacity," is whether a stay should be issued pending the outcome of appellate challenges to the Ruling. While some Courts have refused to stay litigation, others have reached a contrary conclusion. For example, in *Gensel v. Performant Technologies, Inc.*, the U.S. District Court for the Eastern District of Wisconsin stayed litigation during the pendency of appeal stating, "it seems to the Court, as it seemed to the dissenting Commissioners, that the FCC majority's interpretation of the term 'capacity' contradicts the plain language of the statute. If so, then the FCC's ruling on this issue is not entitled to deference on appeal."[12]

The U.S. District Court for the Northern District for Georgia also concluded that a stay was appropriate, noting that "if the case is not stayed, the defendant may suffer hardship conducting discovery and trial preparation in light of the uncertain difference between 'potential' capacity and 'theoretical' capacity under the definition of an ATDS."[13] In light of this precedent, one should consult the case law of her jurisdiction and the facts of her case, giving thought to whether a stay should be pursued while the 2015 Declaratory Ruling is on appeal.

*The Issue of "Capacity"*

A perfect example of the judiciary clarifying the scope of theoretical capacity for purposes of ATDS analysis is found in *Freyja v. Dunn & Bradstreet, Inc.,*[14] Noting the significance of human intervention, the Court cited uncontroverted testimony of the employee who actually called the plaintiff, which reflected that the plaintiff was called manually using an Avaya 4610 desktop phone that cannot, itself, be used as an autodialer. While stating that such a phone "could, at best, be used to receive calls from an autodialer if the agent's computer had the appropriate software, the agent had proper login credentials, and the dialer was appropriately configured," the Court emphasized that none of this was true for the phone used to call the plaintiff, granting summary judgment in the defendant's favor.[15]

A similar conclusion was reached in *Wattie-Bey v. Modern Recovery Solutions,* where the Court granted summary judgment concluding that the plaintiff failed to raise a genuine issue as to whether the defendant's dialing system satisfied the "capacity" requirement of an ATDS.[16]

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[12] Gensel v. Performant Technologies, Inc., No. 13-C-1196, 2015 WL 6158072, at *2 (E.D. Wisc. Oct. 20, 2015).

[13] Rose v. Wells Fargo Advisors, LLC, No. 1:16-cv-562-CAP, 2016 WL 3369283, at *2 (N.D. Ga. June 14, 2016).

[14] Freyja v. Dunn & Bradstreet, Inc., No. CV 14-7831, 2015 WL 6163590 (C.D. Cal. Oct. 14, 2015).

[15] *See id.* at *1.

[16] . Wattie-Bey v. Modern Recovery Solutions, Civ. No. 1:14-cv-01769, 2016 WL 1253489 (M.D. Pa. Mar. 10, 2016).

In support of summary judgment, the defendant proffered affidavit testimony that the phone system used to call the plaintiff was not capable of making autodialed calls and calls to the plaintiff were manually dialed by a person. The defendant also provided an affidavit from its vendor, stating that it sold and installed the defendant's phone system, and it had not installed, supported or maintained any predictive dialer or power dialing software features on the phone, nor had it licensed the defendant to do so. The Court also found significant that the defendant's responses to discovery provided that employees had to take the phone off the handset and use their fingers to physically push the number on the phone to call the plaintiff.

Attempting to rebut this evidence, the plaintiff pointed to an Internet article about an entity with no apparent relationship to the defendant that used the same phone system because it had the ability to integrate with the entity's predictive dialer hardware. Thus, according to the plaintiff, because the third party's phone system was capable of predictive dialing, so too was the defendant's system. Important to the Court, however, was the fact that the phone system of the unrelated party was linked to a separate piece of hardware providing a predictive dialing function. The Court did not believe that evidence of what a third party did with its phone system demonstrated that the defendant's standalone phone system fit the definition of an ATDS.[17]

Another recent interesting case addressing the issue of capacity is *Strauss v. CBE Group, Inc.*[18] In that case, the plaintiff filed suit, placing at issue 26 telephone calls he received on his cell phone that were intended for a third party. Six of the calls were answered and during each call the defendant asked to speak with the third party it was trying to call by name. The plaintiff did not tell the defendant he was not the third party or that the defendant called the wrong party.

It was undisputed that the defendant called the plaintiff twice using a Noble System Predictive Dialer under the mistaken belief that the number being called was associated with a landline. Before the third call, however, the defendant determined the number was associated with a cell phone and began using its Manual Clicker Application (MCA). In order to make the remaining 24 calls using the MCA, at least as the defendant configured it, an agent had to manually initiate the call by clicking a computer mouse or pressing a keyboard enter key. The MCA then used a Noble Systems device to connect the call to a telephone carrier network.

Holding that the first two calls using the Noble System Predictive Dialer violated the TCPA, the Court reached a contrary conclusion relating to the remaining 24 calls that were initiated using the MCA. Holding that the MCA, by itself, lacks the capability to dial predictively, the Court noted that the true issue was whether the Noble equipment that the MCA utilized to connect calls was a predictive dialer or was otherwise classified as an ATDS when paired with the MCA. According to the Court, the overwhelming weight of evidence indicated such was not the case. Specifically, though a Noble Systems Predictive Dialer was used to make the first two calls, the MCA used to call the plaintiff was not connected to a predictive dialer. Rather, after a representative clicked to initiate a call, the MCA utilized Noble connecting devises which only allowed for pass-throughs from the MCA and were incapable of doing any type of automatic outbound dialing.

As such, according to the Court, because the defendant presented substantial evidence that human intervention is essential at the point and time that the number is dialed using the MCA and the Noble equipment used did not have the functionalities required to classify it as a predictive dialer, the defendant shouldered its prima facie burden, which the plaintiff could not rebut.[19]

As is to be expected, however, not all post 2015 Declaratory Ruling cases have reached a similar conclusion. For example, in *Cartrette v. Time Warner Cable, Inc.,* after characterizing courts as aligning

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[17] *Id.* at *4.

[18] Strauss v. CBE Group, Inc., No. 15-620260-civ-COHN/SELTZER, 2016 WL 1273913 (S.D. Fla. Mar. 28, 2016).

[19] *Id.* at *4-5.

their definitions of an ATDS with that of the FCC, the Court rejected the defendant's argument that its Interactive Voice Response (IVR) system was not an ATDS.[20]

In reaching this conclusion, the Court noted that each day the IVR reviewed the defendant's billing system, automatically compiling a list of telephone numbers. While the IVR did not have the capacity to generate a list of numbers using a random or sequential number generator, it used an algorithm to locate the numbers, which once located were dialed by the IVR and played a recorded message. Thus, the Court concluded the IVR had the "'capacity' to 'store' and 'dial' numbers as those terms are used in § 227(a)(1)."[21]

Review of these cases decided since the 2015 Declaratory Ruling confirms that those faced with TCPA litigation should carefully determine whether calls were made with technology constituting an ATDS under the current state of the law in their jurisdiction and consider advancing arguments to the contrary when warranted.

*The Issue of "Human Intervention"*

Since the 2015 Declaratory Ruling, various courts have also addressed the level of human intervention necessary to remove calls from the scope of TCPA liability. One early case rejected an argument contending the Ruling clarified that whether a system is an ATDS should not be based solely on the system's present capacity, but rather its potential capacity to function as an ATDS even if the system requires some modification or additional software.[22]

Characterizing this argument as "miss[ing] the mark," the Court noted that the portion of the 2015 Declaratory Ruling cited by the plaintiff simply indicated that systems requiring modification may fall within the scope of the TCPA but did not suggest a system that never operates without human intervention constitutes and ATDS under the statute. Rather, according to the Court, the 2015 Declaratory Ruling reiterates that the basic functions of an autodialer are to dial numbers *without* human intervention, and to dial thousands of numbers in a short period of time.[23]

A frequent issue facing Courts regarding the issue of human intervention in the year since the Ruling has also been what competing levels of proof are necessary to create a question of fact as to whether an ATDS was used to make the calls at issue. The U.S. District Court for the Middle District of Florida provided guidance on the issue in *Estrella v. Ltd Financial Services, LP*.[24] In that case, the defendant moved for summary judgment, offering testimony from its senior vice president that the calls at issue were made using a "point and click" function, and that no calls were made using an artificial or prerecorded voice.

The plaintiff attempted to counter this argument with an unsworn declaration, contending he could tell the defendant used an ATDS because when he answered calls, there was a prolonged silence and what he described as delays, clicks and prerecorded messages. While the Court noted it could not rely on the plaintiff's unsworn declaration to oppose summary judgment, it nonetheless noted that the plaintiff's contentions were unpersuasive, concluding there was no evidence demonstrating the type or brand of equipment used to call the plaintiff's cellular telephone.

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[20] Cartrette v. Time Warner Cable, Inc., 5:14-cv-143-FL, 2016 WL 183483 (E.D.N.C. Jan. 14, 2016).

[21] *Id.* at *7.

[22] *See* Derby v. AOL, No. 5:15-cv-00452, 2015 WL 5316403, at *3 (N.D. Cal. Sept. 11, 2015).

[23] *See id.* at *4 (emphasis in the original).

[24] Estrella v. Ltd Financial Services, LP, No. 8:14-cv-2624-T-27AEP, 2015 WL 6742062 (M.D. Fla. Nov. 2, 2015).

At most, the calls were placed manually with the use of human intervention through a "point and click function."[25] Relying on *Estrella*, the U.S. District Court for the Eastern District of Arkansas also held that there was no evidence in the record showing an alleged pause or beep meant an autodialer was used to make the calls at issue.[26]

Similarly, in *Luna v. Shac, LLC,* a case issued shortly after the 2015 Declaratory Ruling, the Court ruled that text messages were sent with the requisite level of human intervention to remove them from the scope of TCPA liability.[27] Grating summary judgment in the defendant's favor, the Court specifically noted that human intervention was involved in several stages of the process prior to the plaintiff's receipt of the text message at issue, including uploading the plaintiff's phone number to the data base, drafting the message, determining the timing of the message and clicking send to transmit the message.[28]

**Conclusion**

As Commissioner Pai noted in his dissent to the 2015 Declaratory Ruling, the number of TCPA cases filed has increased exponentially over the years from 14 in 2008 to 1,908 in 2014.[29] The lucrative nature of such claims is certainly the reason for this mindboggling increase in litigation. As can be seen from the precedent above, persuasive arguments can be advanced that technology does not meet the definition of an ATDS based on the capacity of the technology used, or the level of human intervention involved in making calls. With the undiscriminating and potentially financially crippling threat of TCPA litigation ever present, those exposed to such litigation should prepare themselves to properly address the issues of capacity and human intervention since these issues are shaping up to form the new battleground of TCPA litigation.

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[25] *Id.* at *3.

[26] Goad v. Conseo Health, LLC, No. 3:15-cv-00197, 2016 WL 2944658, at *3 (E.D. Ark. May 19, 2016).

[27] Luna v. Shac, LLC, 122 F. Supp.3d 936 (N.D. Cal. Aug. 19, 2015).

[28] *Id.* at 941.

[29] *See* 30 FCC Rcd 8073 (Pai dissenting).