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## **FCC URGED TO TAKE ACTION ON LITIGATION-FUELING AUTODIALER ISSUE UNDER TCPA**

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Retailer groups, including the National Retail Foundation, the U.S. Chamber of Commerce, and the Restaurant Law Center, are part of a coalition urging the Federal Communications Commission to clarify what constitutes an automatic telephone dialing system under the Telephone Consumer Protection Act (TCPA) following a recent decision by the Eleventh Circuit that deepened the legal divide over the issue.

The TCPA prohibits “using any automatic telephone dialing system” to call a cellular telephone number, except for emergency purposes or with the prior express consent of the called party, or to collect a debt owed to the U.S. government.[1]

The statute defines an “automatic telephone dialing system” (or autodialer) 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.”[2]

Last month, the Eleventh Circuit narrowly interpreted the TCPA as stating that an autodialer requires random or sequential number generation, and does not include equipment that dials from a preexisting list of numbers. This directly conflicts with a prior Ninth Circuit decision, which broadly interpreted an autodialer to include all devices with the capacity to automatically dial numbers even if not randomly generated.

A previous FCC order defining what constitutes an autodialer was invalidated by the D.C. Circuit in 2018, because it could have subjected “ordinary calls from any conventional smartphone to the Act’s coverage.”

Since that time, despite two rounds of public comment, the FCC has remained largely inactive on rulemaking concerning what constitutes an autodialer, allowing litigation to flourish. The TCPA contains a private right of action permitting recovery of at least \$500 for each call (or text message) made in violation of the statute, and up to treble damages for “willful or knowing” violation.[3] There is no cap on the amount of recoverable damages.

More than 3,000 TCPA lawsuits have been filed in the past 14 months, with the average cost of settlement being \$6.6 million, according to the letter last week by industry groups, who urged the FCC to take “swift action.”

Many of the same groups that signed the letter lodged a petition in May 2018 seeking a declaratory ruling that an autodialer is limited to equipment that relies on random or sequential number generation to place calls.

Taking action on that petition “would bring much-needed clarity to the definition of ATDS and stop the spread of differing court interpretations that have followed in the wake of the D.C. Circuit’s decision,” the groups wrote. “Addressing unresolved TCPA issues should be one of the Commission’s very top priorities in 2020. There is no reason for further delay.”

*For questions or more information, contact the author.*

[1] 47 U.S.C. § 227(b)(1)(A)(iii)

[2] *Id.* § 227(a)(1)

[3] 47 U.S.C. § 227(b)(3).

## RELATED PRACTICE AREAS

- Retail & Consumer Products
- Telephone Consumer Protection Act (TCPA)

## MEET THE TEAM



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