

NATIONAL CONSUMER LAW CENTER

The Effect of *ACA International*: What Does it Vacate, What Does it Undermine, What Rules Remain?

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On March 16, 2018, the D.C. Circuit issued its long-awaited decision in *ACA International v. FCC*,² an appeal filed by debt collectors and a number of other industry players from a 2015 Declaratory Ruling and Order issued by the FCC.³ This memo addresses the effect of *ACA International* on:

- The definition of “automatic telephone dialing system” (ATDS);
- Callers’ liability for calls to reassigned numbers; and
- The right of consumers to revoke their consent to receive robocalls.

Chapter 6 of NCLC’s *Federal Deception Law*,⁴ available both in print and on-line, is a comprehensive analysis of TCPA issues. The on-line version is updated regularly and will soon be updated to reflect all the aspects of *ACA International*. It should be checked for ongoing developments.

I. THE EFFECT OF *ACA INTERNATIONAL* ON THE DEFINITION OF AUTOMATIC TELEPHONE DIALING SYSTEM

A. *ACA International* Affects Only the FCC’s 2015 Order, Not Earlier Orders.

1. Introduction

The scope of the effect of *ACA International* on the TCPA’s definition of “automatic telephone dialing system” (ATDS) is of profound importance to consumers, because the TCPA is an essential tool to protect them from tsunamis of unwanted calls to their cell phones. A key preliminary question is the scope and formal effect of *ACA International* on the definition of ATDS—in particular, what FCC orders about the definition of ATDS did the D.C. Circuit set aside? This question is important because the FCC has issued a series of orders about the definition, including orders in 2003 (“the 2003 Order”)⁵ and 2008 (“the 2008 Order”).⁶ Among other things, the 2003 Order, echoed by the 2008 Order, held that a predictive dialer is an ATDS:

¹ This memo is written by Carolyn Carter and Margot Saunders, attorneys at the National Consumer Law Center.

² ___ F.3d ___, 2018 WL 1352922 (D.C. Cir. Mar. 16, 2018).

³ *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 ¶¶ 25–41, 30 FCC Rcd. 7961 (F.C.C. July 10, 2015).

⁴ (3d ed. 2017), updated at www.nclc.org/library.

⁵ *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (2003 Order), 18 FCC Rcd. 14,014, 14,115 ¶ 165 (2003).

⁶ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (2008 Order), 23 FCC Rcd. 559 (2008).

“Therefore, the Commission finds that a predictive dialer falls within the meaning and statutory definition of ‘automatic telephone dialing equipment’ and the intent of Congress.”⁷

As shown below, the only formal effect of *ACA International* is that it sets aside certain portions of the FCC’s 2015 order. Nothing in the court’s opinion supports the view that the court intended to overturn the earlier orders.

2. The only formal effect of *ACA International* on the ATDS definition is that certain portions of the FCC’s 2015 order are set aside.

The only matter before the D.C. Circuit in *ACA International* was a Hobbs Act appeal from the 2015 FCC order. In a Hobbs Act appeal, the court has authority “to enjoin, set aside, suspend (in whole or in part), or to determine the validity of” final FCC orders.⁸ The Hobbs Act does not give the court jurisdiction to do more than this.

Nor does the D.C. Circuit’s decision purport to do anything regarding the ATDS definition other than to set aside certain portions of the FCC’s 2015 order. In its opening paragraphs, the decision says:

In this case, a number of regulated entities seek review *of a 2015 order* in which the Commission sought to clarify various aspects of the TCPA's general bar against using automated dialing devices to make uninvited calls. The challenges encompass four issues addressed by the agency's order: (i) which sorts of automated dialing equipment are subject to the TCPA's restrictions on unconsented calls ...

* * *

We *set aside* . . . the Commission's effort to clarify the types of calling equipment that fall within the TCPA's restrictions.⁹

Similarly, in the introduction to the ATDS discussion, the court says:

Applying [the APA’s] standards to petitioners' four sets of challenges *to the Commission's 2015 Declaratory Ruling*, we *set aside* the Commission's explanation of which devices qualify as an ATDS.¹⁰

ACA International thus does no more regarding the ATDS definition than to set aside certain portions of the FCC’s 2015 order that dealt with that definition. The D.C. Circuit’s decision is best viewed as rolling the clock back to 2014, before the FCC had issued the portions of its 2015 order that relate to the definition of an ATDS. In 2014, the TCPA was in place, and the FCC’s 2003 and 2008 orders, which included interpretations of the term ATDS, were also in place. Thus, the role of courts after *ACA International* is to interpret the statute in light of the 2003 and 2008 FCC orders, the decisions of the Court of Appeals for their Circuit, and any decisions of other courts that have persuasive value, but without the benefit of the 2015 order on

⁷ 2003 Order ¶ 133.

⁸ 28 U.S.C. § 2342.

⁹ *ACA Int’l* at *1 (emphasis added).

¹⁰ *ACA Int’l* at *4 (emphasis added). See also *id.* at *12 (repeatedly referring to flaws in 2015 order).

this point. Section I(D) below discusses the current law on defining a system as an ATDS under the TCPA.

3. The D.C. Circuit's references to the 2003 and 2008 FCC orders do not overturn them.

The D.C. Circuit's brief references to the 2003 and 2008 FCC orders in *ACA International* do nothing to undermine the conclusion that the opinion decides only the validity of the 2015 order. Except for a brief mention of the 2003 order in an introductory section describing the FCC's history of rulemaking and declaratory rulings,¹¹ *ACA International* mentions the FCC's 2003 and 2008 order only in section II(A)(2).

That section first addresses the question whether the existence of the 2003 and 2008 orders deprives the D.C. Circuit of jurisdiction to entertain the challenge to the 2015 order. This was a necessary prerequisite for the court to address the 2015 order. The FCC had argued that the petitioners could not appeal the part of the order that addresses the definition of ATDS because it simply reiterated questions that the previous orders had resolved. The court's discussion of this question reads in full:

As a threshold matter, the Commission maintains that the court lacks jurisdiction to entertain petitioners' challenge concerning the functions a device must be able to perform. The agency reasons that the issue was resolved in prior agency orders—specifically, declaratory rulings in 2003 and 2008 concluding that the statutory definition of an ATDS includes “predictive dialers,” dialing equipment that can make use of algorithms to “assist[] telemarketers in predicting when a sales agent will be available to take calls.” [citations omitted] According to the Commission, because there was no timely appeal from those previous orders, it is too late now to raise a challenge by seeking review of a more recent declaratory ruling that essentially ratifies the previous ones. We disagree.

While the Commission's latest ruling purports to reaffirm the prior orders, that does not shield the agency's pertinent pronouncements from review. The agency's prior rulings left significant uncertainty about the precise functions an autodialer must have the capacity to perform. Petitioners covered their bases by filing petitions for both a declaratory ruling and a rulemaking concerning that issue and related ones. *See, e.g.,* Prof'l Ass'n for Customer Engagement, Inc. Pet. 3-4; *ACA Int'l* Pet. 6; *GroupMe, Inc.* Pet. 3; *Glide Talk, Ltd.* Pet. 13. In response, the Commission issued a declaratory ruling that purported to “provid[e] clarification on the definition of ‘autodialer,’ ” and denied the petitions for rulemaking on the issue. 2015 Declaratory Ruling, 30 FCC Rcd. at 8039 ¶ 165 & n.552. *The ruling is thus reviewable on both grounds. See* 5 U.S.C. § 554(e); *Biggerstaff v. FCC*, 511 F.3d 178, 184-85 (D.C. Cir. 2007).¹²

¹¹ *ACA Int'l* at *2.

¹² *ACA Int'l* at *10 (section II(A)(2)(a) of the opinion) (emphasis added).

This section of the D.C. Circuit’s opinion, while it refers to the previous orders, makes it clear that the court’s ruling addresses only the 2015 order and the additional interpretations provided in that order. For example, the court states that it disagrees with the argument that “because there was no timely appeal from those previous orders, it is too late now to raise a challenge by seeking review *of a more recent declaratory ruling... .*” *Id.* (emphasis added). In addition, the court’s conclusion is that “[t]he ruling”—in the singular—is reviewable.¹³ Thus, nothing in this section of the court’s opinion purports to expand the scope of the D.C. Circuit’s review to the 2003 and 2008 orders. Moreover, as can be seen from the underlined portion of the quote above, the D.C. Circuit recognized that the prior orders left some issues unclear, and it was only those open issues that the FCC addressed in the 2015 order.

After concluding that the existence of the 2003 and 2008 orders does not foreclose review of the 2015 order, the decision moves on, in section II(A)(2)(b), to the question of the validity of the 2015 order. This section deals with the 2015 order’s ambiguity about whether an ATDS “must *itself* have the ability to generate random or sequential numbers to be dialed ... [or whether it is] enough if the device can call from a database of telephone numbers generated elsewhere.”¹⁴ It refers to the 2003 and 2008 orders only in the context of trying to interpret the 2015 order. For example, the court says that “[t]he Commission’s prior declaratory rulings *reinforce*” the court’s understanding that the 2015 order requires that an ATDS must generate the numbers it dials.¹⁵ Then the court goes on to point out that the 2015 order also reaffirmed a part of the 2003 order that “suggests a competing view.”¹⁶ After this discussion the court concludes that the 2015 order is so unclear that it does not satisfy the requirement of reasoned decision making:

So which is it: does a device qualify as an ATDS only if it can generate random or sequential numbers to be dialed, or can it so qualify even if it lacks that capacity? The 2015 ruling, while speaking to the question in several ways, gives no clear answer (and in fact seems to give both answers).

* * *

But the Commission nevertheless declined a request to “clarify[] that a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention.” 2015 Declaratory Ruling, 30 FCC Rcd. at 7976 ¶ 20.

* * *

In short, the Commission’s *ruling*, in describing the functions a device must perform to qualify as an autodialer, fails to satisfy the requirement of reasoned decisionmaking.¹⁷

¹³ “The ruling is thus reviewable on both grounds.” *ACA Int’l* at *10.

¹⁴ *ACA Int’l* at *10.

¹⁵ *Id.* at *11 (emphasis added).

¹⁶ *Id.*

¹⁷ *Id.* at *12 (emphasis added).

That the validity of the 2003 and 2008 orders was not before the D.C. Circuit is made even clearer by an examination of the rulemaking petition that ACA International filed with the FCC in 2014 requesting the ruling that it then appealed. In that petition, ACA International stated:

In 2003, the Commission found that predictive dialers fall within the meaning and statutory definition of autodialers: "[w]e believe the purpose of the requirement that equipment have the 'capacity to store or produce telephone numbers to be called' is to ensure that the prohibition on autodialed calls not be circumvented. Therefore, the Commission finds that a predictive dialer falls within the meaning and statutory definition of '[ATDS]' and the intent of Congress." In 2008, the FCC reiterated "that a predictive dialer constitutes an [ATDS] and is subject to the TCPA's restrictions on the use of autodialers."

ACA does not disagree with the FCC's ruling on this point.¹⁸

If ACA or some other party had wanted to challenge the 2003 or 2008 rulings, it was free to petition the Commission to reconsider them, and then file a Hobbs Act appeal if it was dissatisfied with the Commission's disposition of the petition.¹⁹ In its request for a rulemaking to the FCC preceding the 2015 order, the ACA expressly did not disagree with the prior orders. Instead, it asked for a clarification of the extent of the orders as they related to statutory term "capacity."²⁰

Thus, nothing in the *ACA International* decision purports to invalidate the 2003 or 2008 FCC Orders—review of which would be beyond the D.C. Circuit's jurisdiction in any event. Those orders therefore remain in effect. As a result, the role of courts will still be to interpret and apply the statute and the 2003 and 2008 orders; courts will simply have to perform this role without the benefit of the 2015 order.

B. *ACA International* Does Not Provide a Basis for Courts to Disregard the 2003 or 2008 Orders.

Even though the D.C. Circuit's decision does not purport to invalidate the 2003 or 2008 orders, robocallers might argue that it undermines those orders in a way that enables courts to disregard them.

¹⁸ ACA International, Petition for Rulemaking of ACA International (filed Feb. 11, 2014) (emphasis added), available at <https://ecfsapi.fcc.gov/file/7521072801.pdf>. The ACA petition went on to point out: "But it is critical that the Commission confirm that simply because a predictive dialer can be an ATDS for purposes of the TCPA, this does not mean that a predictive dialer must be an ATDS under the TCPA. Pursuant to the statute, to be an ATDS under the TCPA, equipment must have the listed elements. A predictive dialer that does not contain those statutory elements by definition is not an ATDS under the statute."

¹⁹ See *Mais v. Gulf Coast Collection Bur., Inc.*, 768 F.3d 1110, 1121 (11th Cir. 2014) (FCC's 2008 order defining prior express consent is binding in suit brought in district court by private litigant; "Mais is free to ask the Commission to reconsider its interpretation of "prior express consent" and to challenge the FCC's response in the court of appeals.")

²⁰ ACA International, Petition for Rulemaking of ACA International (filed Feb. 11, 2014), available at <https://ecfsapi.fcc.gov/file/7521072801.pdf>

The first problem with this argument is that the 2003 and 2008 orders were not appealed under the Hobbs Act. Jurisdiction to determine the validity of final FCC orders is vested exclusively in the Courts of Appeal through a petition filed under the Hobbs Act²¹ within 60 days after the entry of the order.²² As a result, the Supreme Court held in 1984 that except when exercising jurisdiction under the Hobbs Act, courts do not have jurisdiction to determine that an FCC final order is invalid.²³

Accordingly, many courts—including the Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits—have held that FCC orders are binding on federal courts in litigation between private parties. Many of the Circuits have applied this principle to the very orders at issue here—the FCC’s 2003 and 2008 orders.

For example, *Baisden v. Credit Adjustments, Inc.*,²⁴ was a private suit by a consumer against a caller. The consumer argued that, contrary to several FCC orders—including the 2008 order at issue here—providing a cell phone number to a company was not “prior express consent” to be contacted at that number. The Sixth Circuit held: “Because this is not a direct agency appeal challenging the validity of the FCC’s interpretations, we lack jurisdiction to consider whether the FCC’s interpretations regarding ‘prior express consent’ are consistent with the TCPA.”²⁵

In a very similar case, *Mais v. Gulf Coast Collection Bureau*,²⁶ the Eleventh Circuit held that a district court was bound by the FCC’s 2008 interpretation of prior express consent. The court held: “the district court lacked the power to consider in any way the validity of the 2008 FCC Ruling and also erred in concluding that the FCC’s interpretation did not control the disposition of the case.”²⁷ The court reiterated this holding the next year in *Murphy v. DCI Biologicals Orlando, LLC*.²⁸ The court held:

District courts may not determine the validity of FCC orders, including by refusing to enforce an FCC interpretation, because “[d]eeming 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.” If the Hobbs Act

²¹ 28 U.S.C. §§ 2342, 2349(a).

²² 28 U.S.C. § 2344.

²³ Fed. Communications Comm’n v. ITT World Communications, Inc., 466 U.S. 463, 468-469 104 S. Ct. 1936 (1984) (exclusive jurisdiction for review of final FCC orders lies in the Court of Appeals; district court lacked jurisdiction to hear challenge to FCC actions, here negotiations and meetings, as *ultra vires*).

²⁴ 813 F.3d 338 (6th Cir. 2016).

²⁵ *Id.* at 342. See also *Imhoff Investment, LLC v. Alfocino, Inc.*, 792 F.3d 627, 637 (6th Cir. 2015) (private litigant cannot challenge legitimacy of FCC’s TCPA regulation, “because the Hobbs Act confers jurisdiction on Courts of Appeal to review FCC regulations only by direct appeal from the FCC”); *Leyse v. Clear Channel Broad., Inc.*, 545 Fed. Appx. 444 (6th Cir. 2013) (applying Hobbs Act to preclude review of FCC rule creating exemption from prohibition against prerecorded calls to residential lines, and its interpretation of that rule); *Self v. Bellsouth Mobility, Inc.*, 700 F.3d 453, 461-462 (11th Cir. 2012) (district court lacks jurisdiction to grant relief that would have to be based on a determination that an FCC order was invalid).

²⁶ 768 F.3d 1110 (11th Cir. 2014).

²⁷ *Id.* at 1113.

²⁸ 797 F.3d 1302 (11th Cir. 2015).

applies, a district court must afford FCC final orders deference and may only consider whether the alleged action violates FCC rules or regulations. ... The district court rightly refused to consider Mr. Murphy's argument that the 1992 FCC Order's interpretation was inapplicable and contrary to the plain language of the TCPA because the effect would be to “set aside, annul, or suspend” the FCC Order and thus a violation of the Hobbs Act.²⁹

The Seventh Circuit has also repeatedly held that final FCC orders are binding on the courts except through a Hobbs Act appeal.³⁰ The Eighth Circuit is in accord.³¹ The Second³² and Ninth Circuits³³ have been similarly unequivocal, albeit in unreported decisions.

Moreover, as noted by the D.C. Circuit in an earlier case, an appeal of an FCC order is limited to the matters considered in the order being reviewed.³⁴ The 2015 FCC order did not reevaluate the issues in the prior orders. Instead it points to them and provides further elucidation of the questions left unaddressed in the prior orders, just as requested by the petitioners. As the FCC said in the 2015 order:

In the 2003 TCPA Order, the Commission described a predictive dialer as “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.” In the 2008 ACA Declaratory Ruling, the Commission “affirm[ed] that a predictive dialer constitutes an automatic telephone dialing system and is subject to the TCPA’s restrictions on the use of autodialers.” The Commission considered ACA’s argument that a predictive dialer is an autodialer “only when it randomly or sequentially generates telephone numbers, not when it dials numbers from customer telephone lists,” and stated that ACA raised “no new information about predictive dialers that warrant[ed]

²⁹ *Id.* at 1307 (citations omitted; emphasis added).

³⁰ *Blow v. Bijora, Inc.*, 855 F.3d 793, 802 (7th Cir. 2017) (“Thus, absent a direct appeal to review the 2015 FCC Order’s interpretation of an autodialer, we are bound to follow it”); *Williams v. Capital One Bank*, 682 Fed. Appx. 467, 468 (7th Cir. 2017) (FCC’s 2015, 2008, and 1992 orders regarding prior express consent can be challenged only through a timely, direct appeal to a court of appeals, so 7th Circuit “must presume that these FCC rulings are valid”); *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443 (7th Cir. 2010) (Hobbs Act precludes plaintiff in private litigation from challenging 1992 FCC order stating that fax could be sent to party with whom sender has established business relationship, so defendant can rely on this FCC order as a defense); *City of Peoria v. Gen. Electric Cablevision Corp.*, 690 F.2d 116 (7th Cir. 1982) (Hobbs Act precludes challenge in district court to FCC regulation regarding cable franchise fees).

³¹ *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013) (Hobbs Act precludes court from invalidating junk fax regulations adopted by FCC under TCPA).

³² *Sterling v. Mercantile Adjustment Bureau, L.L.C.*, 667 Fed. Appx. 344, 345 (2d Cir. 2016) (because of Hobbs Act, private litigant is barred from challenging FCC’s 2015 ruling that caller must have consent of actual called party).

³³ *Baird v. Sabre, Inc.*, 636 Fed. Appx. 715, 716 (9th Cir. 2016) (FCC’s 1992 interpretation of “prior express consent” cannot be challenged except by Hobbs Act appeal, so “must be presumed valid”; plaintiff’s argument that providing her phone number was not express consent “is foreclosed in light of the 1992 Order”).

³⁴ *Biggerstaff v. F.C.C.*, 511 F.3d 178 (D.C. Cir. 2007) (reiterating that only “an official reinterpretation of an old rule . . . creates a new opportunity to challenge the continuation of that [old] rule [such that it] triggers reopening.)

reconsideration of these findings” regarding the prohibited uses of autodialers—and therefore predictive dialers—under the TCPA.³⁵

The FCC did nothing in the 2015 order to change its prior interpretations. So nothing in those prior orders was before the D.C. Circuit to review in *ACA International*.

A few courts, instead of simply holding FCC rulings binding *per se*, have evaluated them under the *Chevron*³⁶ deference standard. Although *Chevron* sets forth a highly deferential standard that requires courts to defer to the agency’s interpretation of a silent or ambiguous statute whenever “the agency’s answer is based on a permissible construction of the statute,”³⁷ it is a somewhat less strict standard than the Hobbs Act rule. However, since the decisions that applied the *Chevron* standard upheld the FCC orders they were considering, it was not necessary for them to decide whether the even more deferential Hobbs Act standard would have applied, so their use of the *Chevron* standard was essentially *dicta*. For example, in *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*,³⁸ the Eleventh Circuit gave *Chevron* deference to a 1995 FCC order that established that the person on whose behalf a fax was sent is liable if the fax was sent in violation of the TCPA. The court did not consider whether the Hobbs Act might have made the FCC’s ruling binding, and since a ruling that it was binding would not have changed the outcome of the case, the court’s use of *Chevron* deference was essentially *dicta*. Later that same year, the Eleventh Circuit issued another decision unequivocally adopting the view that the Hobbs Act makes FCC orders binding on the courts.³⁹ A Ninth Circuit decision also gives *Chevron* deference to an FCC interpretation, again without discussing whether the interpretation might be binding under the Hobbs Act.⁴⁰ These decisions do little to undermine the unanimity of the view that the Hobbs Act makes unappealed FCC orders binding on the courts in private litigation.

C. Even if a court treats the 2003 and 2008 orders as open to question, *ACA International* should not be read as undermining them on the question of capacity.

Even if a court erroneously concludes that the 2003 and 2008 Orders are not binding, *ACA International*’s holdings do not undermine these prior orders. If those orders had been before the D.C. Circuit, and the D.C. Circuit had set them aside, the Hobbs Act would likely make that ruling binding throughout the country. But since *ACA International* did not set aside those orders, and did not have jurisdiction to rule on their validity,⁴¹ any comments in its opinion about those orders, or about issues addressed by those orders, are not *stare decisis* for courts

³⁵ FCC 2015 order, ¶ 13.

³⁶ *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

³⁷ *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

³⁸ 781 F.3d 1245, 1256–1257 (11th Cir. 2015).

³⁹ *Murphy v. DCI Biologicals Orlando, L.L.C.*, 797 F.3d 1302 (11th Cir. 2015) (FCC order interpreting prior express consent is incontestable under Hobbs Act).

⁴⁰ *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953 (9th Cir. 2009) (giving *Chevron* deference to FCC determination that text messages are calls subject to robocall restrictions). *See also* *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014) (affording *Chevron* deference to FCC’s 2013 declaratory ruling about vicarious liability for telemarketing calls), *aff’d*, ___ U.S. ___, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016) (finding “no cause to question” FCC’s ruling that there can be vicarious liability for TCPA violations, but without otherwise addressing level of deference).

⁴¹ *See* section I(A) of this memo.

outside the D.C. Circuit. And, to the extent that a court considers *ACA International*'s comments to have persuasive value, they do not in fact undermine the 2003 or 2008 orders, as shown below.

One key question that *ACA International* addresses is the meaning of the term “capacity” in the ATDS definition. To the extent that the 2003 and 2008 orders are viewed as based on a broad definition of capacity that includes both present and potential capacity, defendants may argue that *ACA International*'s reasoning undermines these prior orders.

However, the D.C. Circuit did not reject a broad construction of “capacity.” Quite the contrary: it held that the FCC likely has authority to adopt a construction of capacity that includes potential—*i.e.* future—capacity:

So which is it: does a device qualify as an ATDS only if it can generate random or sequential numbers to be dialed, or can it so qualify even if it lacks that capacity? The 2015 ruling, while speaking to the question in several ways, gives no clear answer (and in fact seems to give both answers). It might be permissible for the Commission to adopt either interpretation. But the Commission cannot, consistent with reasoned decisionmaking, espouse both competing interpretations in the same order.⁴²

Indeed, the opinion recognizes that any definition of capacity has to take future functioning abilities into account:

After all, even under the ostensibly narrower, “present ability” interpretation advanced by petitioners, a device that “presently” (and generally) operates as a traditional telephone would still be considered have the “capacity” to function as an ATDS if it could assume the requisite features merely upon touching a button on the equipment to switch it into autodialer mode. Virtually any understanding of “capacity” thus contemplates some future functioning state, along with some modifying act to bring that state about.⁴³

Instead, the concern of the court in *ACA International* was that the FCC's broad definition of capacity appeared to sweep in all smartphones even when used for ordinary personal interactions, and the FCC had not articulated any criteria for excluding ordinary personal use of a smartphone from the definition of ATDS. The court stated:

[The] straightforward understanding of the Commission's ruling is that all smartphones qualify as autodialers because they have the inherent “capacity” to gain ATDS functionality by downloading an app. That interpretation of the statute, for all the reasons explained, is an unreasonably, and impermissibly, expansive one.⁴⁴

⁴² *ACA International* at *12 (emphasis added).

⁴³ *Id.* at *5 (emphasis added).

⁴⁴ *Id.* at *9.

The D.C. Circuit did not conclude that the FCC could resolve this overbreadth only by narrowing the interpretation of “capacity.” To the contrary, it explicitly suggested that the Commission resolve the problem by “fashion[ing] exemptions preventing a result under which every uninvited call or message from a standard smartphone would violate the statute.”⁴⁵

Thus, *ACA International* leaves open the question whether the term “capacity” is properly interpreted to include both present and potential capacity. Even courts that—mistakenly--conclude that they are not bound by the FCC’s 2003 and 2008 Orders should not view the D.C. Circuit’s opinion as support for the position that a device is an ATDS only if it has the present capacity to act as an ATDS.

The meaning of capacity has been addressed by several courts before the FCC’s 2015 Order, and there is no reason that these interpretations should not be still considered relevant.⁴⁶ Even decisions citing the 2015 Order on this question are pertinent, so long as the courts also engaged in their own, independent, evaluation of the meaning of the statutory requirements for an ATDS,⁴⁷ rather than exclusively relying on the 2015 Order as the basis for their decisions.

D. After *ACA Int’l* What Rules Apply to Determine Whether Equipment is an ATDS?

As shown in the preceding sections, the effect of *ACA International* regarding the definition of ATDS is merely to set aside portions of the FCC’s 2015 order. The FCC’s 2003 and 2008 Orders are still in effect, and, of course, the TCPA itself remains in effect. In addition, a host of Circuit and lower court decisions are unaffected by *ACA International*. This section analyzes the application of these sources of authority to the question whether a particular device is an ATDS.

1. The ATDS Definitions in the FCC’s 2003 and 2008 Orders Encompass Most Dialers Used by Robocallers.

As discussed in section I(A) of this memo, the FCC’s 2003 and 2008 Orders are still in effect and still binding on the courts. While these orders may not have resolved every question about the definition of ATDS, they are crystal clear on some key issues.

First, the 2003 Order is clear that a device cannot be excluded from the definition of ATDS because it dials from a given set of numbers rather than from randomly or sequentially generated numbers:

⁴⁵ *Id.* at *8.

⁴⁶ *Dominguez v. Yahoo, Inc.*, 629 Fed. Appx. 369 (3d Cir. 2014) (device is an autodialer if it is part of a system that has the latent capacity to dial randomly or sequentially generated numbers); *Meyer v. Portfolio Recovery Associates, L.L.C.*, 707 F.3d 1036 (9th Cir. 2012); *Satterfield v. Simon & Shuster*, 569 F.3d 946 (9th Cir. 2009) (reversing grant of summary judgment to advertiser; fact question whether system had capacity to generate random or sequential numbers); *Moore v. DISH Network*, 57 F. Supp. 3d 639 (N.D. W. Va. 2014) (predictive dialer is autodialer if it has capacity to be upgraded by software to store or generate numbers randomly or sequentially; human involvement in inputting the number is irrelevant).

⁴⁷ *See, e.g. Cartrette v. Time Warner Cable, Inc.*, 157 F. Supp. 3d 448 (E.D.N.C. 2016) (hardware that, when paired with software that has capacity to store or produce numbers and dial those numbers, is an autodialer).

[T]o 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. Calls to emergency numbers, health care facilities, and wireless numbers would be permissible when the dialing equipment is paired with predictive dialing software and a database of numbers, but prohibited when the equipment operates independently of such lists and software packages. We believe the purpose of the requirement that equipment have the “capacity to store or produce telephone numbers to be called” is to ensure that the prohibition on autodialed calls not be circumvented. Therefore, the Commission finds that a predictive dialer falls within the meaning and statutory definition of “automatic telephone dialing equipment” and the intent of Congress.⁴⁸

Second, this passage also clearly affirms that a predictive dialer is an ATDS. The order quotes an industry definition of “predictive dialers” as dialers that “store pre-programmed numbers or receive numbers from a computer database and then dial those numbers in a manner that maximizes efficiencies for call centers.” *Id.* at ¶ 130. The Order then provides its own definition:

[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. As commenters point out, in most cases, telemarketers program the numbers to be called into the equipment, and the dialer calls them at a rate to ensure that when a consumer answers the phone, a sales person is available to take the call.⁴⁹

Both of these rulings were reaffirmed in the FCC’s shorter 2008 order. There, the FCC “affirm[ed] that a predictive dialer constitutes an automatic telephone dialing system and is subject to the TCPA’s restrictions on the use of autodialers.”⁵⁰ It also reiterated its rejection of the industry’s argument that “a predictive dialer meets the definition of autodialer only when it randomly or sequentially generates telephone numbers, not when it dials numbers from customer telephone lists.”⁵¹

A third question that the FCC’s 2003 Order resolves is that a predictive dialer is an ATDS even if it cannot be programmed to generate random or sequential phone numbers. In paragraph 131 of that order, the FCC described what a predictive dialer is, as a prelude to its conclusion that a predictive dialer is an ATDS. In a footnote to this passage, the FCC acknowledged that “[s]ome dialers are capable of being programmed for sequential or random

⁴⁸ 2003 FCC Order at ¶ 133 (footnotes omitted).

⁴⁹ *Id.* at ¶ 131.

⁵⁰ 2008 Order ¶ 12.

⁵¹ *Id.*

dialing; some are not.”⁵² The clear meaning of this passage, recognized by *ACA International*, is that “while some predictive dialers cannot be programmed to generate random or sequential phone numbers, they still satisfy the statutory definition of an ATDS.”⁵³

If courts—as they should—accept that these rulings are still in effect and still binding, most autodialers should fall within their coverage, even if the FCC’s 2015 ruling is disregarded. For example, many cases have relied on the 2003 and 2008 Orders to hold that a predictive dialer is an ATDS whether or not it has the capacity to generate random or sequential telephone numbers.⁵⁴ All but one of these decisions were issued before the FCC’s 2015 ruling, so could not have relied on it, and the one that was issued after it did not place any reliance on that ruling.

A number of decisions also rely on the 2003 and 2008 Orders to hold that any device that has the ability to dial numbers without human intervention is an ATDS, so, for example, a system that sends text messages *en masse* to multiple numbers is an ATDS.⁵⁵ Indeed, many courts treat the 2003 and 2008 orders as establishing the ability to dial numbers without human intervention as a separate and independent ground for finding a device to be an ATDS.⁵⁶ These

⁵² *Id.* ¶ 131 n.432 (quoting DMA comments).

⁵³ *ACA Int’l* at *11 (emphasis added) (also noting, at *10-12, that the FCC’s later 2015 order was inconsistent on this question). *Accord* *Swaney v. Regions Bank*, 2015 WL 12751706, at *6 (N.D. Ala. July 13, 2015) (concluding, based on FCC’s statement in its 2003 order that “[s]ome dialers are capable of being programmed for sequential or random dialing; some are not,” that “the FCC is no longer concerned with whether equipment has the capacity to be programmed for sequential or random dialing when determining if it is an ATDS”).

⁵⁴ *See, e.g.,* *Espejo v. Santander Consumer USA, Inc.*, 2016 WL 6037625 (N.D. Ill. Oct. 14, 2016) (relying on FCC’s 2003 Order to hold that predictive dialer is an ATDS); *Brown v. Account Control Technology, Inc.*, 2015 WL 11181947 (S.D. Fla. Jan. 16, 2015) (relying on 2003 and 2008 orders to hold that a predictive dialer is an ATDS; dismissing defendant’s argument that predictive dialer is ATDS only if it has capacity to use random or sequential number generation); *Lardner v. Diversified Consultants, Inc.*, 17 F. Supp. 3d 1215 (S.D. Fla. 2014) (relying on FCC’s 2003 order and finding it reasonable; device is ATDS if it automatically dials numbers from a preprogrammed list); *Sterk v. Path, Inc.*, 46 F. Supp. 3d 813 (N.D. Ill. 2014) (relying on 2003 and 2008 orders; a predictive dialer is an ATDS; here, device that sends text messages to call list is ATDS even if it lacks capacity to generate numbers randomly or sequentially); *Morse v. Allied Interstate, LLC*, 65 F. Supp. 3d 407 (M.D. Pa. 2014) (2003 and 2008 orders are binding; predictive dialer that calls numbers without human intervention is ATDS); *Davis v. Diversified Consultants, Inc.*, 36 F. Supp. 3d 217 (D. Mass. 2014) (relying on 2003 and 2008 orders to hold that predictive dialer is ATDS even if it does not have capacity for random or sequential number generation); *Cabrera v. Gov’t Employees Ins. Co.*, 2014 WL 11881002 (S.D. Fla. Nov. 26, 2014) (relying on FCC’s 2003 and 2008 orders to hold that any device that is able to dial numbers without human intervention, for example by calling numbers stored in a database, is an ATDS; LiveVox system is ATDS). *Cf. Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189 (W.D. Wash. 2014) (accepting FCC position in 2008 order that predictive dialer is ATDS, but finding this system, which sends text message to potential passenger after cab driver agrees to provide a ride, to involve too much human intervention to qualify).

⁵⁵ *See, e.g.,* *Swaney v. Regions Bank*, 2015 WL 12751706 (N.D. Ala. July 13, 2015) (text message sending system is ATDS because it has ability to dial numbers without human intervention); *Zeidel v. A&M (2015) LLC*, 2017 WL 1178150 (N.D. Ill. Mar. 30, 2017) (relying on 2003 order to hold that device that sends text messages *en masse* is ATDS regardless of whether it has capacity to generate numbers sequentially or randomly; device is ATDS if it stores pre-programmed numbers or receives numbers from a computer database; can dial those numbers at random, in sequential order, or from a database of numbers; and its basic function is the capacity to dial numbers without human intervention).

⁵⁶ *See, e.g.,* *Swaney v. Regions Bank*, 2015 WL 12751706 (N.D. Ala. July 13, 2015) (interpreting 2003’s reference to ability to dial numbers without human intervention not to be confined to predictive dialers; describing differing views); *Brown v. Credit Management, LP*, 131 F. Supp. 3d 1332 (N.D. Ga. 2015) (relying on 2003 and 2008 FCC orders to hold predictive dialer an ATDS); *Moore v. Dish Network L.L.C.*, 57 F. Supp. 3d 639 (N.D. W. Va. 2014)

cases are likely to continue to turn on a close examination of the extent of human intervention required by the particular system.⁵⁷ However, it is clear from the FCC’s 2003 order that the human involvement necessary to create and input the lists of numbers to be dialed is insufficient to exclude a device from the definition.⁵⁸

The D.C. Circuit’s concerns about the potential that smartphones used for ordinary personal purposes might be swept in by the broad definition of ATDS in the FCC’s 2015 order should be of no concern to a court that is determining whether something other than a smartphone is an ATDS. Overbreadth may be a legitimate concern in a rulemaking proceeding, because the rulemaker should be concerned about all persons and entities that a definition might encompass. But in litigation between two private parties the court’s concern should be the parties before it. A telemarketer or debt collector that has been robodialing millions of cell phone numbers should not be heard to complain about the potential that an ordinary smartphone user might be charged with violating the TCPA. That objection should be left to the smartphone user. Addressing this sort of issue outside a rulemaking proceeding or declaratory ruling or an appeal from an agency’s pronouncement would amount to issuing an advisory opinion on an issue not necessary to the case before the court.

2. Certain Circuit Decisions Remaining Controlling Precedent in Their Circuits.

In three Circuits—the Third, Seventh, and Ninth—consumers also have the benefit of binding Circuit decisions that adopt key principles regarding the ATDS definition. District courts in these Circuits are still bound by their Circuit’s decision except possibly to the extent that the Circuit relied on the portions of the FCC’s 2015 order that the D.C. Circuit set aside.

(predictive dialer is ATDS even if it lacks capacity to generate random or sequential phone numbers and even though humans create the lists of numbers to be called); *Johnson v. Yahoo!, Inc.*, 2014 WL 7005102 (N.D. Ill. Dec. 11, 2014) (finding FCC’s 2008 order binding; a system that has the capacity to dial stored numbers without human intervention is an ATDS); *Cabrera v. Gov’t Employees Ins. Co.*, 2014 WL 11881002 (S.D. Fla. Nov. 26, 2014) (relying on FCC’s 2003 and 2008 orders to hold that any device that is able to dial numbers without human intervention, for example by calling numbers stored in a database, is an ATDS; LiveVox system is ATDS); *Hickey v. Voxernet LLC*, 887 F. Supp. 2d 1125 (W.D. Wash. Aug. 13, 2012) (citing 2003 order and holding that predictive dialer is ATDS). *But cf.* *Moore v. Dish Network L.L.C.*, 57 F. Supp. 3d 639, 654 (N.D. W. Va. 2014) (interpreting FCC’s reference to lack of human intervention merely as an explanation of its reasoning, not as a separate requirement; this device is an ATDS).

⁵⁷ *See, e.g.*, *Frisch v. AllianceOne Receivables Mgmt., Inc.*, 2017 WL 25471 (E.D. Wis. Jan. 3, 2017) (calls were not autodialed when callers used manual process, such as clicking on a number on a screen, for each call, even if system also had capacity to operate as predictive dialer); *Strauss v. CBE Grp., Inc.*, 173 F. Supp. 3d 1302 (S.D. Fla. 2016) (system requiring caller to click on a number and that was not connected to a machine that could be used for predictive dialing is not autodialer); *Luna v. Shac, L.L.C.*, 122 F. Supp. 3d 936 (N.D. Cal. 2015) (TCPA can apply to Internet-based calling systems, but not when human intervention is involved in drafting message, determining its timing, and clicking “send”); *Jenkins v. mGage, L.L.C.*, 2016 WL 4263937 (N.D. Ga. Aug. 12, 2016) (Internet-based system that sent promotional text messages was not autodialer when an employee had to navigate to the website, log in, determine content of message, type it, decide when to send it, and click send).

⁵⁸ FCC 2003 Order ¶ 131 (describing predictive dialer: “in most cases, telemarketers program the numbers to be called into the equipment”). *See also* *Moore v. DISH Network*, 57 F. Supp. 3d 639 (N.D. W. Va. 2014) (predictive dialer is autodialer if it has capacity to be upgraded by software to store or generate numbers randomly or sequentially; human involvement in inputting number is irrelevant).

The Third Circuit held in *Daubert v. NRA Group*⁵⁹ that a district court did not err in finding that a device was an autodialer when the evidence properly in the record showed that it could make calls without human intervention. The Third Circuit reached this conclusion without relying on the FCC’s 2015 order, so it should be unaffected by *ACA International*.⁶⁰ In addition, a 2017 Third Circuit decision, *Flores v. Adir Int’l, Inc.*,⁶¹ holds that the statutory definition of ATDS requires only that equipment have the capacity to store or produce numbers to be called, using a random or sequential number generator, so can include a device that makes targeted calls to particular individuals. That decision is unpublished and non-precedential, but since it is based on the statute itself, not any FCC interpretation, it is likely to be very persuasive not only in the Third Circuit but in other Circuits as well. Another unreported Third Circuit decision, *Dominguez v. Yahoo, Inc.*,⁶² interprets the definition to require that when the equipment is used to produce numbers it must include a random or sequential number generator. However, the court reiterates in a footnote that the statutory definition also includes a separate component that covers equipment that only stores numbers to be dialed.⁶³

The Seventh Circuit’s decision *Blow v. Bijora, Inc.*⁶⁴ also addresses the definition of ATDS. It relies on the FCC’s 2015 order to hold that the term “capacity” in the ATDS definition is not limited to “present ability.” Even if the 2015 FCC order is no longer binding, however, *Blow* also adopts the view expressed in earlier FCC orders that “predictive dialers, which have the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers,” meet the ATDS definition.⁶⁵ The Seventh Circuit held that it was premature for the district court to have entered summary judgment for the caller without addressing factual issues regarding this definition and the extent to which human intervention was necessary before calls were made.⁶⁶ This decision is additional precedent, unaffected by *ACA International*, that a predictive dialer is an ATDS in the Seventh Circuit.

Ninth Circuit decisions are binding precedent for district courts in that Circuit on at least two questions regarding the definition of ATDS. First, a 2009 decision, *Satterfield v. Simon & Schuster, Inc.*,⁶⁷ requires courts to give meaning to the term “capacity” in the ATDS definition. It holds that the district court erred by focusing on whether the dialer actually stored, produced, or called numbers using a random or sequential number generator. Instead, the district court

⁵⁹ 861 F.3d 382 (3d Cir. 2017).

⁶⁰ The District Court decision that the Third Circuit affirmed cites the FCC’s 2003, 2008, and 2012 orders as support for its view that the definition “covers 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.” *Daubert v. NRA Group, LLC*, 189 F. Supp. 3d 442, 460 (M.D. Pa. 2016). It also cites the FCC’s 2015 order, but declines to give it deference because the appeal to the D.C. Circuit was pending at the time. *Id.* at 461 n. 7.

⁶¹ 685 Fed. Appx. 533 (3d Cir. 2017).

⁶² 629 Fed. Appx. 369 (3d Cir. 2015).

⁶³ *Id.* at 373 n.1 (“To the extent the District Court held otherwise, we clarify that the statutory definition is explicit that the autodialing equipment may have the capacity to store *or* to produce the randomly or sequentially generated numbers to be dialed. We acknowledge that it is unclear how a number can be *stored* (as opposed to *produced*) using a “random or sequential number generator.”)

⁶⁴ 855 F.3d 793 (7th Cir. 2017).

⁶⁵ *Id.* at 802 (citing FCC’s 2003 order; emphasis deleted).

⁶⁶ *Id.*

⁶⁷ 569 F.3d 946 (9th Cir. 2009).

should have asked whether the device had the capacity to do so. Second, *Meyer v. Portfolio Recovery Assocs., LLC*,⁶⁸ decided three years before the FCC’s 2015 order, appears to adopt the view that “capacity” is not limited to present ability.⁶⁹

3. Courts Should Hold that A Device That Stores Numbers to Be Dialed is an ATDS.

A final issue is whether *storing* numbers to be dialed and then dialing those numbers is sufficient to make a device an ATDS. This interpretation, not yet addressed by courts to any extent, appears to comport with even the most rigid and narrow view of the statutory language.

The TCPA defines an ATDS as follows:

(1) The term “automatic telephone dialing system” means 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.⁷⁰

Most of the courts analyzing the question of whether certain equipment satisfies the statutory definition of ATDS have focused on the statute’s reference to capacity to “produce telephone numbers to be called, using a random or sequential number generator.” However, few courts have recognized that there is a whole separate track on which to base a determination that a device is an ATDS. Clearly a system needs to dial numbers to meet the requirement of § 226(a)(1)(B). But it need not *produce* numbers if it has the capacity to *store* numbers, as these requirements are expressed in the alternative.

The next question is the effect of the language in § 226(a)(1)(A) “using a random or sequential number generator.” Robocallers may argue that this clause applies not just to production of numbers to be called, but also to storage of numbers. But that interpretation makes no sense. How can a device *store* numbers using a random or sequential number generator?⁷¹

⁶⁸ 707 F.3d 1036 (9th Cir. 2012).

⁶⁹ The decision states:

[The defendant caller] argues that its dialers do not have the present capacity to store or produce numbers using a random or sequential number generator. As we explained in *Satterfield v. Simon & Schuster, Inc.*, the clear language of the TCPA “mandates that the focus must be on whether the equipment has the *capacity* ‘to store or produce telephone numbers to be called, using a random or sequential number generator.’” 569 F.3d 946, 951 (9th Cir.2009). PRA’s securities filing shows that PRA uses predictive dialers. PRA does not dispute that its predictive dialers have the capacity described in the TCPA. This is sufficient to determine that PRA used an automatic telephone dialing system.

Id. at 1043 (emphasis added). The contrast between “present capacity” in the first sentence of this passage with “the capacity” in the second-to-last sentence compels the conclusion that the court views the term “capacity” as meaning more than “present capacity.”

⁷⁰ 47 U.S.C. § 227(a)(1).

⁷¹ See *Dominguez v. Yahoo, Inc.*, 629 Fed. Appx. 369, 373 n.1 (3d Cir. 2015) (“To the extent the District Court held otherwise, we clarify that the statutory definition is explicit that the autodialing equipment may have the capacity to store *or* to produce the randomly or sequentially generated numbers to be dialed. We acknowledge that it is unclear how a number can be *stored* (as opposed to *produced*) using a “random or sequential number generator. To the

Storage is an entirely separate function from generation of numbers. In fact, it is not possible for one system to both store and produce numbers. Those two functions are mutually exclusive. If the system already has the numbers in it (stored), then there would be no need for it to produce or generate the numbers.

Traditional statutory construction canons support a reading of the statute that treats “storage” of telephone numbers separately from “production” of those numbers. The Last Antecedent Rule says that a limiting clause or phrase “should ordinarily be read as modifying only the noun or phrase that it immediately follows.”⁷² Applying this rule to § 226(a)(1)(A), the phrase “using a random or sequential number generator” modifies the word “produce” rather than the word “store.”

Callers might argue that the Rule of Punctuation trumps the Last Antecedent Rule in this case. The Rule of Punctuation says that where, as in § 226(a)(1)(A), a modifier is set off from the series by a comma, it applies to more than the last antecedent. But punctuation rules should not be applied where applying them distorts a statute’s plain meaning.⁷³ Applying the Rule of Punctuation in this case violates the Rule of Superfluity, which prohibits reading a statutory provision such that any word or phrase is rendered superfluous.⁷⁴ As noted above, storing telephone numbers using a random or sequential number generator makes no sense. Thus, if the phrase “using a random or sequential number generator” modifies both “store” and “produce,” the term “store” is essentially read out of the statute, becomes superfluous, and the plain meaning of the statute is distorted.

Focusing on the statute rather than the FCC’s interpretation of it makes the question whether *ACA International* overturns the FCC’s 2003 and 2008 Orders as well as the 2015 order irrelevant.⁷⁵ A statutory reading that focuses on storage furthers the policies the FCC has previously articulated, including preventing callers from placing thousands of calls and texts in a short time period or developing equipment that circumvents the plain language and intent of the statute. Focusing on the capacity to “store” numbers also makes it clear that a predictive dialer is an ATDS under the statute even if the predictive dialer relies on lists of numbers to call, as those lists would have to be uploaded and stored before they could be dialed. Of course, to be an ATDS, the device must not only store the numbers, but must also dial them, so an ordinary smartphone or desk phone that requires a human caller to dial a stored number would not be an ATDS. Although the decisions are few, courts have found that equipment that has the capacity to store numbers in such a manner constitutes an ATDS under the TCPA.⁷⁶

extent there is any confusion between the parties on this issue (or whether Yahoo's equipment meets this requirement in Dominguez's case), the District Court may address it on remand.”) (emphasis in original).

⁷² *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003).

⁷³ *U.S. Nat’l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 459 (1993).

⁷⁴ *Massle v. U.S. Dept. of Housing & Urban Dev.*, 620 F.3d 340, 352 (3rd Cir. 2010).

⁷⁵ See section I(A) of this memo.

⁷⁶ See, e.g., *Echevvaria v. Diversified Consultants, Inc.*, 2014 WL 929275, at *6 (Feb. 28, 2014) (Mag.) (recommending summary judgment for consumer; system was ATDS where employee loaded 3,500,000 numbers into it each morning, the numbers were stored until midnight, and the system selected numbers to call according to a protocol determined by defendant, even though the system did not have the capacity to store or produce by random or sequential number generation); *Davis v. Diversified Consultants Inc.*, 36 F. Supp. 3d 217, 225–26 (D. Mass. 2014) (granting summary judgment to plaintiff on issue of whether system was ATDS where system had the capacity to store numbers even though evidence was “murky” regarding whether the system had the capacity for

II. CALLS TO REASSIGNED NUMBERS WITHOUT THE CALLED PARTY'S CONSENT REMAIN ILLEGAL, AND THERE IS NO SAFE HARBOR FOR THE FIRST CALL.

A second substantive question that *ACA International* addresses is the FCC's interpretation of the term "called party"⁷⁷ and the treatment of calls to telephone numbers that have been reassigned from a person who gave prior express consent to one who has not. The FCC interpreted the term "called party" to mean the person actually called. In addition, however, the FCC created a safe harbor for the first call to a reassigned number while imposing liability for calls after that first call.

The decision addressed these two questions separately. First, the court agreed with the FCC and the Seventh Circuit,⁷⁸ as well as the Eleventh Circuit,⁷⁹ that "[t]he Commission . . . could permissibly interpret "called party" in that provision to refer to the current subscriber."⁸⁰ It described the Seventh Circuit's reasoning at some length:

The Seventh Circuit explained that the phrase "called party" appears throughout the broader statutory section, 47 U.S.C. § 227, a total of seven times. 679 F.3d at 640. Four of those instances "unmistakably denote the current subscriber," not the previous, pre-reassignment subscriber. *Id.* Of the three remaining instances, "one denotes whoever answers the call (usually the [current] subscriber)," and the other two are unclear. *Id.* By contrast, the court observed, the "phrase 'intended recipient' does not appear anywhere in § 227, so what justification could there be for equating 'called party' with 'intended recipient of the call'?" *Id.* For those and other reasons, the court concluded "that 'called party' in § 227(b)(1) means the person subscribing to the called number at the time the call is made," not the previous subscriber who had given consent.⁸¹

The D.C. Circuit held that this analysis by the Seventh Circuit was "persuasive" support for the conclusion that the FCC could define "called party" to mean the person actually called, even when the telephone number had been reassigned.⁸²

Regarding the second question, however, the court found that the FCC's order allowing a one-call safe harbor was arbitrary, saying –

random or sequential number generation); *Carroll v. SGS N. Am., Inc.*, 2017 WL 4183098 (M.D. La. Sept. 21, 2017) (finding sufficient evidence to defeat summary judgment where record showed defendant input and stored numbers in a predictive dialer system).

⁷⁷ 47 U.S.C. § 227(b)(1)(A).

⁷⁸ *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637 (7th Cir. 2012).

⁷⁹ *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014).

⁸⁰ *ACA Int'l* at *15.

⁸¹ *Id.*

⁸² *Id.* at 15.

The Commission’s one-call-only approach cannot be salvaged by its suggestion that callers rather than new subscribers should bear the risk when calls are made (or messages are sent) to a reassigned number. That consideration would equally support a zero-call, strict-liability rule.⁸³

As the court could not be sure that the FCC would have adopted the first part interpreting called party to mean the person reached if the safe harbor was rejected, the court set aside both parts of the FCC’s treatment of reassigned numbers.⁸⁴

The impact of *ACA International* on the treatment of reassigned numbers is very limited. First, since the FCC’s creation of a safe harbor for the first call to a reassigned number was set aside, callers can no longer rely on that safe harbor. Second, the FCC’s interpretation of “called party” to mean the person actually called was also set aside, so the Hobbs Act will no longer make that interpretation binding on courts. However, since two Circuits (and a number of District Courts)⁸⁵ had reached the same conclusion without any reliance on the FCC’s 2015 order and before the FCC had even issued that order, there is strong and independent precedent that this is the correct interpretation of the TCPA, and reliance on an FCC interpretation is unnecessary. Indeed, the *ACA International* court’s holding that the FCC’s definition of “called party” to mean the person actually called is a permissible construction of the statute, and its reference to the Seventh Circuit’s *Soppet* decision as “persuasive” on this point,⁸⁶ only add to the support for this conclusion. The bottom line is that *ACA International* strengthens the conclusion that consent must be provided by the person whose phone was actually called.

III. *ACA International*’s Confirmation that Consumers Can Revoke Consent By Any Reasonable Means, and Its Implications

With some narrow exceptions not relevant here, the TCPA prohibits autodialed or prerecorded calls to cell phones without the called party’s prior express consent. In *ACA International*, the D.C. Circuit rejected the petitioners’ challenge to the FCC’s determination that consumers can revoke their consent by any reasonable means. The decision also has important implications for several other questions about revocation of consent.

This section will address the impact of *ACA International* on four issues relating to revocation of consent:

- A. Whether consent can be revoked;
- B. Whether callers can limit how consent can be revoked;
- C. Whether consent provided as a term in a contract can be revoked; and

⁸³ *Id.* at *16 (citations omitted).

⁸⁴ *Id.* at *17.

⁸⁵ See National Consumer Law Center, Federal Deception Law § 6.3.4.3 (3d ed. 2017), *updated at* www.nclc.org/library.

⁸⁶ *ACA Int’l* at *15.

D. Whether the method of revoking consent can be limited or controlled by the terms of a contract in which consent was granted.

A. *ACA International* Confirms that Consumers Have the Right to Revoke Consent.

The FCC’s 2015 ruling unequivocally holds that consumers have the right to revoke previously-given consent to receive robocalls.⁸⁷ The *ACA International* decision repeats and confirms this rule. The court said:

It is undisputed that consumers who have consented to receiving calls otherwise forbidden by the TCPA are entitled to revoke their consent.⁸⁸

The Third,⁸⁹ Ninth,⁹⁰ and Eleventh Circuits,⁹¹ and a number of lower court decisions⁹² have all agreed.

Since *ACA International* disposes of all of the Hobbs Act appeals from the FCC’s 2015 order, and sets aside only two parts of that order (both of which relate to matters other than revocation of consent), the FCC’s ruling that consent can be revoked is now—absent an appeal to the Supreme Court—final and binding on the courts.

B. Callers Cannot Limit How Consent Can Be Revoked.

A second important issue resolved by *ACA International* is that callers cannot limit how consent can be revoked. This issue was squarely before the D.C. Circuit, as the petitioners had specifically requested the FCC to rule that callers could “unilaterally prescribe the exclusive means for consumers to revoke consent.”⁹³ The FCC denied that request, saying that such a rule would “materially impair” the right of revocation.⁹⁴ Instead, the FCC concluded that “a called party may revoke consent at any time and through any reasonable means”—orally or in writing—“that clearly expresses a desire not to receive further messages.”⁹⁵

The D.C. Circuit expressly upheld the FCC’s decision in this regard. It described the petitioners’ concerns as “overstated,” and held that the FCC was not required to establish standardized revocation procedures.⁹⁶ Nor did the FCC go beyond its authority by mandating standardized revocation procedures for opting out of time-sensitive banking and healthcare-

⁸⁷ FCC 2015 Order at ¶ 56.

⁸⁸ *ACA Int’l* at *17.

⁸⁹ *Gager v. Dell Fin. Services, L.L.C.*, 727 F.3d 265 (3d Cir. 2013).

⁹⁰ *Van Patten v. Vertical Fitness Grp.*, 847 F.3d 1037, 1047–1049 (9th Cir. 2017).

⁹¹ *Osorio v. State Farm Bank*, 746 F.3d 1242 (11th Cir. 2014). *Accord Schweitzer v. Comenity Bank*, 866 F.3d 1273 (11th Cir. 2017) (reiterating that consent can be revoked orally, and holding that it can be partially revoked).

⁹² *Cartrette v. Time Warner Cable, Inc.*, 157 F. Supp. 3d 448 (E.D.N.C. 2016); *King v. Time Warner Cable*, 113 F. Supp. 3d 718, 726 (S.D.N.Y. 2015) (applying FCC’s 2015 declaratory ruling; consumer’s revocation, communicated to caller, was effective); *Conklin v. Wells Fargo Bank, N.A.*, 2013 WL 6409731 (M.D. Fla. Dec. 9, 2013); *Munro v. King Broad. Co.*, 2013 WL 6185233 (W.D. Wash. Nov. 26, 2013).

⁹³ *ACA Int’l* at *17.

⁹⁴ 2015 Declaratory Ruling, 30 FCC Rcd. at 7996 ¶ 66.

⁹⁵ 2015 Declaratory Ruling, 30 FCC Rcd. at 7996 ¶¶ 47, 63.

⁹⁶ *ACA Int’l* at *18.

related messages that the Commission had exempted from the prior express consent requirement yet declining to do so for revocation of consent.⁹⁷ As the D.C. Circuit pointed out, “the default rule for *non*-exempted calls [*i.e.* calls other than time-sensitive banking and healthcare-related calls] is that they are *disallowed* (absent consent), such that the availability of an opt-out naturally could be broader. In that context, the Commission could reasonably elect to enable consumers to revoke their consent without having to adhere to specific procedures.”⁹⁸

Since the D.C. Circuit upheld the 2015 Order on this point, this part of the Order is now settled law in the United States and is binding on the courts.⁹⁹

C. *ACA International* Lends Additional Support to the View That Consent Provided as a Term in a Contract Can Be Revoked.

Recently, creditors have begun inserting provisions in form agreements purporting to authorize the use of automated equipment to contact consumers at any number furnished by the consumer or otherwise obtained by the creditor. Under the Third Circuit opinion in *Gager v. Dell Financial Services*, this consent can be revoked.¹⁰⁰ By entering into a contractual relationship with a seller, a consumer does not waive the right to revoke consent to receive autodialed or prerecorded cell phone calls.¹⁰¹

However, a 2017 Second Circuit decision, *Reyes v. Lincoln Auto. Fin. Services*, erroneously holds that the consumer’s consent is irrevocable when it is part of a binding contract—in the particular case, a vehicle lease.¹⁰² The decision fails to give appropriate weight to the FCC’s 2015 ruling that, “[w]here the consumer gives prior express consent, the consumer may also revoke that consent.”¹⁰³ The FCC ruling on this point is unambiguous, and without qualifications or conditions. It cannot be construed as dependent on how consent was originally provided.¹⁰⁴

The *ACA International* decision states “It is undisputed that consumers who have consented to receiving calls otherwise forbidden by the TCPA are entitled to revoke their consent.”¹⁰⁵ Like the FCC’s 2015 order, this statement is unambiguous and without qualifications or conditions, so it is further support for the view that a consumer has the right to revoke consent even if consent was provided as part of a contract.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See discussion of the application of the Hobbs Act to the D.C. Circuit opinion in Section I(A) of this memo.

¹⁰⁰ *Gager v. Dell Fin. Services, L.L.C.*, 727 F.3d 265, 273–274 (3d Cir. 2013).

¹⁰¹ *Id.* at 274. *Accord* *Osorio v. State Farm Bank*, 746 F.3d 1242 (11th Cir. 2014); *Cartrette v. Time Warner Cable, Inc.*, 157 F. Supp. 3d 448 (E.D.N.C. 2016). See also *Ginwright v. Exeter Fin. Corp.*, ___ F. Supp. 3d ___, 2017 WL 5716756, at *6 (D. Md. Nov. 28, 2017). See generally National Consumer Law Center, Federal Deception Law § 6.3.4.4 (3d ed. 2017), updated at www.nclc.org/library.

¹⁰² *Reyes v. Lincoln Auto. Fin. Services*, 861 F.3d 51 (2d Cir. 2017).

¹⁰³ *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, No. 02-278, Report & Order, 30 FCC Rcd. 7961, at ¶ 62 (July 10, 2015). See *Ginwright v. Exeter Fin. Corp.*, ___ F. Supp. 3d ___, 2017 WL 5716756, at *6 (D. Md. Nov. 28, 2017) (declining to follow *Reyes*; noting its inconsistency with FCC’s ruling.).

¹⁰⁴ *ACA Int’l* at 43.

¹⁰⁵ *Id.* at *17.

D. The *ACA International* Decision Does Not Decide Whether The Method of Revoking Consent Can Be Limited or Controlled By the Terms of a Contract.

A final issue regarding revocation of consent, mentioned but not resolved in *ACA International*, is whether the *method* of revoking consent can be limited or controlled by the terms of a contract in which consent was granted. As noted in the preceding section, the weight of authority is that consent can be revoked even when that consent has been made a term in a contract,¹⁰⁶ but Courts of Appeals have not yet weighed in on the question whether a contract can impose a specific method of revoking consent.

ACA International holds that this question was not before the court:

The Commission correctly concedes, however, that the ruling “did not address whether contracting parties can select a particular revocation procedure by mutual agreement.” The ruling precludes unilateral imposition of revocation rules by callers; it does not address revocation rules mutually adopted by contracting parties. Nothing in the Commission’s order thus should be understood to speak to parties’ ability to agree upon revocation procedures.¹⁰⁷

Nonetheless, *ACA International* is relevant to the question in that it upholds the FCC’s ruling that a consumer has the right to revoke consent by any reasonable means. Whether or not a *reasonable* method of revoking consent can be required by contract, it should be clear after *ACA International* that a contract cannot require an *unreasonable* method of revoking consent. For example, a requirement in a contract that only permits revocation of consent in writing, delivered by certified mail to a specific address, would seem to be unreasonable. It would be especially unreasonable if the caller continued to call after hearing the called party’s repeated requests to stop calling, and failed to inform the called party during or after those requests of the acceptable method of revocation.

¹⁰⁶ See discussion in section III(C) of this memo.

¹⁰⁷ *ACA Int’l* at *18 (citations omitted).