



## FEDERAL COURT RULES TCPA LIABILITY NOT BASED ON POTENTIAL CAPACITY OF DEVICE

The North District of California concluded that liability for violation of the Telephone Consumer Protection Act (TCPA)'s prohibition on placing calls or sending text messages using a "automatic telephone dialing system" ("ATDS") depends on whether a device has the present capacity, not the potential capacity, to perform autodialing functions. *Glaser v. GroupMe, Inc.*, No. C-11-2584 PJH (N.D. Cal. February 4, 2015). GroupMe, Inc. provides group text messaging services that enables users to send text messages to over 50 recipients. Once a group administrator adds users and provides their telephone numbers, GroupMe sends a pair of non-telemarketing welcome text messages that (i) indicate that the user has been added to a group and (ii) provide information on text messaging rates. The plaintiff alleged that GroupMe violated the TCPA by sending the welcome text messages using an ATDS.

The district court granted GroupMe's motion for summary judgment finding that GroupMe's texting equipment did not meet the definition of ATDS. The TCPA defines ATDS as "equipment which has the capacity (i) to store or produce telephone numbers to be called, using a random or sequential number generator and (ii) to dial such numbers." The plaintiff argued that GroupMe's texting equipment is an ATDS because the equipment has the potential capacity to perform autodialing functions. The court determined that the Ninth Circuit has not spoken on the issue of "present capacity" versus "potential capacity" of a device. The court reasoned that a device must have the present capacity for autodialing because (i) the TCPA, Federal Communication Commission (FCC) and Ninth Circuit used the present tense in defining ATDS and (ii) adopting a "potential capacity" rule would make many contemporary common technological devices ATDS.

After determining that "present capacity" is required, the court examined the FCC's interpretations of ATDS and summarized the FCC's current position that "autodialer" includes "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." The plaintiff argued that the pre-programmed text messages were sent without human interaction through an automated process once a

group creator provided new telephone numbers to add to the group. The court disagreed. The welcome text messages were sent in direct response to the intervention of the group creator. Thus, GroupMe's texting equipment required human intervention and was not an ATDS.

The plaintiff filed this case in May 2011 and the court stayed the proceeding in January 2012 pending the FCC's decisions on three issues: (i) the definition of "ATDS" under the TCPA, (ii) whether prior express consent could be received through an intermediary and (iii) the scope of the TCPA's "common carrier" exemption. On the same day that the court lifted the stay, the FCC released a declaratory ruling in response to GroupMe's petition. See *Alert* dated May 1, 2014. Although the declaratory ruling made no finding on whether GroupMe used an autodialer to send text messages, the FCC concluded that a person's prior express consent to receive non-telemarketing calls or text messages from an autodialer could be obtained and conveyed through an intermediary, such as a GroupMe group creator.

Early last year the FCC committed to processing the backlog of pending TCPA petitions, including petitions that ask the FCC to clarify what devices could be considered ATDSs. No rulings have been published. This month, thirty-five industry groups signed and sent a letter to the FCC asking the FCC to expeditiously address pending petitions to provide certainty and curtail abusive lawsuits that increase costs for consumers and discourage businesses from communicating important information to consumers. □

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