

# Expect Focus Life, Annuity, and Retirement Solutions, April 2020

## Did Your Text Message or Phone Call Campaign Use an Illegal “Autodialer”?

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Like companies in other industries, life, annuity, and securities companies and their affiliates have faced class actions asserting claims under the Telephone Consumer Protection Act. These claims have arisen in connection with promotional campaigns using communications technology that can contact lists of prospects or customers by text message or phone call. At \$500 per communication (or \$1,500 in some cases), exposure for violations of the TCPA can be enormous.

A key litigation issue has been whether communications technology qualifies as an “automatic telephone dialing system” (“autodialer” for short) that violates the TCPA. The TCPA defines an autodialer as equipment that “has the capacity” to “store or produce telephone numbers to be called, using a random or sequential number generator” and “to dial such numbers.” But the grammar is unclear. For example, is “using a random or sequential number generator” a requirement for devices that have the capacity to “store” numbers and devices that have the capacity to “produce” numbers (the “narrow approach”)? Or is the number generator clause applicable only to devices that “produce” numbers, such that devices that “store” numbers need not randomly or sequentially generate numbers to violate the TCPA (the “broad approach”)?

From 2003 to 2015, Federal Communications Commission rulings purported to interpret the law. Then, in 2018, the supervisory D.C. Circuit vacated the FCC’s interpretation, leaving the autodialer definition open for judicial interpretation. In *Marks v. Crunch San Diego LLC*, the Ninth Circuit took the broad approach and deemed devices simply “with the capacity to dial stored numbers automatically” to be autodialers.

Recently, however, the Eleventh and Seventh Circuits took the narrow approach. In *Glasser v. Hilton Grand Vacations Co.* and *Gadelhak v. AT&T Services Inc.*, these two circuits concluded that systems that automatically dial preprogrammed numbers, but that do not dial randomly or sequentially generated numbers, are not autodialers. Additionally, the Eleventh Circuit held that a system that needs “meaningful human interaction” to implement, such as technology that requires an “employee’s choice” to initiate every call, is not an autodialer since it is not “automatic.” In sum, currently, whether a text or call campaign violates the TCPA may depend on the location of the court considering the question.