

# Let It Snow! Two Courts on the Same Day Hold That Random/Sequential Number Generation Required Under the TCPA

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In *Snow v. GE*, No. 5:18-CV-511-FL, 2019 U.S. Dist. LEXIS 99760 (E.D.N.C. June 14, 2019), a North Carolina federal court dismissed a TCPA claim on the grounds that dialing equipment must possess a random or sequential number generator in order to qualify as an “automatic telephone dialing system” (“ATDS”) under the statute, and that the plaintiff’s allegations that the defendant used a predictive dialer were insufficient to plausibly allege the use of an ATDS. That same day, about 800 miles away, in *Bader v. Navient Sols., LLC*, No. 18-cv-1367, 2019 U.S. Dist. LEXIS 100396 (N.D. Ill. June 14, 2019), an Illinois federal court dismissed another TCPA claim on these same grounds. Both dismissals were with prejudice, meaning the plaintiffs’ claims were stopped cold. Let it Snow, Let it Snow, Let it Snow!

Both *Snow* and *Bader* involved the alleged use of predictive dialers--equipment that lacks a random or sequential number generator but “automatically” dials telephone numbers. The courts recognized that while predictive dialing equipment may have constituted an ATDS under prior FCC orders, those orders were set aside by the D.C. Circuit’s 2018 decision in *ACA International v. FCC*. As a result, the definition of an ATDS is limited to its plain meaning in the statute, which requires that equipment be capable of generating telephone numbers using a “random or sequential number generator” to qualify as an ATDS.

**Why these decisions matter 1:** The legal standard over what constitutes an ATDS after *ACA Int’l* is one of the most hotly litigated issues right now in the TCPA. These decisions come as a breath of fresh air as some courts continue to be led astray by the Ninth Circuit’s ~~disingenuous~~ inventive reading of the “plain language” of the ATDS definition and its legislative history from *Marks v. Crunch San Diego*. But *Snow* tackles *Marks* head on and joins, in the court’s words, the “significant number of courts [that] have rejected the reasoning of *Marks*.”

The result in *Bader* is not as surprising in that the decision is in line with the vast majority of courts within the Seventh Circuit. But *Snow* is particularly significant in that it is the first district court in the Fourth Circuit to address the ATDS definition post-*ACA Int’l*, and follows on the heels of a Fourth Circuit decision issued just weeks ago that seemed to laude the perceived merits of TCPA class actions.

**Why these decisions matter 2:** *Snow* and *Bader* are also particularly significant in that they were both decided at the pleading stage. The courts held that allegations of calling specific, targeted telephone numbers is insufficient to establish a plausible inference that the equipment has the capacity for random or sequential dialing. Even amongst courts that ultimately agree with the legal

definition of an ATDS, some courts have been hesitant to rule on this issue at the pleading stage, instead leaving discovery open regarding the “capacity” of such equipment. In one day, *Snow* and *Bader* doubled the number of decisions deciding this issue, with prejudice, at the pleading stage ( *Pinkus* from N.D. Illinois and *Lord* from N.D. Ohio being the other favorable decisions on this issue). Hopefully these decisions encourage more courts to follow suit.

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