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US: Diverging court decisions over definition of ATDS under TCPA

Over the last several years, telemarketing plaintiffs' attorneys and telemarketers throughout the US have shown a desire for clear direction regarding the definition of, and what constitutes, an 'automatic telephone dialing system' ('ATDS') under the Telephone Consumer Protection Act of 1991 ('TCPA'). The TCPA prohibits, *inter alia*, using an ATDS to make automated calls to mobile phones without prior express consent, but varying court decisions in recent years have blurred the view of what legally constitutes an ATDS. Richard Newman, Telemarketing Attorney at Hinch Newman LLP, provides insight into how such court decisions in the US have impacted the jurisprudence around the definition of ATDS under the TCPA, and highlights the clarity needed in this area.

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The TCPA defines an ATDS 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.' In a 10 July 2015 'Omnibus TCPA Declaratory Ruling and Order' ('the Order'), the Federal Communications Commission ('FCC') concluded, *inter alia*, that if equipment has the capacity to act as an ATDS, regardless of how such equipment is actually used, it is an ATDS.

ACA International v. FCC, Case No. 15-1211, 2018 WL 1352922 (D.C. Cir. Mar. 16, 2018) ('*ACA Int'l*), a seminal decision by the U.S. Court of Appeals for the District of Columbia Circuit ('the DC Circuit Court') effectively changed the face of TCPA litigation. The DC Circuit Court struck down the FCC's analysis of the meaning of 'potential capacity' found in its 2015 Order, because it would render nearly every phone on earth an ATDS. However, a recent U.S. Court of Appeals for the Ninth Circuit ('the Ninth Circuit Court') decision illustrates the problem that courts have had finding a consistent definition of an ATDS, including how to interpret the TCPA's use of the word 'capacity.'

In *Marks v. Crunch San Diego, LLC*, Case No. 14-56834, 2018 WL 4495553 (9th Cir. Sept. 20, 2018) ('*Marks*'), the Ninth Circuit Court adopted an expansive ATDS interpretation that is at odds with the DC Circuit Court's rejection of an overly broad definition of an ATDS. The defendant, a gym chain, utilised a 'textmunication' system to send SMS messages to potential and current gym members. The system enabled the gym to send text messages to telephone numbers that were stored either via manual entry by an operator, a current or potential customer's text response to a marketing campaign, or a customer's response to a website consent form.

As described by the Ninth Circuit Court, the gym's employees would send promotional text messages by "log[ging] into the textmunication system, select[ing] the recipient phone numbers, generat[ing] the content of the message, and select[ing] the date and time for the message to be sent." According to the plaintiff, Crunch violated the TCPA's ATDS protections when it sent three promotional text messages. The Ninth Circuit Court disagreed, finding that the textmunication system did not constitute an ATDS because it was not equipped with a random or sequential number generator, as required by the TCPA.

In a win for the plaintiffs' bar, the Ninth Circuit Court disagreed and aligned its rationale with the overturned Order. Specifically, the Ninth Circuit Court found that an ATDS includes devices that can call telephone numbers created by a 'random or sequential number generator' and devices that can automatically dial from a stored list of telephone numbers. In other words, according to the Ninth Circuit Court, generating numbers is not a prerequisite of an ATDS. The Ninth Circuit Court in *Marks* also addressed the element of human intervention, stating that "[c]ommon sense indicates that human intervention of some sort is required before an autodialer can begin making calls [...] Congress was clearly aware that, at the very least, a human has to flip the switch on an ATDS."

Luckily for telemarketers, the *Marks* ruling has not exactly inspired other courts to hold similarly. The TCPA ATDS definition divide has deepened, and the TCPA litigation playing field continues to shift at a rapid pace.

Consider the issue of whether predictive dialing systems are ATDS. Conflicting circuit-level guidance certainly suggests that such technology is no longer always considered to violate the TCPA. The U.S. District Court for the District of Minnesota ('the Minnesota Court') recently grappled with just such an issue and the definition of 'capacity.'

In *Roark v. Credit One Bank, N.A.*, No. 16-173, 2018 WL 5921652 (D. Minn. Nov. 13, 2018) ('*Roark*'), the Minnesota Court attempted to reconcile a number of appellate decisions concerning the definition of an ATDS. It ultimately held that the defendant's 'predictive dialing systems' did not violate the TCPA because - even though it could be modified to function as an ATDS - it did not possess the present capacity to generate numbers to dial either randomly or sequentially[1].

Courts across the country are in disarray on the issue of what constitutes an ATDS under the TCPA.

In contrast to *Marks*, the U.S. District Court for the Middle District of Florida ('the Florida Court') held that human intervention is a dispositive factor in defining an ATDS. In *Glasser v. Hilton Grand Vacations Co.*, Case No. 8:16-cv-952-JDW-AAS, 2018 WL 4565751 (M.D. Fla. Sept. 24, 2018), the defendant's employees manually made telephone calls by selecting a 'make call' button on the sys-

tem's computer screen. The defendant's summary judgment motion was granted because the Florida Court found that the system could not dial telephone numbers without human intervention.

In *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018), the U.S. Court of Appeals for the Third Circuit granted the defendant's motion for summary judgment in favour of the defendant where an email SMS service delivered text messages only to manually entered telephone numbers. Other courts have found that the use of predictive dialing 'clicker agents' that dialed numbers from lists are not considered randomly or sequentially generated, as per the TCPA.

The *Marks* definition of ATDS is a dangerous one for telemarketers, because it could encompass many more platforms and devices that otherwise would not qualify as ATDS. The different approaches to interpreting *ACA Int'l* and just what constitutes 'capacity' to be an ATDS is resulting in forum shopping. At present, the circuit or district court where a TCPA case is initiated will impact the ultimate outcome of whether the dialing technology at issue is considered an ATDS.

The FCC is expected to release a new interpretation of what constitutes an ATDS, one that will add clarity to this vital issue. Many believe that FCC tea leaves signal a favourable interpretation for marketers. Congress could also intervene and pass a TCPA amendment clarifying the definition, but with the slow pace of Congress this may be a long shot.

Against this backdrop, the U.S. Supreme Court has recently agreed to consider whether district courts are obligated to accept the FCC's interpretation of the TCPA.

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1. The Minnesota Court also considered the 'reassigned' telephone number issue. The TCPA makes it unlawful to use an artificial or prerecorded voice to place a call to a cell number without 'the prior express consent of the called party.' The FCC has interpreted the statutory term 'called party' as the current subscriber of the cell number and not the intended recipient of the call. The decision in *ACA Int'l*¸ however, invalidated a portion of the FCC ruling that allowed for a one-call 'safe harbor' rule for reassigned numbers and "set aside the Commission's treatment of reassigned numbers as a whole." The Minnesota Court in *Roark* held that in order to determine whether there has been a violation of this section of the TCPA under current authority, the reasonableness of the caller's reliance on a prior number holder's express consent must be considered. Because the defendant had express consent from its customer to call them at the number they provided via prerecorded messages, coupled with the fact that the defendant had no reason to know that the telephone number had been reassigned because they received no notice from Roark and the caller ID for the number still populated with his information, the defendant's motion for summary judgment was granted.

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