Class Actions Alert

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Second Circuit Decision Widens Circuit Split in TCPA Landscape

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Key Points

- In a departure from the majority view, the 2nd Circuit has held that a texting platform need not have the capacity for random or sequential number generation in order to constitute an automatic telephone dialing system (ATDS) within the meaning of the Telephone Consumer Protection Act (TCPA).
- This decision widens the existing circuit split regarding the proper interpretation of an ATDS.
- Businesses seeking to lawfully place calls and send text messages to consumers may face a heightened risk of TCPA exposure in the 2nd and 9th Circuits until the Supreme Court or the FCC addresses this important issue presently pending before each of them.

Ever since *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018), which broadly defined ATDS in the TCPA to encompass essentially any dialing platform, plaintiffs have strategically focused on filing cases in the 9th Circuit. Now plaintiffs have another inviting option. On April 7, 2020, the 2nd Circuit joined the 9th Circuit in its expansive reading and, in doing so, incentivized more TCPA filings in the New York, Connecticut and Vermont district courts. The 2nd Circuit's ruling *in Duran v. La Boom Disco, Inc*., No. 19-00600, 2020 U.S. App. LEXIS 10861 (2d Cir. 2020), further widens the circuit split with respect to the definition of an ATDS, and creates even more of a basis for the Supreme Court to consider this important issue.

In a narrowly focused opinion, the Court rejected a portion of the reasoning of the majority of the federal Circuits that have held that the statutory definition of ATDS is limited to platforms with the capacity to generate random or sequential numbers. In doing so, the 2nd Circuit parted company with the 3rd, 7th and 11th Circuits. The Court also relied on the Federal Communications Commission's (FCC) prior rulings on the ATDS definition as "persuasive authority"—even though every other Circuit Court (including *Marks*) has held that those rulings were vacated by the D.C. Circuit in *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

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In *Duran*, the plaintiff challenged marketing texts sent to him by a nightclub after he had affirmatively texted that club in connection with a promotion offering free admission. After collecting these marketing texts for more than a year and a half, Duran filed a putative class action under the TCPA, alleging that the texts were sent using an ATDS and without his prior express written consent in violation of the TCPA. The defendant denied liability based primarily on the argument that the text platform did not constitute an ATDS because (1) the equipment cannot generate random or sequential phone numbers and (2) human intervention was required. The Eastern District of New York agreed, and granted summary judgment in the defendant's favor.

On *de novo* review, the 2nd Circuit reversed. The Court acknowledged that, to be an ATDS, the calling platform (1) "must have the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator" and (2) "must have the 'capacity . . . to dial such numbers.'" *Id*. *7 (quoting 47 U.S.C. § 227(a)(1)). In addressing the first requirement, the Court identified two alternative constructions of the statutory definition: (1) the platform must be capable of using a random or sequential number generator to store or produce numbers (the construction adopted by the 3rd, 7th and 11th Circuits); or (2) the platform must either store numbers in a list or produce numbers using a random or sequential number generator (the construction adopted by the 9th Circuit). The Court adopted the latter.

The Court found that the first construction renders the word "store" to be surplusage based on its "common sense" view that a phone number stored using a random or sequential number generator must necessarily be produced by the same number generator. This construction, however, is contrary to several rules of grammar, and also ignores the calling technologies targeted by Congress in enacting the TCPA. As the 7th Circuit recently explained, "[g]iven the range of storage capacities among telemarketing devices at the time of enactment, it is plausible that Congress chose some redundancy in order to cover 'the waterfront.'" *Gadelhak v. AT&T Servs*., 950 F.3d 458, 465 (7th Cir. 2020) (quoting *Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301, 1307 (11th Cir. 2020)).

The 2nd Circuit also concluded that the government-debt exception would make sense only if the definition of an ATDS extends to lists of stored numbers because debtors are not called in a "haphazard" sequential or random order. In a footnote, the Court dismissed the contrary conclusions of the 7th and 11th Circuits that the government-debt exception remains fully applicable to the TCPA's restrictions on prerecorded voice calls, regardless of its application to calls placed using an ATDS.

Lastly, the 2nd Circuit found support in the prior rulings of the FCC in 2003, 2008 and 2012 regarding the scope of the ATDS definition. In an apparent departure from its prior decision in *King v. Time Warner Cable, Inc.*, 894 F.3d 473 (2d Cir. 2018)—suggesting that these FCC rulings had been vacated by *ACA Int'l*—the Court reasoned that the FCC rulings were "persuasive authority" supporting its decision, without acknowledging that every other Circuit Court to consider the issue has held that these rulings were invalidated by *ACA Int'l*. The 2nd Circuit did not explain why its exercise of de novo statutory construction was necessary, if the prior FCC rulings somehow remained in effect.

Turning to the second issue—what it means to dial a number without human intervention—the Court determined that merely clicking "send" does not constitute sufficient human intervention because "it is not the actual or constructive inputting of

numbers to make an individual telephone call or to send an individual text message." *Duran*, 2020 U.S. App. LEXIS 10861 at *21. The Court's analysis, however, skirted the issue that gave pause to the 7th and 11th Circuits: specifically, the actual capabilities of today's smartphones, which include sending text messages without an "actual or constructive" inputting of numbers. As noted by the 7th and 11th Circuit, today's smartphones can send text messages automatically to stored numbers (for example, by sending an automatic text reply when driving or otherwise occupied). Under the 2nd Circuit's construction, the TCPA's ATDS restrictions would potentially include ubiquitous smartphones, resulting in an "eye-popping sweep" to the TCPA statute that the 3rd, 7th, 11th and D.C. Circuits have rejected. *See, e.g., ACA Int'l*, 885 F.3d at 697.

Duran widens the circuit split on the ATDS definition and highlights the pressing need for the Supreme Court to intervene. In *Duguid v. Facebook*, 926 F.3d 1146 (9th Cir. 2019) petition for cert. filed (Oct. 17, 2019) (No. 19-511), Facebook has asked the Supreme Court to consider the definition of an ATDS. Although the Supreme Court has granted certiorari to review the question of whether the TCPA violates the First Amendment right to free speech—see *Amer. Ass'n of Political Consultants, Inc. et al. v. FCC*, 923 F.3d 159 (4th Cir. 2019) *cert. granted sub nom., Barr v. American Association of Political Consultants, et al*., 205 L. Ed 449 (Jan. 10, 2020) (No. 19-631)—which might render the issue moot if the ATDS provisions are stricken. In addition, the proper interpretation of an ATDS is also an issue squarely before the FCC in *ACA Int'l* based on the D.C. Circuit's order vacating portions of the FCC's July 2015 Declaratory Ruling. The comment period is long-closed, and the FCC could conceivably rule at any time.

In the near term, the *Duran* decision may spark plaintiffs' lawyers to file more actions in the 2nd Circuit—a jurisdiction that had, in the past, not been a particularly favorable venue for plaintiffs because of common-sense decisions interpreting the TCPA's consent rules, such as *Reyes v. Lincoln Auto. Fin. Servs*., 861 F.3d 51 (2d Cir. 2017). Until the Supreme Court or the FCC resolves this issue, legitimate customer communications—including ones affirmatively sought out and welcomed by consumers—now face greater risk of liability in the 2nd Circuit.

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