COURT INTERPRETS "AUTOMATIC TELEPHONE DIALING SYSTEM" UNDER THE TCPA

The United States District Court for the Northern District of Alabama recently held that to meet the federal Telephone Consumer Protection Act definition of an "automatic telephone dialing system," a system must have a present capacity, at the time calls are being made, to store or produce and call numbers from a number generator. *Hunt v. 21st Mortgage Corp.,* No. 2:12-CV-2697-WMA, 2013 WL 5230061 (N.D. Ala. Sept. 17, 2013).

In *Hunt,* the plaintiff had alleged that the defendant made harassing phone calls to him in violation of the TCPA, the federal Fair Debt Collection Practices Act and various state laws. The plaintiff sought to examine the defendant's facilities, including (i) all telephones and telephone systems used in the collection of accounts, (ii) any computer systems and/or software used and (iii) any equipment mentioned in or referred to by defendant in its responses to plaintiff's discovery or otherwise. The defendant objected, and the plaintiff's motion to compel such discovery was before the court.

In opposing the plaintiff's motion, the defendant argued, among other things, that its telephone system is not covered by the TCPA and so is irrelevant to the litigation. Because the parties had focused their oral arguments on how an "automatic telephone dialing system" should be defined for purposes of the TCPA, the court determined it should resolve that issue. Section 227(a) of the TCPA defines the term "automatic telephone dialing system" to mean equipment that 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 court noted that the text of the statute plainly focuses on "the capacity" of equipment in its definition and that nearly every court that has examined the issue has taken the text at face value.

The court stated that while it would be willing to adopt the reasoning of previous courts, the case before it would require it to stretch the definition in the TCPA a bit further. It noted that unlike in other cases that have looked at the issue, the telephone system used by the defendant was (and is) in its present state incapable of automatic dialing. The plaintiff's argument is that certain software could have been installed onto the defendant's system which would have made automatic dialing possible. The problem with that argument, the court determined, is that possible modifications and alterations to telephone systems currently are virtually limitless. Thus, the court held that an "automatic telephone dialing system" under the TCPA must have a present capacity, at the time the calls are being made, to store or produce and call numbers from a number generator. It went on to say that while a defendant can be liable under Section 227(b)(1)(A) when it has such a system, even if it doesn't make use of the automatic dialing capacity, it cannot be held liable if substantial modification or alteration of the system would be required to achieve that capability. Despite its conclusion regarding the "automatic telephone dialing system" definition, the court ultimately granted the plaintiff's discovery motion, allowing the plaintiff to inspect the defendant's equipment.

As the *Hunt* court points out, the term "automatic telephone dialing system" as defined by the TCPA can be applied broadly. Whether other courts will follow the *Hunt* court's limitation is unclear. Continued vigilance in complying with TCPA requirements in using systems that may fall within the TCPA definition is warranted. ❑

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