DREHER TOMKIES LLP ALERT

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April 4, 2019

TWO FEDERAL DISTRICT COURTS OPINE ON TCPA ISSUES

***Schaevitz v. Braman Hyundai, Inc.*, Case No. 1:17-cv-23890-KMM (S.D. Fl. March 25, 2019)**

On March 25, 2019, the U.S. District Court for the Southern District of Florida concluded that a "ringless" voicemail is a call under the Telephone Consumer Protection Act ("TCPA").

The consumer in this case alleged that the defendant left a "ringless voicemail" (*i.e.*, direct to voicemail message) on the consumer's cell phone without the consumer's express consent to be contacted. The consumer alleged that he received actual harm from the voicemail, including invasion of privacy, aggravation and annoyance. The defendant allegedly violated the TCPA by transmitting or directing third parties to transmit calls using an artificial or prerecorded voice to the cellular telephone numbers of the consumer and members of a putative class without permission.

The defendant countered that the consumer lacked standing to bring the complaint because the consumer did not receive a "call" within the meaning of the TCPA. The defendant also alleged that the TCPA violates the First Amendment.

In addressing whether a ringless voicemail is a call within the ambit of the TCPA, the court reviewed prior TCPA cases and stated that the ringless voicemail accompanied by a pre-recorded message is no less intrusive than a standard voicemail or text message, both of which have been held to constitute "calls" under the TCPA. The court also stated that the fact that the cellular telephone does not ring as it traditionally would prior to the receipt of a voicemail is not significant in determining whether the act qualifies as a call because the TCPA does not require that the recipient of a call answer the phone or somehow be aware of the arrival of the call.

The court also reviewed the defendant's claim that the TCPA, as amended in 2015 violates the First Amendment because preventing phone traffic and protecting the privacy of cellular telephone users are not compelling interests and the TCPA is not narrowly tailored to advance those interests. The court concluded that the TCPA survives strict scrutiny and denied the defendant's motion to dismiss the claim for violation of the First Amendment.

The defendant in this case used a ringless voicemail platform to transmit the voicemail message. According to the facts of the complaint, the ringless voicemail technology used to transmit the voicemail message establishes a direct Internet-based computer-to-computer data connection to the respective voicemails systems of the cellular carriers.

***Gadelhak v. AT&T Services, Inc.*, Case No. 1:17-cv-01559 (N.D. Ill. March 29, 2019)**

On March 29, 2019, the U.S. District Court for the Northern District of Illinois granted a telephone service provider's motion for summary judgment because the provider did not use an automated telephone dialing system ("ATDS") as alleged by the consumer.

The consumer, who was not a customer of the telephone service provider, received five automated text messages from the provider. The consumer brought a proposed class action against the provider for violations of the TCPA, specifically that the provider negligently, knowingly and/or willfully contacted the consumer via text message using an ATDS without the consumer's prior consent. The provider asserted that it did not use an ATDS to send a text message to the consumer and thus did not violate the TCPA.

The court ultimately was tasked with determining whether the D.C. Circuit's opinion in *ACA International v. FCC* (*see* our ALERT of March 21, 2018) nullified previous FCC orders defining the term ATDS, and if so, determining the proper definition of the statutory term under the plain language of the TCPA.

The court first reviewed the scope of the D.C. Circuit's opinion. The court ruled that the *ACA International* opinion invalidated the Federal Communications Commission's ("FCC") understanding of the term ATDS as articulated in the FCC's 2015 Declaratory Ruling, as well as the FCC's 2008 Declaratory Ruling and the FCC's 2003 Order. Thus, the court pressed on to interpret the TCPA without the FCC's definitions.

The court reviewed the TCPA to ascertain a definition for ATDS. Under the TCPA, an ATDS has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator and the calls the numbers. Relying on the Ninth Circuit opinion in *Marks v. Crunch San Diego, LLC* (*see* our ALERT of February 4, 2019), the consumer argued that the phrase "using a random or sequential number generator" modifies only the verb "produce" and has no effect on the verb "store." The court respectfully disagreed with the consumer and the Ninth Circuit's

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holding.

The court stated that the most sensible reading of the provision is that the phrase "using a random or sequential number generator" describes a required characteristic of the numbers to be dialed by an ATDS – that is, what generates the numbers. The court held that the numbers stored by an ATDS must have been generated using a random or sequential number generator.

Although the ruling in the *Gadelhak* case may bring some relief to financial service providers, a circuit court split still remains due to the *Marks* case definition of what devices qualify as an ATDS under the TCPA. We will continue to monitor and report on developments as they occur. ❑

✧ *Mike Tomkies and Lindsay Valentine*