



TWO RECENT FEDERAL COURT DECISIONS FOCUS ON THE SCOPE OF THE TCPA

***Adams v. Safe Home Security Inc.*, Case No. 3:18-cv-03098-M (N.D. Tex. July 30, 2019)**

On July 30, 2019, the U.S. District Court for the Northern District of Texas concluded that predictive dialers are outside the scope of the Telephone Consumer Protection Act ("TCPA"), as they fall outside the definition of an automatic telephone dialing system ("ATDS").

The consumer in the case alleged that the defendant placed calls to the consumer's cell phone after the consumer allegedly demanded the calls stop. The consumer alleged that after she answered the call, there would be a pause of several seconds before a live representative spoke.

The defendant filed a motion to dismiss, arguing that a mere pause at the beginning of the call only suggests the use of a predictive dialer; a device, that as a matter of law, no longer qualifies as an ATDS. The defendant cited to the D.C. Circuit's recent decision in *ACA International v. Federal Communications Commission* (see our Alert of March 21, 2018) to support this argument.

The court stated that, because the ACA International case invalidates the Federal Communication Commission's ("FCC") interpretation of what an ATDS is, the court must independently interpret the TCPA to determine the scope of the definition of an ATDS and whether it applies to a predictive dialer (*i.e.*, a device that automatically dials stored customer phone numbers).

Under the TCPA, an "ATDS" means equipment which 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. In addressing what clause "using a random or sequential number generator" modifies in the definition of an ATDS, the court rejected the Ninth Circuit's decision in *Marks v. Crunch San Diego* (see our Alert of September 27, 2018), which determined that an ATDS is a device that merely dials any stored number, which includes a predictive dialer.

The court concluded that "using a random or sequential number generator" modifies both "to store" and "to produce," and thus, the

TCPA does not prohibit the use of predictive dialers as they fall outside the definition of an ATDS.

Although the court agreed with the defendant's argument that predictive dialers are not ATDSs, the court ultimately denied the defendant's motion to dismiss, stating that nothing precludes the defendant from having used a device that can both randomly or sequentially generate numbers *and* act as a predictive dialer. The court stated that without the benefit of discovery, it is impossible for the consumer to fully understand the current capacity of the defendant's device, and this uncertainty is one reason courts have not held plaintiffs to the highest pleading standards in TCPA cases.

***Breda v. Celco Partnership, d/b/a Verizon Wireless*, Case Nos. 17-2196, 18-1010 (1st Cir. Aug. 2, 2019)**

On August 2, 2019, the U.S. Court of Appeals for the First Circuit overturned the district court's grant of summary judgment for defendant and concluded that a telephone service plan that uses a hybrid of Voice over Internet Protocol ("VoIP") technology and cellular network constitutes "cellular telephone service" within the meaning of the TCPA.

The consumer was a customer of defendants until she requested to transfer her telephone number to a new service provider. Under the consumer's new service provider's plan, the consumer had a hybrid plan, which at times, used a VoIP technology for transmission of calls. Under the plan, if a customer is connected to wireless internet ("Wi-Fi"), the service provider routes the call using VoIP technology. If the customer is not connected to Wi-Fi, calls are routed to a customer's cell phone by using its cellular network.

The consumer alleged that she began receiving automated calls from the defendant that included a prerecorded voice prompt announcing the calls were intended for an unrelated person. The consumer alleged that she spoke to a live representative and pressed the appropriate button when prompted to indicate that she was not the intended recipient of the calls, yet the call allegedly continued.

The consumer filed a complaint alleging that the automated calls violated the TCPA, and the defendant filed a motion for summary judgment. The lower court granted the defendant's motion because it determined that the consumer's TCPA claims failed as a matter of law because her telephone number is not assigned to a cellular

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telephone service and she, undisputedly, is not charged for each incoming call. The lower court concluded that “VoIP telephone services” are not “cellular telephone services” within the meaning of the TCPA.

The Court of Appeals disagreed with the district court’s analysis and overturned the lower court’s motion for summary judgment. The Court of Appeals stated that the lower court did not consider the hybrid nature of the consumer’s cellular service when it determined that the consumer’s telephone service is “VoIP service.” Thus, the Court of Appeals stated that the question before the court is whether a hybrid service with both cellular and VoIP components is “cellular telephone service” under the TCPA.

The defendant argued that the VoIP component of the customer’s service negates the cellular component for purposes of the TCPA. The Court of Appeals declined to read the statute in such a narrow way, stating that the TCPA is a consumer protection statute and it must be interpreted broadly in favor of consumers. In its analysis, the Court of Appeals stated that, as a matter of common sense, the court sees no principled reason for treating a service that involves the routing of calls over a cellular network the same as a service that exclusively uses VoIP technology for purposes of determining liability under the “cellular telephone service” provision of the TCPA. The Court of Appeals remanded the case to the district court for further proceedings consistent with the Court of Appeals opinion.

The definition of an “ATDS” and the scope of the TCPA has been a recurring topic opined on by federal courts. We will continue to monitor and report on TCPA developments as they occur. □

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