DREHER TOMKIES LLP ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

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ELEVENTH CIRCUIT ADOPTS NARROW READING OF AUTODIALER DEFINITION

On January 27, 2020, the U.S. Court of Appeals for the Eleventh Circuit ruled that phone systems that do not use randomly or sequentially generated numbers are not automatic telephone dialing system ("ATDS") covered under the Telephone Consumer Protection Act ("TCPA"). *Glasser v. Hilton Grand Vacations Co., LLC*, Case No. 8:16-cv-00952-JDW-AAS; *Evans v. Pennsylvania Higher Education Assistance Agency*, Case No. 3:16-cv-00082-TCB (11th Cir. Jan. 27, 2020).

In this consolidated case, the plaintiffs allegedly received over a dozen unsolicited phone calls to their cell phones from a timeshare marketer and a loan servicer. The plaintiffs alleged that they did not consent to the calls and that the companies used ATDS in violation of the TCPA.

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 the clause "using a random or sequential number generator" modifies in the definition of an ATDS, the Eleventh Circuit concluded that the clause modifies both "to store" and "to produce."

The Eleventh Circuit supported its finding by citing (i) the regulatory history of the enactment of the TCPA and (ii) a Federal Communication Commission ("FCC") 1992 declaratory order that explained that certain technologies would not qualify as "autodialers" under the TCPA because the numbers these devices called are not generated in a random or sequential fashion – a baseline for all covered calls. The Eleventh Circuit noted that the FCC's interpretation remain unchanged until the FCC attempted to expand the TCPA's coverage in response to a change in technology and marketing strategies. The Eleventh Circuit agreed with the D.C. Circuit's finding in *ACA International v. Federal Communications Commission* (*see* our ALERT of March 21, 2018) that invalidated the FCC's new interpretation of what constitutes an ATDS.

The Eleventh Circuit rejected the Ninth Circuit's decision in *Marks v. Crunch San Diego* (*see* our ALERT of September 27, 2018), stating that to adopt the Ninth Circuit's reading of ATDS, "one must separate the statute's two verbs ("to store or produce"), place the verbs' shared object ("telephone number to be called") in between those verbs, then insert a copy of that shared object to the statute, this time after the now separate verb 'to produce' to make clear that 'using a random or sequential number generator' modifies only 'to produce.'"

The Eleventh Circuit also noted that the timeshare marketer's telephone equipment requires human intervention before it places any calls, and thus is not "automatic" in the first place.

Although the Eleventh Circuit's holding is good news for financial services providers, a circuit split still remains on how to define an ATDS. The Eleventh Circuit joined the D.C. Circuit, Second Circuit and Third Circuit in adopting a narrowed ATDS definition, whereas the Ninth Circuit has interpreted the definition of ATDS to mean equipment which has the capacity (1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator – and to dial such numbers automatically.

In October 2018, the FCC issued a request for public comment on how the FCC should interpret the definition of the ATDS after *Marks*. The FCC has not issued a proposed or final rule. In December 2019, the President signed into law the bipartisan TRACED Act. *See* our ALERT of November 21, 2019. The TRACED Act requires telecommunication carriers to implement a number-authentication system to help consumers identify the caller of robocalls placed to the consumer's phone. However, the final version of the TRACED Act does not include the requirement that the FCC clarify the definition of ATDS.

Uncertainty remains as to the scope of the TCPA for financial services providers. We will continue to monitor and report on TCPA updates as they occur. ❑

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