



March 5, 2020

FEDERAL DISTRICT COURT GRANTS DEFENDANTS' TCPA SUMMARY JUDGMENT MOTION

On February 25, 2020, the U.S. District Court for the Middle District of Florida granted defendants' motion for summary judgment because the defendants did not use an automated telephone dialing system ("ATDS") to send text messages as alleged by the consumer. *Northrup v. Innovative Health Insurance Partners, LLC*, Case No. 8:17-cv-01890-CEH-JSS (M.D. Fla. Feb. 25, 2020).

In this case, the consumer claimed that he received a text message on his cellular telephone advertising a healthcare product. The health company outsourced the advertisement of the healthcare product to a company that contracted with a technology company to send the text messages to various phone numbers. The technology company used the Twilio Platform ("Twilio"), a web-based software application that allows a user to direct Twilio to send text messages to specific phone numbers as provided by the user.

The court stated that Twilio delivered messages to the appropriate phone carriers exactly as instructed by the user's commands and sent only the requested message content, to the requested recipient numbers, in the requested order. The court noted that Twilio did not generate the phone numbers for any of the text messages and cannot generate phone numbers.

The court reviewed the history of the statutory definition of an ATDS and highlighted the current divide among the Third Circuit and Ninth Circuit courts concerning the correct interpretation. See our ALERT of September 27, 2018. 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.

Then the court discussed the recent Eleventh Circuit ruling in *Glasser v. Hilton Grand Vacations Co., LLC* that a device is not an ATDS if it (i) does not use randomly or sequentially generated numbers or (ii) requires human intervention. See our ALERT of January 30, 2020. The court said that the Eleventh Circuit's conclusions in *Glasser* dictated the result in this case. The court held that neither Twilio nor the 212CRM software that the technology company used qualify as an ATDS for the reasons that (i) neither had the capacity to randomly or sequentially generate numbers and

(ii) both require human intervention.

TCPA consent remains a litigious area. Ensuring that a party has proper TCPA consent to place a call or send a text message can involve a number of considerations especially when third-party vendors are involved. We frequently advise clients on federal and state laws regulating telemarketing and non-telemarketing communications with business and consumer customers. We will continue to monitor and report on TCPA updates as they occur. □

✧ *Mike Tomkies & Lindsay Valentine*

LOOKING FOR A MARKETING AND PRIVACY COMPLIANCE

RESOURCE? We publish an easy-to-use reference, our **MARKETING AND PRIVACY DIGEST**, that compiles the state laws governing financial privacy, fair credit reporting, telemarketing/automatic dialing and announcing devices, telephone monitoring and recording, electronic signatures and restrictions on the use of social security numbers by financial service providers. Creditors, marketers and servicers should find this resource invaluable to marketing and privacy program development and regulatory compliance. **Contact us for details.**

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