



April 13, 2020

## SECOND CIRCUIT FOLLOWS NINTH CIRCUIT'S INTERPRETATION OF AUTODIALER DEFINITION

On April 7, 2020, the U.S. Court of Appeals for the Second Circuit expanded the Circuit split over the correct interpretation of the definition of automatic telephone dialing system ("ATDS") under the Telephone Consumer Protection Act ("TCPA") by following the Ninth Circuit's lead and holding that an ATDS includes devices that have the capacity to dial "stored" numbers. *Duran v. La Boom Disco, Inc.*, No. 19-600-cv (2d Cir. Apr. 7, 2020).

The plaintiff claimed that after he texted a number that the defendant nightclub had advertised for a promotion, he received, over the course of more than a year and a half, hundreds of unsolicited text messages from the defendant, all sent using an ATDS and without the consumer's consent. The defendant argued that the text messages are not prohibited by the TCPA because the texting platforms used to send the text messages were not ATDSs. The defendant asserted that the texting platforms required human intervention to dial and send the text messages.

Under the TCPA, to qualify as an ATDS, a dialing system must have both (i) the capacity to store or produce telephone numbers to be called, using a random or sequential number generator and (ii) the capacity to dial such numbers.

### The Capacity to Dial

The district court granted summary judgment for the defendant, deciding that the text platforms were not, as a matter of law, ATDSs, as they did not meet the second criteria of an ATDS. The district court determined that because the texting platforms require a human to upload the message to be sent, to determine the time at which the message gets sent and to initiate the sending, the texting platforms were not ATDSs as these activities rise to the level of sufficient human intervention.

The Second Circuit court disagreed. The court analyzed how much intervention is tolerable under the TCPA before an ATDS becomes a non-ATDS and concluded that an ATDS is different from a non-ATDS merely because of its ability to "dial" numbers automatically. The Second Circuit noted that merely clicking "send" or an equivalent button in a text message program is not the same thing as "dialing" a number. The court noted that when a person

clicks "send" in such a program, he may be instructing the system to dial the numbers, but he is not actually dialing the numbers himself. The Second Circuit concluded that since the texting platforms in this case required only a human to click "send" or some similar button to initiate a text campaign, the platforms did not require human intervention to dial and did have the capacity to dial such numbers automatically.

In a footnote, the Second Circuit court addressed critics that argue that this interpretation would imply that a "smartphone" is an ATDS, stating that clicking on a name in a digital phonebook to initiate a call or text is a form of speed-dialing or constructive dialing that is the functional equivalent of dialing by inputting numbers.

### The Capacity to Store or Produce Numbers...Using a Random or Sequential Number Generator

The Second Circuit also analyzed whether the texting platforms have the capacity to store or produce telephone numbers to be called, using a random or sequential number generator. The Second Circuit determined that the proper way to interpret the TCPA is to read this first prong as the numbers to be called by an ATDS may be "stored" or they may be "produced," but only if they are produced must they come from "a random or sequential number generator." The court stated that the mere fact that the texting programs "store" the list of telephone numbers is enough to render them ATDSs.

The court supported its interpretation by asserting it is the only interpretation that avoids the problem of surplusage, effectuates Congress's intent in passing the TCPA as enacted and follows the Federal Communication Commission's ("FCC") longstanding and valid interpretation of the TCPA. The Second Circuit noted that it disagrees with other courts that claim its decision in *King v. Time Warner Cable, Inc.* and the D.C. Circuit's decision in *ACA International v. Federal Communications Commission* (see our ALERT of March 21, 2018) invalidate the FCC's prior 2003, 2008 and 2012 orders interpreting the TCPA.

The Second Circuit highlighted that a split among the Court of Appeals has emerged on what exactly is an ATDS. In another footnote, the Second Circuit noted that the Ninth Circuit concluded that an ATDS can make calls from stored lists. See our ALERT of September 27, 2018.

In January 2020, the Eleventh Circuit joined the D.C. Circuit and Third Circuit in adopting a narrowed ATDS definition when it rejected

Darrell L. Dreher  
ddreher@dtlaw.com

Elizabeth L. Anstaett  
eanstaett@dtlaw.com

Emily C. Cellier  
ecellier@dtlaw.com

Susan L. Ostrander  
sostrander@dtlaw.com

2750 HUNTINGTON CENTER  
41 S. HIGH STREET  
COLUMBUS, OHIO 43215  
TELEPHONE: (614) 628-8000 FACSIMILE: (614) 628-1600  
WWW.DTLAW.COM

To see previously sent ALERTS, visit our website at [www.dtlaw.com](http://www.dtlaw.com)

To decline future ALERTS, please contact us at [ALERTS@DTLAW.COM](mailto:ALERTS@DTLAW.COM).  
This ALERT has been prepared for informational purposes only. It does not constitute legal advice and does not create an attorney-client relationship.

Michael C. Tomkies  
mtomkies@dtlaw.com

Susan M. Seaman  
sseaman@dtlaw.com

Lindsay P. Valentine  
lvalentine@dtlaw.com

Judith M. Scheiderer  
jscheiderer@dtlaw.com

Robin R. De Leo  
robin@deher-la.com



the Ninth Circuit's interpretation by determining that the clause "using a random or sequential number generator" modifies both "to store" and "to produce." See our ALERT of January 30, 2020.

The Second Circuit's decision creates more uncertainty as to the scope of the devices subject to the TCPA. We will continue to monitor and report on TCPA updates as they occur. □

✧ *Mike Tomkies and Lindsay Valentine.*