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Second Circuit Takes Expansive Approach on the Definition of an ATDS

Jessica E. Salisbury-Copper, Scott A. King, and Doori Song*

The authors review a decision by the U.S. Court of Appeals for the Second Circuit adopting a broad definition of an automatic telephone dialing system, rejecting the approach recently taken by the Seventh and Eleventh Circuits.

Since the 2018 decision by the U.S. Court of Appeals for the District of Columbia Circuit in *ACA International v. Federal Communications Commission*, courts throughout the country have struggled to clarify the definition of an automatic telephone dialing system ("ATDS") under the Telephone Consumer Protection Act ("TCPA"). Now, the U.S. Court of Appeals for the Second Circuit has issued its decision in *Duran v. La Boom Disco, Inc.*, in which the court clarified its prior decision in *King v. Time Warner Cable* and held that a system qualifies as an ATDS when the numbers called are "stored in any way or produced using a random-or-sequential-number generator."

In doing so, the Second Circuit adopted a broad definition of an ATDS followed by the U.S. Court of Appeals for the Ninth Circuit, and rejected the approach recently taken by the U.S. Courts of Appeals for the Seventh and Eleventh Circuits.

Background

In 1991, Congress enacted the TCPA to address the onslaught of telemarketers. The TCPA prohibits callers from calling someone using an ATDS or automated or prerecorded voice without the consent of the called party. Those who receive calls (which includes text messages) in violation of the TCPA are afforded a private right of action that includes statutory damages of $500 to $1,500 per call.

After texting a code to receive free admission to an event, Radames Duran ("Duran") claimed he received hundreds of unsolicited text messages from La Boom Disco ("LBD") in violation

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of the TCPA. LBD conceded that the text messages were sent but argued that the systems used to send those messages did not meet the definition of an ATDS and, as a result, the TCPA was not violated.

The U.S. District Court for the Eastern District of New York agreed with LBD, holding that the systems LBD used to text Duran did not constitute ATDSs. The district court reasoned that because a person determined when the texts were sent, LBD's programs operated with too much human intervention to meet the definition of an ATDS. Duran appealed to the Second Circuit.

Second Circuit Decision

The Second Circuit reversed and found that the systems used by LBD met the definition of an ATDS.

Under the TCPA, an ATDS is "equipment which has the capacity" "to store or produce telephone numbers to be called, using a random or sequential number generator; and" "to dial such numbers." As the Second Circuit recognized, "this statutory language leaves much to interpretation." Must the numbers be stored and produced using a random or sequential number generator, or can they be stored in any way and simply produced using a random or sequential number generator? The court also asked whether the equipment dials the number "automatically" in violation of the TCPA if a campaign that sends thousands of calls or texts at once has to be manually initiated by a human. The court addressed each issue in turn.

The Capacity to Store or Produce Telephone Numbers to Be Called, Using a Random or Sequential Number Generator

The Second Circuit acknowledged two different approaches applied by courts when determining whether a system has the "capacity . . . to store or produce numbers to be called, using a random or sequential number generator."

The first approach, as used in the Seventh and Eleventh Circuits, states that in order to qualify as an ATDS, a dialing system must use a "random or sequential number generator" to "store" and

"produce" numbers to be called. Under the first approach, LBD's dialing system would not qualify as an ATDS because it stored numbers from prepared lists as opposed to storing numbers using a random or sequential number generator.

By contrast, the second approach, as used in the Ninth Circuit, rests upon the proposition that the phrase "using a random or sequential number generator" modifies only the verb "produce" and, as a result, a system that merely stores phone numbers to be called (even from lists prepared by humans) may qualify as an ATDS.

Because LBD's system stored numbers from prepared lists, it would not meet the definition of an ATDS under the first approach, but it would meet the definition of an ATDS under the second.

The Second Circuit adopted the second approach for three reasons. First, the court found that the second approach avoids rendering any words in the statute "surplusage" because the first approach made the use of the two verbs "store" and "produce" redundant. Second, the court reasoned that the second approach better effectuated the purpose of the TCPA. Finally, the court found that the second approach was consistent with the FCC's interpretation of the TCPA because the FCC has, on multiple occasions, made clear that a system that merely stores a list of numbers can qualify as an ATDS.

Notably, in relying on the FCC's interpretation, the Second Circuit rejected the holdings of those courts that have held that the FCC's rules that systems that call numbers from human-prepared lists were invalidated by *ACA International* and the Second Circuit's 2018 decision in *King v. Time Warner Cable Inc.*, explaining that although *ACA International* set aside a portion of the FCC's 2015 Order on the TCPA, "the 2003, 2008, and 2012 Orders, among others, survived our decision in *King* and the D.C. Circuit's decision in *ACA International*, and continue to inform our interpretation of the TCPA today."

The Capacity to Dial Numbers

After determining that LBD's system met the first hurdle required of an ATDS (i.e., the capacity to store or produce numbers using a random or sequential number generator), the court turned to whether the system had the capacity "to dial such numbers," or

whether the level of human intervention involved was sufficient to take the systems out of the scope of the TCPA.

The court acknowledged that one of the most basic functions of an ATDS is the ability to dial without human intervention, but also said that "[a]ny system—ATDSs included—will always require *some* human intervention somewhere along the way, even if it is merely to flip a switch that turns the system on."

The district court had held that because a person had to determine "when" to initiate the calls, the calls placed by LBD were not "automatically" dialed. The Second Circuit held that was not a sufficient amount of human intervention and, instead, the key issue was "dialing," which the court interpreted to mean "actual or constructive inputting of numbers." Based on its interpretation, the court found that "[m]erely clicking 'send' or an equivalent button in a text messaging program . . . is not the same thing as dialing a number." Because the system used by LBD required only a human to click a button to send out a multitude of texts, the court found insufficient human intervention and ruled that the systems met the definition of an ATDS.

Conclusion

Courts remain divided on what constitutes an ATDS, resulting in some litigants alleging that the TCPA is unconstitutionally vague. Until the definition of an ATDS is amended by Congress, clarified by the FCC, or struck down by the Supreme Court, those that call or text as part of their business practices should be conservative in using systems to place such calls and should ensure they have the consent required to comply with the TCPA.

Notes

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