Class Actions Alert

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Eleventh Circuit Decision "Marks" a Further Shift in the TCPA Landscape

January 30, 2020

Key Points

- On January 27, 2020, the 11th Circuit held that telephone equipment must randomly or sequentially generate numbers in order to constitute an "automatic telephone dialing system" (ATDS) under the Telephone Consumer Protection Act (TCPA). Platforms that dial numbers from stored lists, but lack the capacity to generate random or sequential numbers, are outside the scope of the ATDS definition.
- *Glasser v. Hilton Grand Vacations Co., LLC*, --- F.3d ---, 2020 WL 415811 (11th Cir. 2020) is the latest circuit-level decision to hold that random or sequential number generation is required by the statutory definition. It is also the first published appellate decision to reject the 9th Circuit's contrary analysis in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018).
- The ruling should stem the tide of TCPA litigation within the 11th Circuit and offer district courts in other circuits sound precedent for rejecting the expansive definition of ATDS set forth in *Marks*.

On January 27, 2020, the 11th Circuit Court of Appeals, in a 2-1 decision, rejected yet another attempt by plaintiffs in a consolidated appeal to broaden the reach of the TCPA, specifically as it pertains to the definition of an ATDS. In *Glasser v. Hilton Grand Vacations Co., LLC*, the Court held an ATDS, which is expressly defined in the TCPA as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers," should be interpreted as written. In doing so, the Court specifically rejected the "surgery" that the 9th Circuit performed to reach its sweeping conclusion in Marks as to what constitutes an ATDS. Under *Glasser*, the TCPA's prior consent requirements for autodialers are limited to dialing equipment with the capacity to randomly or sequentially generate numbers. The 11th Circuit's decision harmonizes the language of the statute with its legislative history and provides a much-needed bulwark against the flood of TCPA litigation in the federal courts.

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These cases on appeal in *Glasser* involved telemarketing calls related to vacation opportunities and informational calls related to debt collection efforts. Defendants argued that the calls were placed to designated telephone numbers on a list and were therefore not "randomly or sequentially" generated. Plaintiffs responded that the TCPA applies to preset calling lists, so long as the equipment used has the capacity to store phone numbers and dial them later. In a well-reasoned published opinion, the 11th Circuit rejected plaintiffs' attempts to rewrite the words of the statute to dispense with the "random or sequential" requirement.

Applying conventional rules of grammar and punctuation to the clause "using a random or sequential number generator," the court found it modifies both "store" and "produce." This interpretation is consistent with the legislative history of the TCPA, which reflects that in 1991 "at the time of [the TCPA's] enactment, devices existed that could randomly or sequentially create telephone numbers and (1) make them available for immediate dialing or (2) make them available for later dialing." This interpretation also was supported by the "[c]ontemporaneous understanding" from 1991 to 2003, as reflected in the Federal Communications Commission's (FCC) rulings from that period, that dialing equipment had to meet the "random or sequential" requirement in order to be considered an ATDS subject to the TCPA.

The 11th Circuit also rejected more recent attempts by the FCC to expand the ATDS definition to encompass predictive dialers and other modern dialing technology, finding that while technology changed, the statute had not. The Court shared the D.C. Circuit's concerns, as expressed in *ACA Int'l v. FCC*, that the FCC's expansion of the ATDS definition would place smartphones "within the definition's fold," so as to improperly expand the TCPA to encompass "the most ubiquitous type of phone equipment known[.]" 885 F.3d 687, 697 (D.C. Cir. 2018).

The 11th Circuit then directly addressed the 9th Circuit's opinion in *Marks*, which had read the statutory definition of ATDS to encompass devices with the capacity to automatically dial numbers from a stored list and dispensed with any requirement for random or sequential number generation. The 11th Circuit declined to follow *Marks*, noting that its reading of the statute amounted to something "more like 'surgery' … than interpretation."

The Court also touched on the First Amendment implications of interpreting the term ATDS to encompass all platforms capable of dialing from a stored list of numbers, asking whether"[t]he First Amendment [would] really allow Congress to punish every unsolicited call to a cell phone?" The court cited the Supreme Court's recent grant of certiorari on the question of whether the TCPA's exception for government debt collection calls comports with the First Amendment. *See Am. Ass'n of Political Consultants, Inc. v. FCC*, 923 F.3d 159 (4th Cir. 2019), cert. granted, No. 19-631, 205 L. Ed. 2d 449, 2020 WL 113070 (Jan. 10, 2020).

Judge Martin concurred in part and dissented in part, disagreeing with the majority's interpretation that the statute requires a device to randomly or sequentially generate numbers in order to qualify as an autodialer and instead "understand[ing] that a machine may qualify as an autodialer based solely on its ability to store numbers."

The 11th Circuit's decision in *Glasser* represents another important step towards rejecting the "all-expansive view of the [TCPA's] purpose" embraced by certain courts and prior regulators. As *Glasser* explains, the TCPA presents "a fair balancing of

commercial and consumer interests” and does not require judicial or regulatory expansion to fulfill its purpose.

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