

2nd Circ. Ruling Widens TCPA Autodialer Circuit Split

By **Michael Stortz, James Tysse, Daniel Brewer and Marie Bussey-Garza** (April 23, 2020)

Ever since *Marks v. Crunch San Diego LLC*[1] which broadly interpreted “automatic telephone dialing system” in the Telephone Consumer Protection Act to encompass nearly any dialing platform, plaintiffs counsel have strategically focused on filing cases in the U.S. Court of Appeals for the Ninth Circuit. There is now another inviting option.

On April 7, the U.S. Court of Appeals for the Second Circuit joined the Ninth Circuit in its expansive reading of the term ATDS and, in doing so, incentivized more TCPA filings in the New York, Connecticut and Vermont district courts.

The Second Circuit’s ruling in *Duran v. La Boom Disco Inc.*,[2] further widens the circuit split with respect to the definition of an ATDS. That uncertainty creates even more incentive for the U.S. Supreme Court — or the Federal Communications Commission, which has sought public comment on the question — to resolve this important issue.

Until either the Supreme Court or the FCC weighs in, however, businesses seeking to lawfully place calls and send text messages to consumers may face a heightened risk of TCPA exposure in the Ninth and (now) Second Circuits.

The Duran Opinion

In a narrowly focused opinion, the Second Circuit rejected a portion of the reasoning of the majority of the federal circuits that have held that the statutory definition of ATDS is limited to platforms with the capacity to generate random or sequential numbers. In doing so, the Second Circuit parted company with the U.S. Court of Appeals for the Third Circuit, the U.S. Court of Appeals for the Seventh Circuit and the U.S. Court of Appeals for the Eleventh Circuit.

The court also relied on the FCC’s prior rulings on the ATDS definition as “persuasive authority” — even though every other circuit court (including *Marks*) has held that those rulings were vacated by the U.S. Court of Appeals for the D.C. Circuit in *ACA International v. FCC*. [3]

In *Duran*, the plaintiff challenged marketing texts sent to him by a nightclub after he had affirmatively texted that club in connection with a promotion offering free admission. After collecting these marketing texts for more than a year and a half, *Duran* filed a putative class action under the TCPA, alleging that the texts were sent using an ATDS and without his prior express written consent in violation of the TCPA.

The defendant denied liability based primarily on the argument that the text platform did not constitute an ATDS because (1) the equipment cannot generate random or sequential phone numbers and (2) human intervention was required. The U.S. District Court for the Eastern District of New York agreed, and granted summary judgment in the defendant’s



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favor.

On de novo review, the Second Circuit reversed. As for defendant's first argument, the court recognized that, under the statutory definition of an ATDS, the calling platform (1) "must have the capacity ... to store or produce telephone numbers to be called, using a random or sequential number generator" and (2) "must have the 'capacity ... to dial such numbers.'"[4]

In addressing the first requirement, the court identified two alternative constructions of the statutory definition: (1) The platform must be capable of using a random or sequential number generator to store or produce numbers (the construction adopted by the Third, Seventh and Eleventh Circuits); or (2) the platform must either store numbers in a list, or produce numbers using a random or sequential number generator (the construction adopted by the Ninth Circuit). The court adopted the latter.

The court found that the first construction renders the word "store" to be surplusage based on its "common sense" view that a phone number stored using a random or sequential number generator must necessarily be produced by the same number generator. It reached this conclusion, however, without addressing basic rules of grammar or the specific technologies that Congress was concerned with when it enacted the TCPA.

By contrast, both the Seventh Circuit in *Gadelhak v. AT&T Services Inc.* and the Eleventh Circuit in *Glasser v. Hilton Grand Vacations Co. LLC* specifically and extensively considered both issues and concluded that the Marks (and now Duran) construction of the term ATDS is contrary to several rules of grammar, and also ignores the calling technologies targeted by Congress with the TCPA. As both courts recognized, "[w]hen two conjoined verbs ('to store or produce') share a direct object ('telephone numbers to be called'), a modifier following that object ('using a random or sequential number generator') customarily modifies both verbs."[5]

It follows that an ATDS must either store numbers using a random or sequential number generator or produce numbers using a random or sequential number generator. That reading is consistent with dialing technology at the time of the TCPA's enactment, which included equipment "that could randomly or sequentially create telephone numbers and (1) make them available for immediate dialing or (2) make them available for later dialing" — such that "[s]ometimes storage would happen; sometimes it wouldn't."[6]

Thus, as the Seventh Circuit explained, the word "store" does not amount to surplusage; rather, "[g]iven the range of storage capacities among telemarketing devices at the time of enactment, it is plausible that Congress chose some redundancy in order to cover 'the waterfront.'"[7]

The Second Circuit in *Duran* also concluded that the government-debt exception would make sense only if the definition of an ATDS extends to lists of stored numbers because debtors are not called in a "haphazard" sequential or random order. In a footnote, the court dismissed the contrary conclusions of the Seventh and Eleventh Circuits that the government-debt exception remains fully applicable to the TCPA's restrictions on prerecorded voice calls, regardless of its application to calls placed using an ATDS.

Lastly, the Second Circuit found support in the prior rulings of the FCC in 2003, 2008 and 2012 regarding the scope of the ATDS definition. In an apparent departure from its prior decision in *King v. Time Warner Cable Inc.*,[8] which suggested that these FCC rulings had been vacated by *ACA International*, the court reasoned that the FCC rulings "survived" *King*

and ACA International and were “persuasive authority” supporting its decision.

It did not acknowledge, however, that every other circuit court to consider the issue has held that these rulings were invalidated by ACA International — nor did it explain why, if those rulings remain in effect, its exercise of de novo statutory construction was necessary.

Turning to the defendant’s second argument — that the texting platform was not an ATDS because it required human intervention to dial — the Second Circuit determined that merely clicking “send” does not constitute sufficient human intervention to exclude the platform from the ATDS definition because “it is not the actual or constructive inputting of numbers to make an individual telephone call or to send an individual text message.”[9]

The court’s analysis, however, skirted the issue that gave pause to the Seventh and Eleventh Circuits: specifically, the actual capabilities of today’s smartphones, which include sending text messages without an “actual or constructive” inputting of numbers. As noted by the Seventh and Eleventh Circuit, today’s smartphones can send text messages automatically to stored numbers (for example, by sending an automatic text reply when driving or otherwise occupied).

Under the Second Circuit’s construction, the TCPA’s ATDS restrictions would potentially include ubiquitous smartphones, resulting in an “eye-popping sweep” to the TCPA statute that the Seventh and Eleventh (along with the Third and D.C.) Circuits have rejected.[10]

The Impact of Barr

Noticeably missing from the Duran decision is any discussion of the First Amendment implications of such a sweeping ATDS interpretation. By contrast, the Eleventh Circuit addressed this issue head on, concluding that “[c]onstitutional avoidance principles also support [its] interpretation [of an ATDS].”[11]

According to the Eleventh Circuit, the First Amendment would not “really allow Congress to punish every unsolicited call to a cell phone,”[12] but the Marks and Duran definitions are poised to do exactly that. The Eleventh Circuit also expressed doubt that the government-debt exception — which the Second Circuit also relied on in its analysis — could withstand First Amendment scrutiny.[13]

In fact, both the U.S. Court of Appeals for the Fourth Circuit (in *American Association of Political Consultants Inc. v. FCC*) and the Ninth Circuit (in *Duguid v. Facebook*) have considered and rejected the constitutionality of the government-debt exception, but in both cases, the courts held that the proper remedy was to sever the exception and to leave the remainder of the statute intact.[14]

The Supreme Court granted certiorari on Jan. 10 to review this constitutional question in *Barr v. American Association of Political Consultants Inc.*[15] and recently identified that case as one of 10 for which it will hear oral arguments telephonically in May.[16] Although the ATDS definition is not squarely before the court in *Barr*, Facebook has asked the Supreme Court to consider this issue in *Duguid*. [17]

The Supreme Court’s ruling in *Barr*, however, might render the issue moot if the ATDS provisions are stricken completely. In the interim, any constitutional challenge to the broad ATDS definition adopted in *Duran* will only heighten the need for Supreme Court guidance on this issue.

In addition, the proper interpretation of an ATDS is also an issue squarely before the FCC in ACA International based on the D.C. Circuit's order vacating portions of the FCC's July 2015 declaratory ruling. The comment period is long closed, and the FCC may finally address the issue with the benefit of the ruling in Barr. Some district courts have already adopted the position that TCPA proceedings should be stayed pending the anticipated guidance from the Supreme Court.[18] With Duran widening the circuit split, such stays will likely become more commonplace.

Looking Ahead

In the near term, the Duran decision will likely lead plaintiffs lawyers to file more actions in the Second Circuit — a jurisdiction that had, in the past, not been a particularly favorable venue for plaintiffs because of common-sense decisions interpreting the TCPA's consent rules, such as *Reyes v. Lincoln Automotive Financial Services*.[19] Indeed, since Marks, the plaintiffs bar has unapologetically clustered cases in the district courts of the Ninth Circuit.

In the wake of Duran, the significant number of TCPA plaintiffs lawyers in New York — who had been partnering with firms in California, Nevada and Washington — will undoubtedly solicit and pursue considerably more cases in the New York federal courts, which have already seen their dockets clogged by abusive gift card litigation.[20] The U.S. District Court for the District Court of Connecticut — which has already been a popular venue for several TCPA cases, including 17 fax-based cases filed by the same serial plaintiff[21] — will likely see an uptick as well.

Until the Supreme Court or the FCC resolves the ATDS issue, TCPA plaintiffs lawyers will continue to solicit claimants and file cases in jurisdictions that embrace an ATDS definition that reaches every common smartphone. As a result, legitimate customer communications — including ones affirmatively sought out and welcomed by consumers — will be the focus of continued litigation on both coasts.

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[1] 904 F.3d 1041 (9th Cir. 2018).

[2] No. 19-0600, 2020 U.S. App. LEXIS 10861 (2d Cir. 2020).

[3] 885 F.3d 687 (D.C. Cir. 2018).

[4] Duran, 2020 U.S. App. LEXIS 10861, at *7 (quoting 47 U.S.C. § 227(a)(1)).

[5] *Gadelhak v. AT&T Servs.*, 950 F.3d 458, 464 (7th Cir. 2020) (quoting *Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301, 1306 (11th Cir. 2020) (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation Of Legal Texts* 148 (2012)).

[6] *Glasser*, 948 F.3d at 1307.

[7] Gadelhak, 950 F.3d at 465 (quoting Glasser, 948 F.3d at 1307).

[8] 894 F.3d 473 (2d Cir. 2018).

[9] Duran, 2020 U.S. App. LEXIS 10861, at *21.

[10] See, e.g., ACA Int'l, 885 F.3d at 697 (rejecting interpretation of ATDS that would reach "every smartphone"); Dominguez v. Yahoo, Inc., 894 F.3d 116, 121 (3d Cir. 2018) (concluding that the statutory definition of ATDS requires that a device have the capacity for "generating random or sequential telephone numbers").

[11] Glasser, 948 F.3d at 1310.

[12] Id.

[13] See id.

[14] See Duguid v. Facebook, 926 F.3d 1146, 1157 (9th Cir. 2019); Am. Ass'n of Political Consultants, Inc. v. FCC, 923 F.3d 159, 172 (4th Cir. 2019).

[15] See Am. Ass'n of Political Consultants, Inc. v. FCC, 923 F.3d 159 (4th Cir. 2019), cert. granted sub nom., Barr v. Am. Ass'n of Political Consultants, Inc., 205 L. Ed 449 (Jan. 10, 2020) (No. 19-0631).

[16] See <https://www.scotusblog.com/2020/04/court-sets-cases-for-may-telephone-arguments-will-make-live-audio-available>. The argument in Barr has been scheduled for May 6, 2020. See <https://www.scotusblog.com/case-files/cases/barr-v-american-association-of-political-consultants-inc>.

[17] Duguid v. Facebook, 926 F.3d 1146 (9th Cir. 2019), petition for cert. filed (Oct. 17, 2019) (No. 19-0511).

[18] See, e.g., Wright v. Exp Realty, LLC, No. 18-1851, 2020 U.S. Dist. LEXIS 43378, at *3 (M.D. Fla. Feb. 7, 2020) ("The Court believes that any proceedings before the Supreme Court issues guidance in the upcoming Barr v. Am. Ass'n will be—among other things—a waste of judicial resources and a waste of the parties' time and energy."); Seefeldt v. Entm't Consulting Int'l, No. 19-0188, 2020 U.S. Dist. LEXIS 31815, at *9 (E.D. Mo. Feb. 25, 2020) (staying case pending resolution of Barr because "the best approach is to wait for much-needed clarity from the Supreme Court").

[19] 861 F.3d 51 (2d Cir. 2017).

[20] See Kathryn Deal, et al., ADA Braille Gift Card Claims Shouldn't Gain Traction In NY, Law360 (Nov. 15, 2019, 4:57 PM EST), <https://www.law360.com/articles/1219185/ada-braille-gift-card-claims-shouldn-t-gain-traction-in-ny>.

[21] See, e.g., Gorss Motels v. Illen Products Ltd., No. 18-1052 (D. Conn.).