GT GreenbergTraurig

Alert | Financial Services Litigation

July 2020

Sixth Circuit Construes 'Automatic Telephone Dialing System' Under TCPA, Adding to Circuit Split

In *Allan v. Pennsylvania Higher Education Assistance Agency*, a split panel of the Sixth Circuit considered whether defendant's telephone system constituted an automated telephone dialing system (ATDS) for purposes of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (TCPA). Defendant's Avaya Proactive Contact system created calling lists and placed calls with a pre-recorded, artificial voice; it did not "generate" telephone numbers to be called. As discussed below, the Sixth Circuit determined that the system is an ATDS because it called from a stored list.

The TCPA provides that: An ATDS is 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. 47 USC § 227(a)(1). The Majority in *Allan* identified three ways to interpret this language: (1) the phrase "using a random or sequential number generator" applies to both "store" and "produce"; (2) the phrase "using a random or sequential number generator" applies only to "produce"; or (3) the phrase "using a random or sequential number generator" applies to the phrase "telephone numbers to be called."

As to the first interpretation, the Majority determined that it would render the word "store" superfluous, because a number would have to be produced in order to be stored. The Majority thus rejected that reading as "too labored and problematic to carry the day." As to the second, the Majority concluded that it lacked grammatical sense. As to the third (favored by the Dissent), the Majority found that it again

rendered "store" superfluous and "is not so different from the first reading and does not open up a new interpretive avenue not previously analyzed by this court or other circuits."

Accordingly, after undertaking this analysis – and considering the legislative history of the TCPA and the protracted controversy over the meaning of "ATDS" – the Majority found that the best interpretation arises from considering the "prior express consent" requirement for calls made to cellular phones. Relying on the reasoning in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018), the Majority observed that "[c]onsenting recipients are known persons whose numbers are stored in a list." Noting that, "[i]n order to give their express consent prior to receiving a call, they must give their number to the entity making the call," the Majority stated that "the entity making the automated call is dialing a stored number – not a number that it randomly generated." Therefore, "the autodialer ban applies to stored-number systems."

With this ruling, the Sixth Circuit aligns with the Ninth (*Marks*) and the Second (*Duran v. La Boom Disco, Inc.*, 955 F.3d 279 (2020). However, three circuits have reached contrary conclusions: Third (*Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3rd Cir. 2018); Seventh (*Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458 (7th Cir. 2020); Eleventh (*Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301 (11th Cir. 2020). The United States Supreme Court has already taken up the issue in *Facebook v. Duguid,* a decision from the Ninth Circuit following *Marks*, Supreme Court Dkt. No. 19-511. A ruling in *Duguid* is expected by June 2021. Parties impacted by the circuit split may wish to consider seeking a stay pending a ruling by the U.S. Supreme Court.

Author

This GT Alert was prepared by:

- Lisa M. Simonetti | +1 310.586.7824 | simonettil@gtlaw.com