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CLIENT**BULLETIN**

Not Automatic For The People – The 7th Circuit Weighs In on the Definition of an ATDS

In a decision with significant implications for claims brought under the Telephone Consumer Protection Act ("TCPA"), the Seventh Circuit held that a device used to send text messages only falls within the statutory definition of an automatic telephone dialing system ("ATDS") if it (1) has the capacity to store or produce telephone numbers to be called, and (2) has the capacity to perform at least one of those functions "using a random or sequential number generator." *Gadelhak v. AT&T Services, Inc.*, -- F.3d --, 2020 WL 808270 (7th Cir. 2020). The court's determination means fewer devices used to send text messages will qualify as an ATDS.

The decision turned on the court's highly technical analysis of the TCPA's confusing definition of an ATDS. The first line of the opinion reinforced that point: "The wording of the provision that we interpret today is enough to make a grammarian thrown down her pen." *Id.* at *1. The statute defines an ATDS 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." 47 U.S.C. § 227(a)(1). The plaintiff argued the phrase "using a random or sequential number generator" modified only the verb "produce." The verb "to store" was not modified, according to the plaintiff, meaning any device that simply stored numbers to be called fell within the definition of an ATDS. That is the definition the Ninth Circuit adopted in *Marks v. Crunch San Diego*, 904 F.3d 1041 (9th Cir. 2018).

The Seventh Circuit rejected that argument, reasoning that "when 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**." *Id.* at *4 (quoting *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301 (11th Cir. 2020)) (emphasis added). Also, "[t]he placement of the comma before 'using a random or sequential number generator' in the statute further suggests that the modifier is meant to apply to the entire preceding clause." *Id.* The court acknowledged that its reasoning did not resolve all of the grammatical issues the statute's phrasing created, but it concluded its determination worked better than any of the alternatives. The court's decision is consistent with the interpretation the Third and Eleventh Circuits have given to the statute's definition of an ATDS. *Glasser*, 948 F.3d 1301; *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018).

The device AT&T used to send text messages to the plaintiff lacked the capacity to either store or produce telephone numbers using a number generator. Rather, the device pulled and dialed numbers from an existing database of customers. Thus, the numbers dialed were not randomly generated. The court observed that most systems today operate as AT&T's does and contrasted that to how telemarketers contacted people at the time the TCPA was passed. At that time, telemarketers primarily used systems that randomly generated numbers and dialed them. All agreed that such systems met the TCPA's definition of an ATDS. Because AT&T's device did not use "a random or sequential number generator" to generate or dial numbers to which the texts were sent, the texts were not sent with an ATDS and therefore did not violate the TCPA.

The Seventh Circuit also addressed another issue that has split the circuit courts. It examined

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whether a party who received a text message in violation of the TCPA had standing to bring suit. The Eleventh Circuit in *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019), held that the receipt of an unwanted automated text message was not a cognizable injury under Article III because it was not "concrete." The party in that case had only received one unwanted text, so the Eleventh Circuit's decision provided an avenue for arguing that parties who received one text only lacked a concrete injury and, thus, lacked standing to assert a claim. The Seventh Circuit disagreed with that analysis and, in the process, followed holdings from the Second and Ninth Circuits. See *Melito v. Experian Mtkg. Sols, Inc.*, 923 F.3d 85, 92-93 (2d Cir. 2019); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1042-43 (9th Cir. 2017). It confirmed "that unwanted text messages can constitute a concrete injury-in-fact for Article III purposes" and it rejected the Eleventh Circuit's suggestion that the number of texts received was material to determining whether a party suffered an injury-in-fact. *Id.* at *3 n.2.

While there is a split in the circuits when it comes to the definition of an ATDS and a party's standing to bring a TCPA claim, the balance is now tilted in favor of a narrow construction of an ATDS and a broad construction of standing.

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