Sixth Circuit Holds That Stored-Number Systems Meet the TCPA's Definition of an Autodialer, Deepening Circuit Split to be Addressed by the Supreme Court Next Term

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It has been more than two years since the D.C. Circuit found the Federal Communications Commission's (the "FCC") discussion of predictive dialers and other equipment alleged to be an automatic telephone dialing system ("ATDS," or "autodialer") to "offer no meaningful guidance" on the question. In the absence of an FCC ruling on the remand, multiple courts of appeals have addressed the statute's definition. In the most recent case, *Allan v. Pennsylvania Higher Education Assistance Agency*, the Sixth Circuit adopted (in a split decision) a broad definition of an autodialer. Construing the term ATDS to include both devices that "generate[] and dial[] random or sequential numbers," and "that dial from a stored list of numbers," the Sixth Circuit has aligned itself with the Second and Ninth Circuits in a growing circuit split, with the Third, Seventh and Eleventh Circuits adopting a narrower interpretation. At this point, all eyes are on the Supreme Court, which accepted a case addressing the ATDS definition for next term.[1] The FCC, meanwhile, is not likely to address the core ATDS definition until after the Supreme Court ruling.

Case Background

Allan came before the Sixth Circuit on appeal of the district court's entry of summary judgment for plaintiffs. Plaintiffs alleged that defendant had placed 353 calls to them using an ATDS after they had each revoked consent. The district court held that defendant's system qualified as an autodialer. It was undisputed that the system did not randomly or sequentially generate numbers. It would place calls to a daily-created list based on a stored list of a numbers in connection with collection of specific individual's private education loan debt. By a 2-1 majority, the Sixth Circuit concluded that equipment may be an ATDS if it has the capacity to store numbers to be called, or to produce numbers using a random or sequential number generator, and to dial such numbers.

Majority Opinion

The majority opinion found that the ATDS definition is facially ambiguous. The TCPA defines an ATDS as "equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator" (and the capacity to dial those numbers automatically). The opinion engaged in a grammatical analysis of the statutory text to resolve the definition's latent ambiguity, which interpretation it then confirmed with reference to relevant statutory and

administrative history.

The Sixth Circuit concluded that a predictive dialer or system that dials from a stored list could qualify as an ATDS under the TCPA. The Court relied on the existence of exceptions to help establish the rule. For example, the Court confirmed that the "prior express consent" exception permits calls made using an autodialer if the recipient has given his or her prior express consent to receiving those calls. Thus, it reasoned, "[a]n exception for consented-to calls implies that the autodialer ban otherwise could be interpreted to prohibit consented-to calls. And consented-to calls by their nature are calls made to known persons, i.e., persons whose numbers are stored on a list and were not randomly generated." Ergo, the Court held that the definition of an ATDS must broadly sweep in stored-number systems and predictive dialers, not just calls to unknown individuals via random or sequential number generation.

Delving into the TCPA's legislative history, the Court highlighted Congress's intent to crack down on pervasive and intrusive telemarketing practices. Rather than regulate certain types of technology used to place calls, the TCPA was meant to curb the calls themselves – particularly the near-daily, multiple calls that formed the *Allan* plaintiffs' cause of action.

Consistent with every other Circuit to have addressed the issue, the Sixth Circuit reached this decision without administrative guidance, holding that prior guidance from the FCC, including those pre-2015, was invalidated by the D.C. Circuit in its 2018 decision *ACA International v. FCC*. While some District Courts have relied on those prior FCC orders, the Circuit Courts, with the exception of the Second Circuit, have held that the prior orders were set aside.

Importantly, the Court affirmatively declined to comment on the potential impact of human intervention on dialing because, it found, the defendant failed to present a legal basis for that argument in this case.

Dissent

The dissent disagreed with the majority's conclusion and methodology, putting forth a third interpretation of the statutory language. Rather than modifying the verbs "store" and/or "produce," the dissent maintained that the language "using a random of sequential number generator" should be read to modify the entire phrase "telephone numbers to be called." In the instant case, because the telephone numbers dialed were not generated randomly or sequentially, the dissent would have held that the equipment at issue did not qualify as an ATDS.

The dissent gave four reasons why its interpretation was the "best" reading among the three possible interpretations. *First*, it does not require a judicial rewrite of the statute as does the definition of an ATDS that includes stored-number systems: even if unartfully drafted, it is grammatically correct. In contrast, the majority's definition requires a grammatically incorrect reading of the statute. *Second*, it avoids the problem of superfluity associated with a definition of ATDS that excludes stored-number systems (thereby rendering the term "store" in the statute's definition surplusage). *Third*, the dissent concludes that the interpretation is consistent with the FCC's early orders interpreting the TCPA. The FCC's early definitions of an ATDS define it "as a device that uses a random or sequential number generator." And *fourth*, the dissent argues that Congress's intent was in fact to curb the use of machines that dialed randomly or sequentially generated numbers, pointing out language from an early congressional hearing to that effect. (KDW note: This argument is similar to the argument made by then-Commissioner Ajit Pai in dissent to the 2015 FCC decision that was overturned in *ACA International* v. FCC.)

What Comes Next

The Sixth Circuit's position only further deepens the divide between the Circuits with six, evenly split Circuits having offered their positions. In the short term, the *Allan* decision expands the definition of an ATDS for callers and litigants in the Sixth Circuit; thus, increasing the potential risks and exposure.

The *Allan* decision is not likely to have lasting effect, however, because the United States Supreme Court has accepted a case to address the ATDS definition. The Sixth Circuit's reasoning in *Allan* closely tracks the Ninth Circuit's decision in *Duguid v. Facebook*, 926 F.3d 1146 (9th Cir. 2019). That decision has been accepted for review by the Supreme Court and will be argued in the fall. The resolution of the appeal should settle the question of what is an ATDS, providing (we hope) consumers and businesses alike with clear guidance on permissible autodialing systems.

Interestingly, the defendant in *Allan* had opposed a motion to stay the pending appeal until the Supreme Court reached a decision in *Facebook*. With this unhelpful ruling in hand, the defendant in Allen may file its own petition for certiorari, and/or seek further review by the Sixth Circuit *en banc*.

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[1] These circuits stand opposite to the Seventh and Eleventh Circuits, which hold that an ATDS must use a random or sequential number generator. Although the Third Circuit has also weighed in *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018), the *Allan* court took the position that it did not expressly construe the definition. "The Third Circuit has not expressly addressed this question, but it did assume (without providing any analysis) that an ATDS must use a random or sequential number generator." *Allan* at 5, n.3; *but see Dominguez v. Yahoo, Inc.*, 629 F. App'x 369 (3d Cir. 2015) (considering "the definition of 'random or sequential' number generation" and confirming "the phrase refers to the numbers themselves rather than the manner in which they are dialed.")