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The Eleventh Circuit Weighs In On ATDS Definition

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February 3, 2020

In *Glasser v. Hilton Grand Vacations Company, LLC*, the Eleventh Circuit addressed a pair of appeals that presented the question of the appropriate definition of an automatic telephone dialing system (“ATDS”) as set forth in the Telephone Consumer Protection Act (“TCPA”). In answering that question, the Eleventh Circuit expanded upon the Third Circuit’s ruling in *Dominguez v. Yahoo, Inc.* to conclude that calling technology will not satisfy the ATDS definition unless the equipment at issue generates the telephone numbers “randomly or sequentially” and then dials them automatically. Under the Eleventh Circuit’s approach, companies who are, for example, contacting customers from a database of telephone numbers, even using the kind of “sophisticated telephone equipment” at issue in *Glasser*, will not face liability under the TCPA, so long as the technology used is not generating the numbers itself.

Glasser represents a significant reduction in the scope of liability under the TCPA. Since 2003, due to an order by the Federal Communications Commission (“FCC”), the use of predictive dialing equipment has been sufficient to trigger the TCPA’s protections under the ATDS provisions of the statute. In *ACA Int’l v. FCC*, however, the D.C. Circuit vacated prior FCC guidance on this issue, which the Eleventh Circuit (along with other courts), held includes the FCC’s 2003 order. In reaching its conclusion, the Eleventh Circuit noted that the FCC had improperly sought to expand to the scope of the TCPA in order to capture more modern technology. “[T]he [FCC] had watched companies switch from using machines that dialed a high volume of randomly or sequentially generated numbers to using ‘predictive dialers’ that called a list of pre-determined customers. . . .Watching this happen in real time, the [FCC] tried to use a broad ‘reading of the legislative history’ and an all-encompassing view of the law’s purpose to expand the statute’s coverage and fill this gap.”

Even under *Glasser*’s interpretation of the statute, an important limitation on the use of “automated telephone equipment” remains, however, because such equipment must connect customers with a “human representative” or obtain the requisite consent to place calls using an “artificial or prerecorded voice” to avoid liability under the TCPA. In *Glasser*, where the record demonstrated that one of the defendants had made calls using an “an artificial or prerecorded voice,” the Eleventh Circuit held that this conduct provided an “independent basis” for liability under the TCPA and affirmed summary judgment in plaintiff’s favor with respect to those calls.

In addition, it is important to keep in mind that while the Eleventh Circuit’s decision provides strong support to limit the scope of liability under the TCPA, the Ninth Circuit has held that dialing numbers from a stored list “automatically” will trigger the TCPA’s protections. In addition, there is uncertainty in many other jurisdictions as to the type of technology that will qualify as an ATDS and the FCC still has not issued its order on remand following the D.C. Circuit’s ruling in *ACA Int’l. See* www.adlawaccess.com/2019/03/articles/taking-stock-of-the-tcpa-in-2019-what-is-an-autodialer/. Further, it remains to be seen whether the Supreme Court will take up the issue of the appropriate

definition of ATDS presented by the appeal in *Duguid v. Facebook, Inc.*, in addition to the constitutional challenge it has already accepted in *Barr v. American Association of Political Consultants, Inc.* on January 10, 2020.