

Eastern District of Pennsylvania Denies a Motion to Dismiss Claim Based on Alleged Use of an ATDS

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The Eastern District of Pennsylvania recently denied a motion to dismiss a TCPA claim, finding that the plaintiff had standing, that the court had jurisdiction, and that the plaintiff had adequately alleged that an ATDS had been used to place the call at issue. See *Shelton v. Nat'l Gas & Elec., LLC*, No. 17-4063, 2019 WL 1506378 (E.D. Pa. Apr. 5, 2019).

The plaintiff owns a professional judgment collection agency called “Final Verdict Solutions.” *Id.* at *1. Its website “warns telemarketers ... that he will sue them if they violate the TCPA.” *Id.* at *5. The website also lists the plaintiff’s cell phone number as his business number. *Id.* at *4. The defendant is alleged to have called the plaintiff’s cell phone using an ATDS, leaving a voicemail that included a “distinctive click and pause.” *Id.* at *1.

The defendant moved to dismiss on constitutional and prudential standing grounds as well as on personal jurisdiction grounds; however, the more interesting portion of the opinion dealt with whether the plaintiff had sufficiently pleaded that an ATDS had been used to place the call.

The defendant argued that, in light of the March 2018 D.C. Circuit determination in *ACA International*, the plaintiff had failed to allege that the defendant had used an ATDS. *Id.* at *8. The court disagreed, finding that the allegations—in particular the

allegation regarding a “distinctive click and pause”—raised a “plausible inference that Defendant used a predictive dialer with the present capacity to generate and dial phone numbers.” *Id.* at *11. It observed that, at the pleading stage, it “cannot require a plaintiff to make allegations regarding the technical aspects of a device, including the precise levels of human intervention needed to place a call, when he or she has no way of knowing those details prior to discovery.” *Id.* The court therefore denied the motion to dismiss. *Id.*

It should be noted that this particular plaintiff is quite serious about his website’s warning to sue telemarketers that allegedly violate the TCPA. Indeed, he has filed no fewer than 29 TCPA specific actions and has received approximately 30 judgments totaling over \$100,000. *See, e.g., Shelton v. Target Advance LLC.*, No. 18-2070, 2019 WL 1641353, at *1 (E.D. Pa. Apr. 16, 2019). He also has outstanding judgment receivables worth over \$600,000. *Id.* at *1, 5 (denying, in part, defendant’s summary judgment motion due to a factual issue regarding whether the “sole purpose” of plaintiff’s company was to “drum up TCPA litigation by inducing business-to business robocalls”). While the court here denied the defendant’s motion to dismiss, there is ample room for others to look at the facts and the law and to rule differently.

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