Those of you following TCPAWorld.com’s daily TCPA filing counter know that the cases continue to pour in. 14 more cases were filed today. It seems the combined impact of Glasser and a SCOTUS review are simply not enough to stop the onslaught. And a case out of New Jersey on Friday helps to explain why.

In Johnson v. Comodo Group, Case No. 16-4469, DKT # 221 (D. N.J. Jan. 31, 2020), the Court denied summary judgment to the Defendant concluding that the use of a predictive dialer per se triggers TCPA coverage under the plain language of the statute. The Court also held that pre-recorded voicemails trigger the TCPA—even where a live caller is on the line to play the message—and concluded that willfulness does not require knowledge that the TCPA is being violated. Eesh. (Case is available here: Johnson MSJ Order)

On the ATDS issue, the Court first recognizes the ongoing split of authority around the TCPA’s ATDS definition. Although the Plaintiff invited the Court to rely on the 2003 and 2008 predictive dialer rulings the Court ultimately concluded that
doing so was unnecessary to deny the motion. Instead, the Johnson court concludes that even under the statutory language a predictive dialer qualifies, and cites to Marks for support. So the popular VICIdialer is, definitively, an ATDS—at least in the view of one court.

That is just the start of the bad news for the Defendant, however. Defendant argued—rather convincingly—that the TCPA should only apply to messages played to a live call recipient; not to voicemails. Moreover the Defendant used quite a bit of human intervention in leaving voicemails—each one was initiated by an agent specifically pushing a button to play the message. The Court was unmoved. Without providing much analysis the Court observed that many courts have found voicemails subject to the statute and pointed out that Defendant failed to cite to any authority supporting its position.

The Court also concluded that a party can be guilty of a “willful” violation of the TCPA where they were “warned” by the manufacturer of the dialer to scrub numbers. The Court was unmoved by Defendant’s argument that it thought calls to business numbers did not trigger the TCPA.

As Johnson demonstrates, TCPAWorld remains a dangerous place. While the Eleventh Circuit has cleaned up some of the TCPA mess, the statute continues to plague callers in the rest of the country. More to come.

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