In back-to-back decisions bound to have significant impact on Telephone Consumer Protection Act (TCPA) class action litigation, the Eleventh and Seventh Circuit Courts recently reached similar conclusions, narrowly holding that the TCPA’s definition of Automatic Telephone Dialing System (ATDS) only includes equipment that is capable of storing or producing numbers using a “random or sequential” number generator, excluding most “smartphone age” dialers. Each court expressly rejected the Ninth Circuit’s more expansive interpretation from a ruling in 2018, concluding that the TCPA covers any dialer that calls from a stored list of numbers “automatically”. These decisions are significant as most technologies in use today only dial numbers from predetermined lists of numbers.

One of the most complex issues under the TCPA is determining whether the technology utilized qualifies as an ATDS. The TCPA prohibits using an ATDS to make
calls to cell phone numbers, absent prior consent of the called party. The complexity lies with the TCPA’s definition of 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.*

When the TCPA was enacted in 1991, most American consumers were using landline phones, and Congress could not begin to contemplate the evolution of the mobile phone. The Federal Communications Commission (FCC) with its 2015 Declaratory Ruling & Order (2015 Order), attempted to provide clarifications on the TCPA for the mobile era, including the definition of ATDS and what devices qualify. The 2015 Order only complicated matters further, providing an expansive interpretation for what constitutes an ATDS, and sparking a surge of TCPA lawsuits in recent years. The FCC’s expansive definition in the 2015 Order was *set aside by the D.C. Circuit Court in March 2018.*

The Eleventh Circuit three-judge panel opinion concluded simply, “In the age of smartphones, it’s hard to think of a phone that does not have the capacity to automatically dial telephone numbers stored in a list, giving §227 [of the TCPA] an ‘eye-popping sweep’...Suddenly an unsolicited call using voice activated software (think Siri, Cortana, Alexa), or an automatic ‘I’m driving’ text message could be a violation worth $500...Not everyone is a telemarketer, not even in America.”

In the case before the Eleventh Circuit, the plaintiffs alleged that they had received over a dozen unsolicited calls over a one-year period, from the defendants. While the defendants acknowledged that that they had indeed placed the calls, they argued that this was not a TCPA violation, as their calling system required too much “human intervention” to qualify as an ATDS. The Court agreed with the defendants, finding that in each element of the calling system, there was a “human’s involvement” – from the marketing team creating a “set of parameters” regarding who they intended to contact, to a team of employees programing the “criteria” into the system, a team that reviews the final call list, and finally a team that presses a button labeled “make the call”. “Unless and until the employee presses this button, no call goes out...far from automatically dialing phone numbers, this system requires human involvement to do everything except press the numbers on a phone.”

Last week, less than one month after the Eleventh Circuit’s ruling, the Seventh Circuit, with a similar fact pattern reached a similar conclusion. The Seventh Circuit noted that accepting the plaintiffs’ arguments against the defendant’s dialing system would have “far-reach consequences...it would create liability for every text message sent from an iPhone. That is sweeping restriction on private consumer conduct that is inconsistent with the statute’s narrower focus”. The Seventh Circuit also emphasized the historical intention of the TCPA.

“The [defendant’s] system, like others commonly used today, pulls and dials numbers from an existing database of customers rather than randomly generating them... Determining whether such systems meet the statutory definition has forced courts to confront an awkwardness in the statutory language that apparently didn’t matter much when the statute was enacted: it’s not obvious what the phrase “using a random or sequential number generator” modifies. The answer to that question dictates whether the definition captures only the technology that predominated in 1991 or is broad
As we reported last week, several petitions are currently before the Supreme Court addressing issues with the TCPA, all with the potential to significantly impact the future of TCPA class action litigation. Particularly relevant to the Eleventh and Seventh Circuit rulings, back in October of 2019, the Court was petitioned to review the following issues: 1) whether the TCPA’s prohibition on calls made by an ATDS is an unconstitutional restriction of speech, and if so whether the proper remedy is to broaden the prohibition to abridge more speech, and 2) whether the definition of “ATDS” in the TCPA encompasses any device that can “store” and “automatically dial” telephone numbers, even if the device does not “us[e] a random or sequential number generator.” The Court has still not announced whether it will accept this petition.

The future of the TCPA remains uncertain, and 2020 will hopefully provide clarity for organizations facing TCPA class action litigation. While it appears that courts are generally leaning towards the narrowing of the TCPA in a myriad of aspects, organizations are still advised to err on the side of caution, during this period of uncertainty, when implementing and updating telemarketing and/or automatic dialing practices.

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