The seesaw battle over the ATDS definition carries on, and although Defendants certainly appear to be winning the war, Plaintiffs are still picking up wins in skirmishes here and there. This is especially true, it seems, in battles at the pleadings stage.

Just yesterday, for instance, a Magistrate Judge in Delaware recommended denying a motion to dismiss a TCPA claim on ATDS grounds. In Davis v. D.R. Horton, Case No. 19-cv-01686, Doc. No. 25 (D. De. March 16, 2020) the Court concluded that allegations the Defendant used a CallFire mass texting system were sufficient to survive the pleadings stage. Ruling here: Ruling Denying Motion to Dismiss.

The Defendant had argued in its motion that an ATDS requires random or sequential number generation. The Plaintiff countered that the text messages at issue were, indeed, seemingly random in that they were impersonal in nature and mere generic advertisements. Defendant countered that the messages were not random but were actually targeted to real estate professionals in a specific geographic area, but those facts were not pleaded in the complaint and could not be accepted as true.
The Court was also disinclined to consider the content of CallFire’s website with respect to how the platform operated. In the Court’s view that website could be changed and, more basically, the Court was not inclined to accept representations on a website as unshakable truth at the pleadings stage of litigation.

Notably, the Court seemed somewhat inclined to adopt a statutory approach to the ATDS definition—which is certainly the majority position nationwide—but simply could not bring itself to definitively conclude CallFire’s system does not meet that definition at the current stage of the case.

Presumably the Defendant will have more success at the summary judgment phase but, for now at least, CallFire remains a “plausible” ATDS.

We’ll keep an eye on this.

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