Mobile Alphabet Soup...What Exactly Is an Automatic Telephone Dialing System (ATDS) under the Telephone Consumer Protection Act (TCPA)?

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An Important Issue for Text-Message Marketers

There has been an uptick in litigation under the federal Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227 — likely due to the increased use of mobile marketing (not to mention the availability of statutory damages between $500 and $1,500 per violation). And with the growth of easy technologies to reach smartphone users, compliance remains a careful proposition...FCC Commissioner Michael O’Rielly, in a blog post, suggested that as the FCC and the courts have interpreted the TCPA in the face of new technologies, “the rules have become complex and unclear.” Not surprisingly, companies have filed petitions with the FCC seeking clarification on how the latest marketing techniques and customer contact methods are covered under the TCPA. However, except for a few situations, the FCC has yet to process the backlog of petitions for rulemaking or declaratory rulings.

Even as companies strive to offer users new services and social applications that facilitate communication and streamline e-commerce transactions, they are rightfully concerned they might misinterpret some provision of the TCPA and face a class action suit.

In the last decade, the legal debate surrounding the TCPA was over whether a text message was a “call” under the statute (it is) and whether the statute was implicated, absent certain exceptions, even if the user is not charged for receipt of a text message (it is). In recent years, different legal issues are at the forefront: the contours of express consent and revocation of consent, the definition of non-telemarketing calls, a safe harbor for non-marketing calls and messages to discontinued mobile numbers, the status of one-time confirmatory text messages, class action certification, jurisdictional questions, as well as what constitutes an automatic telephone dialing system (an “ATDS”) under the statute. Indeed, the latter issue – whether or not the call was made using an ATDS – is often the focus in the early stages of litigation since it is a prima facie element of a TCPA claim and companies try to knock out suits based upon the argument that the equipment used to transmit the messages in question does not implicate the TCPA.

Generally speaking, the three elements of a TCPA claim are: (1) the defendant called a cellular telephone number; (2) using an automatic telephone dialing system — the ATDS; (3) without the recipient’s prior express consent. The term ATDS means equipment that 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.” 47 U.S.C. § 227(a)(1). Importantly, a system need not actually store, produce, or call randomly or sequentially generated numbers, it need only have the capacity to do it. The current debate is over what it means for an autodialing device to have the “capacity” to generate random numbers — whether that capacity may be theoretical or whether the device must possess the present capacity at the time the messages were transmitted.

A recent Illinois district court decision arguably took an expansive view of the definition of an ATDS in a dispute involving an allegedly unsolicited promotional text message sent by the social network, Path, Inc. In Sterk v. Path, Inc., No. 13-cv-02330 (N.D. Ill. May 30, 2014), the court ruled that the equipment Path used to send the text
message was an ATDS, even though such equipment did not actually make the call using a random or sequential number generator.

The Ninth Circuit and a number of other courts have held that the operative determination is whether the equipment used to place a call could possibly be used to store or produce phone numbers using a random or sequential number generator, not whether the equipment was actually used in such a way to place the call or send the text messages at issue. However, marketers have pointed out that this definition must have some outer limit because every smartphone could conceivably be engineered to store or produce numbers using a random or sequential number generator by simply downloading an app. The TCPA, the marketers note, surely does not mean to define every telephone or device as an ATDS subjecting the sender to liability for every unsolicited call or text message to a mobile phone. Underneath this backdrop, courts have wrestled with whether the definition of an ATDS should rely on present capacity or potential capacity.

In a narrow ruling, the District Court for the Northern District of Alabama court ruled that a telephone system is only covered by the TCPA if, at the time the calls at issue were made, the system had the capacity, without “substantial modification or alteration,” to store or produce numbers using a random or sequential number generator, even if the sender did not use that automatic dialing capacity. See Hunt v. 21st Mortgage Corp., 2013 WL 5230061 (N.D. Ala. Sept. 17, 2013), further proceedings at Hunt v. 21st Mortgage Corp., 2014 WL 426275 (N.D. Ala. Feb. 4, 2014). To meet the TCPA definition of an “automatic telephone dialing system,” the Hunt court stated that a system must have a present capacity, at the time the calls were being made, to store or produce and call numbers from a number generator, otherwise the sender cannot be liable under the TCPA. This limitation of “present capacity” was echoed by a California state court in Stockwell v. Credit Management, L.P., No. 30-2012-00596110 (Cal. Super., Orange Cty. Oct. 3, 2013). The Stockwell court focused on the present capacity of the defendant’s equipment, granting summary judgment in favor of the defendant because its calling device did not have a number generator.

The court in Sterk v. Path, Inc. arguably took a more expansive view of what constitutes an ATDS. The Illinois court relied on FCC decisions that stated that an ATDS may include predictive dialing equipment that automatically dial numbers from a stored list without human intervention, even when the equipment lacks the capacity to dial telephone numbers using a random or sequential number generator. Following the FCC’s guidance, the court stressed the main requirement for an ATDS is not the capacity to generate random or sequential numbers, but rather to “dial numbers without human intervention.” See e.g., In re Rules & Regulations Implementing the TCPA, 18 FCC Rcd. 14014 (FCC 2003). The court found that the equipment used by Path, which sent messages from a stored list without human intervention, was comparable to the predictive dialers that have been found by the FCC to constitute an ATDS – “The uploading of call lists from Path users is essentially the same as when a call list is entered by a telemarketer in a database. It is the ultimate dialing from the list by the automated equipment that is the violation of the TCPA.” Path argued “human interaction” was present when users affirmatively clicked through prompts to upload their phone contacts to Path’s list, but the court stated that such conduct merely pertained to the collection of numbers, not the act of calling.

The court also rejected Path’s argument that such an interpretation would lead to the “absurd” result that every cell phone that could make calls from a list is an ATDS. The Path court reasoned that the TCPA only prohibits improper use of an ATDS and that if a person uses a mobile phone to send countless unsolicited text messages that produce the harm envisioned under the statute, “it would not be an absurd result to find that the cell phone user had violated the TCPA.”

Given the potential exposure of a TCPA action involving numerous messages, companies will continue to use the ATDS defense to try to obtain a dismissal during the early stages of a case following limited discovery. While it is a technical, factually-dependent argument that may require expert declarations explaining the capabilities of the dialing equipment in question, it is often more preferable than trying to argue consent, particularly given the stricter telemarketing rules that went into effect in October 2013. As discussed, several decisions have been defense-friendly in limiting the scope of the ATDS definition, yet without clear guidance from the FCC, each court may take its own route to an interpretation. As always, companies should stay abreast of developments and review their mobile marketing practices and procedures to ensure that they are in compliance.

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