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Seventh Circuit Joins The Party: Another Circuit Rejects Marks And Holds A Random or Sequential Number Generator Is Required For A System to be An ATDS

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Turns out words do have meaning, at least in the Third, Seventh, and Eleventh Circuits. Earlier today, a unanimous Seventh Circuit panel followed the plain language of the TCPA and held that a system must store or produce numbers, using a random or sequential number generator, to be an ATDS. *See Gadelhak v. AT&T Services*, No. 19-1738 (7th Cir. Feb. 19, 2020). And because the defendant's system dialed from a list of numbers stored in a database, it is not an ATDS, and "unwanted" text messages did not violate the TCPA.

Gadelhak is significant on multiple fronts. Most importantly, it became the second Circuit Court to reject *Marks* by name, making the circuit split 3-1 in favor of the statutory definition. Almost as significant, however, is the Seventh Circuit's reasoning.

The court began by noting that when the TCPA was enacted, telemarketers relied primarily on systems that randomly generated telephone numbers and then dialed them. Thus, the statute's "awkwardness," to use the Court's term, did not have much of an impact. The TCPA plainly applied to the type of systems Congress found problematic — namely, systems that generated and called random numbers.

And despite acknowledging at least some awkwardness in the definition of an ATDS, the Seventh Circuit reasoned that the Third and Eleventh Circuit interpretation is "the most natural one based on sentence construction and grammar." Which is not surprising. A statutory definition requiring a random or sequential number generator means that a system must actually have a random or sequential number generator to qualify.

When advocating for a broader definition of an ATDS, the Ninth Circuit and plaintiff's attorneys typically argue that the random or sequential number generation requirement only applies to "producing" numbers, not to "storing" them. Thus, they argue, so long as a system stores numbers to be called automatically, it is an ATDS.

But as the Seventh Circuit pointed out, systems in use in 1991 and 1992 would "store" numbers that were randomly or sequentially generated for lengthy periods of time and then dial them throughout the course of a telemarketing campaign. Faced with systems that performed in this manner,

Congress had every reason to include the word “store” in the statute. Otherwise, Congress would have left a gaping hole in the statute that would have excluded systems used by telemarketers at the time.

The Seventh Circuit further noted that jettisoning the random or sequential number generation requirement would be inconsistent with the “narrow” purpose of the TCPA. It therefore rejected the Ninth Circuit’s “ungrammatical interpretation,” in part because “it would create liability for every text message sent from an iPhone.” As the court observed, every iPhone is able to “store” numbers and then text or call them. Leaving the word “store” on an island, standing alone and unmodified, would therefore turn a once narrowly focused statute into a behemoth broad enough to capture commonly used personal phones.

The Seventh Circuit correctly reasoned that such a broad interpretation would be at odds with the plain language of the TCPA and its narrow focus. And that is certainly the case. As we have remarked several times here at TCPAWorld, the TCPA was enacted with a very narrow focus: prohibiting random-fire telemarketing calls. It simply was not passed to be a panacea against every form of “unwanted” telephone call or text.

Gadelhak is a tour-de-force of statutory construction and legislative history. It took an in-depth view of n the plain language of the TCPA and — significantly — of the reasons Congress included that plain language. And it provides a clear roadmap for future courts and the FCC, as they continue to litigate the definition of an ATDS.

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