

## TCPA Developments on Definition of ATDS Continue Full Steam in Midst of Global Pandemic

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COVID-19 has closed courts and delayed hearings and trials across the country, but developments concerning the definition of an automatic telephone dialing system have continued unabated. Over the past few months, courts have continued to address the ATDS definition, resulting in a deepening split over this question of statutory interpretation.

### **Second Circuit Holds that an ATDS Includes Devices that Dials from a List of Telephone Numbers**

In *Duran v. La Boom Disco, Inc.*, 955 F.3d 279 (2d Cir. 2020), the Second Circuit held that “a dialing system that merely stores a list of numbers, even if it does not store or produce it using a random-or sequential-number-generator, can still qualify as an ATDS.”

In reaching its conclusion the Court undertook a two-part analysis.

First, the Court examined whether the texting programs used by Defendant LaBoom have the “capacity ... to store or produce telephone numbers to be called, using a random or sequential number generator.” The Court found the clause requiring use of “a random or sequential number generator” modifies only the verb “produce,” not the word “store.” The Court concluded this reading of the statute was the most logical because it gives each verb independent significance. Otherwise, according to the Court, the verb “store” would be redundant.

Therefore, the Court held that an ATDS includes a device that has the capacity to (1) store telephone numbers or (2) produce telephone numbers using a random or sequential number generator. In the Court’s view, devices that merely “store” a list of numbers (even if they are generated using a non-random or non-sequential number generator) is enough to qualify as an ATDS.

The Second Circuit also reasoned that the TCPA’s exemption for calls made to collect on a federally-backed debt only makes sense if an ATDS included calls or text messages generated from a list of telephone numbers because the government does not haphazardly call people at random to collect money.

The Court, in a surprising move, also acknowledged that the FCC’s 2003 and 2008 predictive dialer

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rulings may still be good law. The Court directly rejected the notion that its prior decision in *King v. Time Warner Cable Inc.* 894 F.3d 473 (2d Cir. 2018) set aside the FCC's prior predictive dialer rulings and instead acknowledged that *ACA Int'l v. FCC*, 85 F.3d 687 (D.C. Cir. 2018) only set aside the FCC's 2015 Order on ATDS.

In the second part of the analysis, the Court went on to address whether Defendant La Boom's texting programs have the "capacity...to dial such numbers." The Court noted that the FCC has stated this capacity exists when a device can dial numbers without human intervention. Here, the Court rejected the district court's conclusion that human-selected timing of when to send out calls or texts is determinative of human intervention. Rather, the Court focused on the act of hitting the "send" button. It found that such action was not enough to be considered human intervention because clicking the "send" button was akin to initiating a mass text campaign, but the system was the one doing the automatic "dialing." Thus, the Court concluded that LaBoom's texting programs did not require human intervention in order to dial.

### **District Courts Continue to Weigh in on the ATDS Definition**

While the *Duran v. LaBoom* case is probably the most notable ATDS development recently, lower courts have also continued to grapple with the ATDS definition, with some courts finding a heightened pleading standard in light of the new ATDS rulings.

#### **1. District Courts in Western District of Missouri and District of Rhode Island hold that an ATDS is a device that has the capacity to randomly and sequentially generate numbers**

In *DeCapua v. Metro. Prop. & Cas. Ins. Co.*, No. CV 18-590 WES, 2020 WL 1303248 (D.R.I. Mar. 19, 2020), the Court granted Defendant's motion to dismiss on two separate grounds. First, it held the dialing platform allegedly used (EZ Texting) required too much human intervention to qualify as an ATDS. As alleged in the Complaint, the system required humans to upload and store a list of numbers from outside the system, select recipients from "groups" of stored numbers, draft the message, select the time for delivery, and finally review and send the message. Second, the Court followed the Third, Seventh and Eleventh Circuits in holding that to qualify as an ATDS, a system must be able to randomly or sequentially generate telephone numbers. And since the EZ Texting system does not have the present capacity to randomly and sequential generate numbers, it was not an ATDS.

In *Hand v. Beach Entm't Kc*, No. 4:18-cv-00668-NKL, 2020 U.S. Dist. LEXIS 80201 (W.D. Mo. Apr. 27, 2020) and *Smith v. Truman Rd. Dev., LLC*, No. 4:18-CV-00670-NKL, 2020 WL 2044730 (W.D. Mo. Apr. 28, 2020), the court found that "in order to qualify as an ATDS, a device must have the capacity to generate numbers randomly or sequentially." The Court rejected the Ninth Circuit's *Marks v. Crunch San Diego, LLC*, 904 F. 3d 1041 (9th Cir. 2018) interpretation of the statutory definition of an ATDS in favor of the Eleventh Circuit's interpretation in *Glasser v. Hilton Grand Vacations Company, LLC*, 948 F.3d 1301 (11th Cir. 2020) which found the verbs "to store or produce" both modified the phrase "using a random or sequential number generator." Thus, the Court granted Defendant's motion for summary judgment as to Plaintiff's TCPA claim finding that the system Defendant used did not have the capacity to randomly or sequentially generate numbers.

#### **2. District Court in Seventh Circuit finds that pleading standards are heightened after *Gadelhak***

In **Perez v. Quicken Loans, Inc.**, No. 19-CV-2072, 2020 WL 1491145 (N.D. Ill. Mar. 27, 2020), the Court dismissed Plaintiff's Complaint at the pleadings stage finding that "light of *Gadelhak* and the D.C. Circuit's decision in *ACA Int'l v. FCC*, 885 F.3d 687, 703 (D.C. Cir. 2018), it is fair to conclude that the standards for pleading and proving a claim under section 227(b)(1)(iii) have been raised, especially in regard to the [ATDS] element." *Id.* at \*2. Specifically, the Court found the allegation that plaintiff heard a "pause" before an agent came on the line was not sufficient to allege ATDS use after *Gadelhak*. Notably, the Court stated that "it ...cannot be the case that every barebones TCPA claim can survive a motion to dismiss by alleging unwanted calls and a short period of dead air when the call is answered."

### 3. District courts within circuits that have already ruled on the ATDS issue continue to follow its circuit's decision

In **Hagood v. Portfolio Recovery Assocs., LLC**, No. 3:18-CV-1510-NJR, 2020 WL 1308388, at \*5 (S.D. Ill. Mar. 19, 2020), the Court followed the *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458 (7th Cir. 2020) decision in holding that an ATDS must randomly or sequentially generate telephone numbers. Thus, the Court granted Defendant's motion for summary judgment on the TCPA claim finding "there is no evidence that the Avaya Proactive Contact Dialer used by PRA has the capacity to store or produce random or sequential telephone numbers and dial them. And the Avaya system is not an ATDS merely because it reorganizes pre-programmed telephone numbers into a list in a different sequence." *Id.* at \*5

In **Eisenband v. Pine Belt Auto., Inc.**, No. CV178549FLWLHG, 2020 WL 1486045 (D.N.J. Mar. 27, 2020), which is pending with the Third Circuit, unsurprisingly followed *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 119 (3d Cir. 2018) in finding that the 2003 and 2008 FCC Orders were invalidated by *ACA Int'l*. Thus, the Court held "to qualify as an ATDS, a system must randomly or sequentially generate numbers, and, accordingly, any system that dials numbers from a preprogrammed list does not fall within the statutory definition." *Id.* at \*6.

As demonstrated by these cases, courts continue to remain split over the interpretation of the definition of ATDS. While the Supreme Court has recently shown interest in granting certiorari in TCPA cases involving broader issues, such as the First Amendment, and separation of powers, it is left to be seen if the high court will step in to resolve this split over the statutory interpretation of the TCPA.