

WORRYING TCPA TREND: More ATDS Cases Are Slipping Past the Pleadings Stage and Marketers Need to Take Note

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Following the U.S. Supreme Court's *Facebook* decision many plaintiff's lawyers have moved on from the ATDS claims, but Perrong has a sense that they may have given up too quickly. And recent cases look to be proving him right.

In *Yelton v. Affordable Insurance*, 2024 WL 262529 (S.D. Fl. Jan 24, 2024), for instance, the court allowed an ATDS claim past the pleadings stage simply because the messages at issue were not personalized and there was no alleged relationship between the marketer and the consumer.

In other words, all a consumer needs to do to allege a viable ATDS claim against a lead generator or marketer in the *Yelton* court's view is claim a lack of relationship with that company.

That is a pretty low bar, and one seemingly met in most TCPA cases arising out of a lack of express consent:

Here, Plaintiff has sufficiently pled that Defendant used an ATDS. Plaintiff had no previous relationship with Defendant and never provided his number to Defendant. DE 1 at ¶ 20. Within a span of less than twenty-four hours, he received three phone calls and only one of those phone calls resulted in a voicemail message. Id. at ¶¶ 12–13. These calls were not personalized and aimed to solicit the purchase of Defendant's insurance services. Id. at ¶¶ 13, 19. The voicemail message started three seconds after the recording began and seemed to be prerecorded. Id. at ¶ 14. Plaintiff's lack of authorization for the contact is relevant because it reduces the likelihood that Defendant specifically targeted Plaintiff and increases the likelihood of the use of an ATDS. The prerecorded voicemail message also reduces the likelihood that the initial callers involved people and not an automated system.

Recently lead generators and direct-to-consumer marketers have received pretty grim news from the FCC—specifically the entire webform consent infrastructure underlying lead generation is about to change massively.

While there is a big loophole in the order—it only applies to prerecorded, artificial voice and ATDS calls—cases like *Yelton* make it a lot harder for lead sellers and call centers to rely on this seeming loophole. That expands the impact of the FCC's new ruling and really emphasizes the need for

compliance with the rule—or the use of human selection systems where valid consent has not/cannot be obtained and verified.

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National Law Review, Volume XIV, Number 25

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