Published on *The National Law Review* https://natlawreview.com

Perrong Loses Massive ATDS Ruling: Third Circuit Court of Appeal Rejects Fn7 Argument and Follows Borden in Unpublished TCPA ATDS Ruling

Article By:

Eric J. Troutman

So the Third Circuit Court of Appeals just followed the Ninth Circuit's *Borden* ruling adopting a limited ATDS interpretation and it is a really big deal.

Making matters more fun, the case was brought by repeat-litigator turned attorney Andrew Perrong.

Now since Perrong has been a licensed attorney and he seems to have turned a new leaf.

That is to say, I haven't seen any recent rulings by federal courts chastising him for improper conduct. And he came on my podcast and generally behaved himself.

So I'd consider myself neutral on the guy for the moment.

Plus he did just give us a big win on the TCPA's ATDS definition, although he probably didn't mean to do that.

In *Perrong v. Montgomery County Democratic Committee,* 2024 WL 1651274 (3rd Cir. 2024) Perrong sued the Dems claiming they sent him a text message without consent. He alleged the device used to send the message was an ATDS because it used a randomizer to decide what number to send the message to from a list. The district court granted a motion to dismiss finding no ATDS was used and Perrong appealed.

Now the Third Circuit Court of Appeals has the most interesting ATDS take in the country so far. It rejects the "capacity" argument and look solely at the "use" of the system — plus it has an extremely broad definition of "equipment" so that if any integrated software has the required functionalities of an ATDS the entire system is an ATDS. In other words, everything is an ATDS and nothing is. Its weird and Nietzche-esque

But for all the nihilism of the *Panzarella* decision it didn't neatly answer the core question of the ATDS dialectic–what *precisely* are the required functionalities of an ATDS?

That's where the much more manageable *Perrong* ruling comes in.

There the Court holds: *Here, the defendants' calls were list-mode calls which, according to Panzarella, fall outside the scope of the TCPA's prohibitions. Perrong fails to explain how the defendants' method of calling risks dialing up emergency lines or tying up sequentially numbered business lines. This lawsuit is a case in point: Perrong received a targeted phone call (addressing him by name) that urged him to vote for a political party in his county's general elections. Thus, the defendants did not use an ATDS to call Perrong. See Beal v. Outfield Brew House, LLC, 29 F.4th 391, 395–96 (8th Cir. 2022); Borden v. eFinancial, LLC, 53 F.4th 1230, 1234– 35 (9th Cir. 2022)*

So no risk of random calls hitting random phone lines– no ATDS. Nice.

Court also expressly rejects footnote 7 arguments:

The gist of Perrong's argument is that in footnote seven of Duguid, the Supreme Court endorsed the proposition that a device using a number generator to select and dial phone numbers from a previously compiled list is also an ATDS. But we did not adopt this reading of Duguid in our subsequent decision in Panzarella. And our sister Courts of Appeals have rejected this precise argument on the ground that it takes the footnote completely out of context. Borden, 53 F.4th at 1236; Beal, 29 F.4th at 396. We concur with their persuasive reasoning and reject Perrong's interpretation of Duguid.

Wow!

So the Third Circuit Court of Appeals has (lightly) held that an ATDS is only an ATDS if it uses a randomizer to generation telephone numbers. Now this is definitively WRONG–see here–BUT it is good news for callers regardless. (Do remember, however, this is a non-binding decision–so the 3COA can change its mind!)

National Law Review, Volume XIV, Number 134