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Why Everyone Is Upset About The Third Circuit's Recent TCPA Decisions … And A Few Reasons Why They Shouldn't Be: Part II

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This is the second of two posts discussing the Third Circuit's recent TCPA decisions.
This one, Dominguez v. Yahoo, Inc., No. 14-1751 (3d Cir.), concerns the proper interpretation of the term "automatic telephone dialing system" ("ATDS"), which is front and center in the consolidated appeal from the FCC's July 10th Declaratory Ruling and Order.

Dominguez v. Yahoo:
What is an ATDS?

Judge Baylson of the Eastern District of Pennsylvania granted summary judgment in favor of Yahoo! because he found that its email-to-text alert system did not use an automatic telephone dialing system ("ATDS"). Plaintiff Bill Dominguez alleged that Yahoo! used an ATDS to send thousands of unsolicited text messages (27,809 over 17 months) to his cell phone. The text messages were part of a Yahoo! service that allowed account holders to have incoming email messages automatically truncated and forwarded to cell phones as text messages. One such account holder was Jose Gonzalez, who neglected to disable or update the service after his cell phone number was reassigned to Mr. Dominguez. Uninterested in Mr. Gonzalez's emails, Mr. Dominguez contacted Yahoo!, which told him that the service could only be stopped if the Yahoo! account holder (Mr. Gonzalez) disabled it himself. Mr. Dominguez then filed suit and sought statutory damages of at least $500 per text message, which would come to nearly $14,000,000 for him (before trebling) and an unknown but presumably enormous number for the putative class he hoped to represent.

One of the primary issues on summary judgment was whether the Yahoo! service used an ATDS, which the statute defines as "equipment which 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). Yahoo! argued that its system was not an ATDS because it did not use a "random or sequential number generator" to "store or produce telephone numbers to be called." Rather, its system only sent messages to a user that had authorized them and only when that user received an email. The plaintiff, on the hand, argued that the definition of an ATDS captured not only systems that can "store or produce" numbers randomly or sequentially, but also systems that can "dial … numbers" randomly or sequentially from a stored list.

The district court agreed with Yahoo!, finding that the plaintiff had not offered any evidence to show that its system had the capacity to randomly or sequentially produce telephone numbers (as opposed to simply storing telephone numbers). The district court rejected the plaintiff's reading of the statute, finding that it improperly focused on the manner in which calls are "dial[ed]" rather than how they are "store[d] or produce[d]." The district court also rejected the plaintiff's reliance on FCC rulings that purported to expand the definition of an ATDS to include predictive dialers that dial stored numbers without human intervention, finding that the FCC's statements were not entitled to Chevron deference because they contradicted statutory language that was clear and unambiguous. Dominguez took an appeal to the Third Circuit.

In a short non-precedential opinion, the Third Circuit vacated the district court's entry of summary judgment and remanded with instructions that the district court "address more fully in the first instance whether Yahoo!'s equipment meets the statutory definition." Dominguez, slip op. at 8. The plaintiffs' bar was quick to tout the ruling and make predictions about its impact (never mind that it is non-precedential) and suggestions that it endorsed an expansive definition of an ATDS (never mind that it instructed the district court to address that "in the first instance"). However, a careful review of the opinion reveals that it actually reaffirmed important rulings by the district court that may rein in attempts by the plaintiffs' bar to expand the ATDS definition.

First, the Third Circuit did not rule that the Yahoo! system was an ATDS. Rather, it vacated the entry of summary judgment because "[t]he only evidence Yahoo! can point to that is probative of whether its equipment has the requisite capacity is the conclusory affidavit of its expert." Id. at 8. As an aside, that turns the summary judgment standard on its head; if evidence the only evidence of the system's "capacity" came from the defendant, it follows that no such evidence came from the plaintiff, which would be reason enough to enter summary judgment in favor of the defendant even if the defendant had offered only "conclusory" evidence—or indeed no evidence at all. In any event, the opinion neither means that dialing platforms like the one used by Yahoo! are an ATDS nor precludes the district court in this case from finding on remand that the Yahoo! system is not one.

Second, the Third Circuit agreed with a critical holding that rebuffs some of the more expansive ATDS interpretations. Specifically, it agreed with the district court that, in order to qualify as an ATDS, a system must have the capacity to "store or produce" numbers randomly or sequentially, not merely the capacity to "dial" such numbers randomly or sequentially from a stored list. Id. at 7. In doing so, it endorsed a definition that is narrower than the one advocated by many plaintiffs and adopted by some courts.

Third, the Third Circuit left unanswered the question that likely will be at the center of TCPA litigation in the near future: how courts (including the district court in this case on remand) will treat the FCC's recent statements about the meaning of "capacity" in the definition of ATDS. To be sure, the Third Circuit correctly characterized the FCC's views that "capacity" mean potential ability, not "present ability." Id. at 6-7. But by no means did the Third Circuit indicate that it was endorsing that ruling, which is now the subject of consolidated Hobbs Act appeals to the United States Court of Appeals for the District of Columbia Circuit. Indeed, it is not even apparent from the opinion that the Third Circuit was aware of the pendency of those appeals, and the opinion suggests that in this particular case the plaintiff may have waived the "capacity" argument altogether by conceded below that a system's present capacity is the relevant consideration. In any event, the opinion does not shed any light on the practical implications of applying the FCC's interpretation to a particular dialing platform.

In short, while the Third Circuit's opinion is a short term setback to Yahoo! in this particular case, it does not appear to pose long term concerns to either Yahoo! specifically or defendants generally. To

the contrary, the opinion pushes back against efforts to ignore the clear statutory requirement that an ATDS must have the capacity to store or produce numbers using a random or sequential number generator, and largely skirts the critical question of how courts should treat the FCC's recent statements about the meaning of "capacity" in this context. TCPA observers looking for a case grappling with the implications of those statements will need to wait for another case (or for the proceedings on remand in this one).

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