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# Business Litigation Update

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## Sixth Circuit Agrees with Second and Ninth Circuits' Definition of ATDS

For years, courts have struggled with the definition of an automatic telephone dialing system (ATDS) under the Telephone Consumer Protection Act (TCPA), which generally bans the use of an ATDS to make phone calls without obtaining the called parties' express consent. In some jurisdictions, the definition of an ATDS may depend on the judge (as opposed to the jurisdiction), leaving attorneys and industry participants seeking guidance from the circuit court level.

That guidance has been unclear and slow to develop, and a split has recently emerged, with the Seventh and Eleventh Circuits taking a narrower approach (an ATDS must include random or sequential number generation and would thus not include a system where numbers are called from a stored list (predictive dialer)) and the Second and Ninth Circuits applying a broader definition (systems that call from stored lists are sufficient).

On July 29, in its decision in *Allan v. Penn. Higher Educ. Assistance Agency*, the Sixth Circuit deepened the circuit split, siding with the Second and Ninth Circuits and expressly disagreeing with the Seventh and Eleventh, when it concluded that a device that dials from a stored list qualifies as an ATDS.

### Background

In 1991, Congress enacted the TCPA to address Americans' frustrations with the onslaught of telemarketers. Put simply, the TCPA prohibits the use of an ATDS to call a cell phone without the prior express consent of the called party. Those who receive violative phone calls or text messages are afforded a private right of action that includes statutory damages of $500 to $1,500 per call.

In *Allan*, the plaintiffs claimed that they received hundreds of calls from their student loan servicer after revoking consent to be called. They sued the servicer in the U.S. District Court for the Western District of Michigan, alleging that the calls violated the TCPA.

The servicer claimed that because its system merely called numbers from a stored list and did not use a random or sequential number generator, it did not use an ATDS and the TCPA did not apply. The district court granted summary judgment for the plaintiffs and entered judgment in their favor for $176,500. The servicer appealed.

### Sixth Circuit Decision

The Sixth Circuit affirmed the district court's decision and found that the servicer's system met the definition of an ATDS.

According to the TCPA, an ATDS is equipment which has the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator; and" "to dial such numbers." While the Seventh and Eleventh Circuits interpret this definition to mean that an ATDS must use a random or sequential number generator, the Second and Ninth Circuits interpret it to include devices that store numbers to be called without the use of such a generator. For creditors calling defaulted debtors, the difference is crucial, as creditors do not dial random numbers to seek collection but do use systems that make automated calls using a list of accounts in default.

In deciding which interpretation to adopt, the Sixth Circuit first considered the TCPA's text which, like many jurisdictions, it concluded was ambiguous.

The Sixth Circuit then considered the TCPA in general and agreed with the Second and Ninth Circuits that the structure and context of the autodialer ban supported an interpretation of an ATDS that covered stored-number systems. It applied the rule of surplusage, reasoning that there would be no reason to except consented-to calls from the TCPA if it did not apply to systems that merely called from stored lists in the first instance.

Finally, the Sixth Circuit noted that Congress intended to crack down on automated calls themselves, and not just the technology making them possible. It rejected the Seventh and Eleventh Circuits' concern that an expansive definition of an ATDS would make the use of everyday smartphones subject to the TCPA. However, the Sixth Circuit acknowledged that its definition of an ATDS would apply to the use of smartphone autodialer software to call or message recipients *en masse*.

## Dissenting Opinion

Writing in dissent, Judge Nalbandian proposed a third interpretative approach to the definition of an ATDS. Based on the TCPA's text, history and FCC orders, he argued that the clause "using a random or sequential number generator" should be interpreted as modifying only the phrase "telephone numbers to be called" and not the words "store" or "produce."

The majority rejected Judge Nalbandian's approach, finding that it required a strained reading of the statute.

## Conclusion

Although the circuits are split on what qualifies as an ATDS, the U.S. Supreme Court should make this determination when it decides *Facebook Inc. v. Duguid* in its upcoming term. Until then, companies should be extremely cautious about using technology to place telephone calls and send text messages and ensure they have the consent required to comply with the TCPA.

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