Sixth Circuit weighs in at the 11th hour, rebalancing a circuit split on the definition of 'automatic telephone dialing system'

August 3, 2020

In the wake of the Supreme Court's grant of certiorari in a case which will settle the rift between US courts of appeals on the issue of what constitutes an "automatic telephone dialing system" (ATDS) under the Telephone Consumer Protection Act (TCPA),[1] the Sixth Circuit[2] published its split-balancing opinion in favor of a broader interpretation. Having decided that devices that dial from a stored list of numbers are subject to the ATDS ban, the Sixth Circuit's opinion reshuffled the deck, adding greater uncertainty to the Supreme Court's decision.

Despite the Eleventh,[3] Seventh[4] and Third Circuits,[5] deciding in favor of a circumscribed definition of an ATDS encompassing only those platforms which randomly or sequentially store or generate numbers, the Sixth Circuit went along with the Second[6] and Ninth Circuits[7]. The Sixth Circuit examined the structure and content of the autodialer ban to reach its conclusion. Ultimately, the Sixth Circuit found the exception for calls "made with the prior express consent of the called party" was key, because to permit such calls meant the called party had to have given its number to the calling entity to be stored and contacted. 47 U.S.C.A. § 227(b)(1)(A). Since these permitted calls were not made by randomly generating numbers, but by contacting pre-prepared lists of consenting individuals, the Sixth Circuit reasoned that the TCPA had to apply to stored-number systems, not just those that randomly or sequentially generate numbers.

The Sixth Circuit then looked to the TCPA's "purpose," which was to prohibit unwelcome intrusion of automated calls into the peace and quiet of our homes. This would occur regardless of whether the numbers are randomly generated or called from a pre-prepared list. The Court was further unfazed by the Eleventh Circuit's concern that an expansive interpretation of an ATDS could encompass everyday use of smart phones, determining that the concern was "unfounded" because the TCPA will only prohibit actual *use* of a smart phone as an ATDS, and not punish its capacity to be used as such.

Bringing its concise opinion to a swift close, the Sixth Circuit concluded that concerns regarding the long-term ramifications of a broad definition of an ATDS were nothing more than "a parade of horribles."

Practically speaking, the Sixth Circuit's opinion will remain the authoritative decision in this circuit for less than a year. The Supreme Court will ultimately have the final say in this case.

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1. *Supreme Court to settle circuit split on TCPA definition of 'automatic telephone dialing system ," Dentons Client Alert, July 21, 2020.*↩
2. *Susan Allan et al. v. Penn. Higher Ed. Assist. Agency, No. 19-2043 (6th Cir. 2020).*↩
3. *Glasser v. Hilton Grand Vacations Co., LLC, No. 18-14499 (11th Cir. 2020); Evans v. Penn. Higher Educ. Assistance Agency, No. 18-14586 (11th Cir. 2020).* ↩
4. *Gadelhak v. AT&T Svcs., Inc., No. 19-1738 (7th Cir. 2020).* ↩
5. *Dominguez v. Yahoo, Inc., 894 F.3d 116 (3rd Cir. 2018).*↩
6. *Duran v. La Boom Disco, Inc., No. 19-600-cv (2nd Cir. 2019).*↩
7. *Marks v. Crunch San Diego, LLC, 904 F.3d 1041 (9th Cir. 2018).*↩

Your Key Contacts

Nathan L. Garroway
Partner, Atlanta
D +1 404 527 4391
nathan.garroway@dentons.com

Mark A. Silver
Senior Managing Associate, Atlanta
D +1 404 527 4671
mark.silver@dentons.com

John McCauley, CIPP-US, CIPP-EU, CIPM
Partner, Indianapolis
D +1 317 968 5546
john.mccauley@dentons.com

Bety Javidzad
Partner, Los Angeles
D +1 213 623 9300
bety.javidzad@dentons.com

Taylor M. Koshak
Associate, Atlanta
D +1 404 527 4148
taylor.koshak@dentons.com

Ingrid A. Bohme
Shareholder, Pittsburgh
D +1 412 297 4615
ingrid.bohme@dentons.com

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