Court Rejects Broad Definition of 'Autodialer' Under TCPA

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The United States District Court for the Southern District of Florida recently addressed a critical threshold issue in cases brought under the Telephone Consumer Protection Act arising out of text messages or calls to cellphones: what constitutes an "automatic telephone dialing system" (commonly referred to as an "autodialer").

In De Los Santos v. Millward Brown Inc.,[1] the court rejected the broad interpretation of the phrase "automatic telephone dialing system" favored by the plaintiff-side TCPA class action bar.[2] Rather than finding that an autodialer is any equipment that can dial a list of numbers without human intervention, the court held that an autodialer must have the present capacity to generate random or sequential telephone numbers.

Beyond the decision itself, it is significant that the United States intervened as a party, and in defending the constitutionality of the TCPA, sided with those courts that have adopted the more narrow interpretation of "automatic telephone dialing system." The district court's decision and the government's position provide support for companies fighting these TCPA lawsuits.

Background

With certain exceptions, calling a person's cellphone absent an emergency or prior express consent from the called party violates the TCPA if the call is placed using an autodialer. The Federal Communications Commission and numerous courts have concluded that a text message is a "call" for purposes of the TCPA.[3] Thus, the TCPA's prohibitions have been invoked to address nonconsensual text messaging as well. Where calls or texts are at issue, a key question is whether the equipment used to place the call or send the text qualifies as an autodialer. If it does not, the claim fails.[4]

Congress defined "automatic telephone dialing system" 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."[5] Consistent with this statutory language and congressional intent, many courts have interpreted this provision to mean that only equipment with a present capacity to generate random or sequential numbers is covered by the TCPA.[6] Recently, in fact, two district courts and a California state court granted summary judgment to defendants charged with TCPA violations where the system used to place the calls at issue indisputably lacked the requisite capacity.[7]

A minority of courts, however, have interpreted "automatic telephone dialing system" expansively.[8] These courts have taken statements made by the FCC out of context to conclude that a device need not have the capacity to generate random or sequential numbers to qualify as an autodialer.[9] According to these courts, any equipment that can dial lists of numbers without human intervention qualifies as an autodialer. Today's smartphones have speed dial, group texting, and auto-response capabilities and therefore would qualify as autodialers under this expansive interpretation. Indeed, the most recent court to adopt the minority view acknowledged that under the expansive interpretation ordinary cell phones constitute autodialers for purposes of the TCPA.[10]

De Los Santos v. Millward Brown Inc.

The district court in De Los Santos recently confronted the autodialer issue, but did so in an odd posture. Typically, TCPA defendants argue in motions to dismiss or motions for summary judgment that autodialers must have the present capacity to generate random or sequential numbers, and that the equipment they used lacked that capacity, or that the allegations are insufficient to plausibly suggest use of equipment with such capacity. But in De Los Santos, the defendant urged the broad autodialer interpretation, and from there argued that the TCPA is unconstitutionally overbroad because it covers phone calls or texts sent from virtually any smartphone or computer, and therefore regulates far too much protected speech.[11]

The United States defended the TCPA's constitutionality. It took the position that interpreting the "automatic telephone dialing system" definition as requiring random or sequential number generation capacity safeguards the statute from unconstitutional overbreadth.[12] Specifically, the United States cited with approval Hunt v. 21st Mortgage Co., which held that to satisfy the statutory definition, the equipment at issue must "have a present capacity, at the time the calls were being made, to store or produce and call numbers from a number generator."[13] Furthermore, the United States rejected the proposition that smartphones or personal computers could qualify as an autodialer, relying on the analysis of In re Jiffy Lube, which found "'no support for [the proposition] that ... an iPhone or Black[]Berry'" is an autodialer[14] after concluding that number generation capacity is required to qualify.[15]

The De Los Santos court agreed with the United States and declined to read the TCPA expansively. It agreed with and cited a host of cases that have interpreted the definition of "automatic telephone dialing system" as requiring a present capacity to randomly or sequentially generate numbers.[16] Moreover, the court stressed that "[i]f autodialers included smartphones, or if autodialers included computers, then the Defendant could argue [constitutional] overbreadth."[17] Only because the court construed the autodialer definition to require a present capacity to generate random or sequential numbers, was the constitutional problem avoided.

Both the De Los Santos opinion and the brief filed by the United States thus provide support for defendants arguing that the TCPA does not apply to their conduct because they did not place a call or send a text message using equipment with a present capacity to randomly or sequentially generate numbers. In light of this decision, and the position taken by the United States, it would seem that the minority interpretation eschewing the number generator requirement can be challenged as unconstitutionally overbroad.

Guidance from the FCC and appellate courts would go a long way to end the uncertainty over the proper interpretation of "automatic telephone dialing system." At least seven petitions are pending before the FCC seeking clarification on this issue.[18] But until that guidance arrives, the De Los Santos opinion and the United States' brief provide a welcome assist to TCPA defendants.

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Disclosure: Wilson Sonsini Goodrich & Rosati, P.C., represents Path Inc. in Sterk v. Path (N.D. Ill.) in which the proper interpretation of "automatic telephone dialing system" is at issue.

[1] De Los Santos v. Millward Brown, Inc., No. 9:13-80670, slip op. (S.D. Fla. June 30, 2014) (ECF No. 66).

[2] United States Mem. In Supp. Of The Constitutionality Of The TCPA, De Los Santos (S.D. Fla. Jan. 31, 2014) (ECF No. 54).

[3] See, e.g., Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 951-54 (9th Cir. 2009); In re Rules and Regulations Implementing the TCPA, 18 FCC Rcd. 14014, 14115 (July 3, 2003) ("2003 Order").

[4] The TCPA also prohibits calls placed "using . . . an artificial or prerecorded voice," absent an emergency or prior express consent. 47 U.S.C. § 227(b)(1)(A)(iii). Recently, plaintiffs' attorneys have made the remarkable claim that a text message is an "artificial or prerecorded voice," and therefore the TCPA prohibits the sending of any nonconsensual text messages, regardless of the equipment used to send it. So far no court has adopted such a strained and broad interpretation of the TCPA.

[5] 47 U.S.C. § 227(a)(1) (emphasis added).

[6] See, e.g., Satterfield, 569 F.3d at 951; Dominguez v. Yahoo!, Inc., No. 13-1887, slip op. at 7-11 & n.6 (E.D. Pa. Mar. 20, 2014) (ECF No. 55); Gragg v. Orange Cab Co., No. C12-0576RSL, slip op. at 4-6 (W.D. Wash. Feb. 7, 2014); Stockwell v. Credit Mgmt., No. 30-2012-00596110, slip op. at 1-2 (Cal. Super Ct. Oct. 3, 2013); Lozano v. Twentieth Century Fox Film Corp., 702 F. Supp. 2d 999, 1010-11 (N.D. Ill. 2010); In re Jiffy Lube Int'l, Inc. Text Spam Litig., 847 F. Supp. 2d 1253, 1261 (S.D. Cal. 2012); Ibey v. Taco Bell Corp., No. 12-cv-0583-H, slip op. at 5-6 (S.D. Cal. June 18, 2012) (ECF No. 20).

[7] Dominguez, slip op. at 7-11 & n.6; Gragg, slip op. at 4-6; Stockwell, slip op. at 1-2.

[8] Legg v. Voice Media Grp., Inc., No. 13-cv-62044, slip op. at 5-8 (S.D. Fla. May 16, 2014) (ECF No. 99); Sherman v. Yahoo! Inc., No. 13-cv-0041, slip. op. at 9-12 (S.D. Cal. Feb. 3, 2014) (ECF No. 30); Sterk v. Path, No. 1:13-cv-02330, slip op. at 8-14 (N.D. Ill. May 30, 2014) (ECF No. 122).

[9] See Legg, slip op. at 5-8 (citing 2003 Order at 14,091-93); Sherman, slip. op. at 9-10 (citing 2003 Order at 14,091-93; In re Rules & Regulations Implementing the TCPA, 23 FCC Rcd. 559, 566 (2008) ("2008 Order")); Sterk, slip op. at 9-14 (citing 2003 Order at 14,091-93; In re Rules & Regulations Implementing the TCPA, 27 FCC Rcd. 15,391, 15,392 n.5 (2012)). For example, in in the context of deciding that a "predictive dialer"—telemarketing equipment that places calls using software that predicts when a live operator will be available to connect to the call when the recipient answers—falls within the statutory autodialer definition, the FCC stated that although in the past telemarketers "used dialing equipment to create and dial 10-digit telephone numbers arbitrarily . . . the evolution of the teleservices industry has progressed to the point where using lists of numbers is far more cost effective. The basic function of such equipment, however, has not changed-the capacity to dial numbers without human intervention." 2003 Order at 14,092.

[10] Sterk, slip op. at 13.

[11] De Los Santos, slip op. at 11-13.

[12] DOJ Br. at 10-11 & n.7.

[13] Id. at 11 n.7 (quoting Hunt v. 21st Mortg. Corp., No. 2:12-cv-02697, slip op. at 9 (N.D. Ala. Sept. 17, 2013) (ECF No. 31)).

[14] Id. at 8 (quoting Jiffy Lube, 847 F. Supp. 2d at 1261-62).

[15] See Jiffy Lube, 847 F. Supp. 2d at 1261 (citing Satterfield, 569 F.3d at 951). Notably absent from the United States' brief was any support for the notion that the FCC had somehow modified the TCPA's autodialer definition to eliminate the requirement for equipment to have the capacity to generate random or sequential numbers. To the contrary, it recognized that the TCPA "regulat[es] the 'capacity' to store or produce randomly or sequentially generated numbers." DOJ Br. at 9 n.5.

[16] De Los Santos, slip op. at 12-13 (citing Gragg, slip op.; Dominguez, slip op. at 7-10 & n.4; Jiffy Lube, 847 F. Supp. 2d at 1261).

[17] Id..

[18] See Milton H. Fried, Jr. and Richard Evans' Petition for Expedited Declaratory Ruling on Autodialer Issue, CG Docket No. 02-278 (May 27, 2014); TextMe, Inc.'s Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (Mar. 18, 2014); ACA International's Petition for Rulemaking, CG Docket No. 02-278 (Jan. 21, 2014); Glide Talk, Ltd.'s Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (Oct. 28, 2013); Professional Association for Consumer Engagement's Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking, CG Docket No. 02-278 (Oct. 18, 2013); YouMail Inc.'s Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (Apr. 19, 2013); Communication Innovators' Petition for Declaratory Ruling, CG Docket No. 02-278 (June 7, 2012).

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