

INSIGHT: Third Circuit Continues to Rein in Runaway TCPA Claims

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On June 26, the United States Court of Appeals for the Third Circuit issued an important decision that builds momentum toward imposing rational and appropriate limits on Telephone Consumer Protection Act claims.

In *Dominguez v. Yahoo, Inc.*, No. 17-1243, 2018 BL 226359, __F.3d __ (3d Cir. June 26, 2018), the plaintiff claimed that Yahoo violated the TCPA by sending unwanted text messages to his cell phone without his consent. Dominguez contended that the equipment that Yahoo used to send the texts qualified as an automatic telephone dialing system (“ATDS”), a necessary predicate for his TCPA claim. The TCPA defines an ATDS 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.

The FCC previously had adopted an expansive interpretation of what equipment could qualify as an ATDS. The FCC had held that equipment need not actually be used to dial numbers randomly or sequentially, and, in fact, need not even have any present capacity to dial numbers randomly or sequentially. It was sufficient, according to the FCC, for equipment to have some “latent or potential” (yet completely untapped) capacity to dial numbers randomly or sequentially in order to qualify as an ATDS, even if the calls or texts at issue were not placed randomly or sequentially.

Earlier this year, in a much-anticipated decision, the D.C. Circuit Court of Appeals rejected the FCC’s expansive interpretation of the TCPA. See *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). The D.C. Circuit held that the FCC’s rulings displayed a lack of reasoned decision-making and would lead to absurd results of “eye-popping sweep,” including that each and every smartphone in the United States would today be an ATDS because all smartphones would have the latent or potential capacity to dial numbers randomly or sequentially, by way of some new software or an app download.

Many courts have recognized the significance of ACA. *See, e.g., Marshall v. CBE Group, Inc.*, 2:16-cv-02406, 2018 BL 114096 (D. Nev. Mar. 30, 2018); *Herrick v. GoDaddy.com, LLC*, No. CV-16-00254, 2018 BL 176954, ___ F. Supp. 3d___ (D. Ariz. May 14, 2018). The FCC itself has acknowledged the impact of ACA by instituting new rule-making proceedings to address the need for regulatory guidance on ATDS issues in light of ACA. *See Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision*, 83 Fed. Reg. 26284 (June 6, 2018). However, a handful of holdout district courts have refused to acknowledge the full significance and impact of ACA. *See Swaney v. Regions Bank*, 2:13-cv-544, 2018 BL 180446 (N.D. Ala. May 22, 2018); *Maddox v. CBE Group, Inc.*, 1:17-cv-1909, 2018 BL 187786 (N.D. Ga. May 22, 2018); *Reyes v. BCA Financial Services, Inc.*, No. 16-24077, ___ F. Supp. 3d. ___, 2018 BL 170560 (S.D. Fla. May 14, 2018); *McMillion v. Rash Curtis & Associates*, No. 16-cv-03396, 2018 BL 215725 (N.D. Cal. June 18, 2018).

Dominguez eliminates any uncertainty in the Third Circuit regarding the impact of ACA. The *Dominguez* court recognized that ACA nullified the FCC's inappropriately expansive interpretation of the TCPA. "Dominguez can no longer rely on his argument that [Yahoo's system] had the latent or potential capacity to function as" an ATDS. Instead, in light of ACA, the Third Circuit held that Dominguez was obligated to prove that Yahoo's system had the "present capacity" to send texts randomly or sequentially.

The Third Circuit concluded that Dominguez failed to do so. Dominguez had submitted multiple expert reports, but those reports asserted, in essence, that, because Yahoo's system used computers, those computers had the present ability to be reprogrammed to do something that Yahoo's system was not then designed to do – send texts randomly or sequentially. The Third Circuit rejected those reports as inadequate and in conflict with ACA. Accepting those opinions as sufficient to qualify Yahoo's equipment as an ATDS would mean that every smartphone and computer would qualify as an ATDS, a result that ACA rejected.

According to the current FCC chairman, the TCPA has long been the "poster child for lawsuit abuse." ACA went a long way toward limiting those abuses. *Dominguez* will help in that effort.

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