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11th Circuit declines to perform 'surgery' on obsolete Telephone Consumer Protection Act provisions

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The 11th Circuit Court of Appeals joined the camp of courts that refuse to take on a legislative role and rewrite the TCPA, 47 U.S.C.A. § 227, with its ruling in *Glasser v. Hilton Grand Vacations Co.*, No. 18-14499, 2020 WL 415811 (11th Cir. Jan. 27, 2020).

In *Glasser*, the 11th Circuit concurred with, most prominently, the D.C. Circuit's interpretation of the TCPA and rejected the Federal Communications Commission's regulatory effort to cram the TCPA's aging statutory square peg into current technology's round hole.

Glasser's majority opinion is written with clarity. The opinion addresses the proper interpretation of the TCPA's definition of an "automatic telephone dialing system."

> The 11th Circuit held that the TCPA does not apply to predictive dialers, primarily because that technology and those telemarketing practices did not exist when Congress adopted the TCPA in 1991.

It specifically addresses whether a predictive dialing system — i.e., one that dials numbers automatically from a stored list of numbers rather than randomly or sequentially — qualifies as an ATDS under the statute.

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Congress did not clairvoyantly craft the TCPA's provisions to prohibit such technology or calls.

The *Glasser* majority opinion's more notable and quotable passages include:

- "There is plenty of evidence [in the TCPA's legislative history] that Congress wanted the statute to eradicate machines that dialed randomly or sequentially generated numbers. That indeed seems to have been the be-all and end-all of the law."
- "Congress in retrospect drafted the 1991 law for the moment but not for the duration. The focus on number generation eradicated one form of pernicious telemarketing but failed to account for how business needs and technology would evolve."
- "Before it tried to pour new wine into this old skin, the [FCC] had watched companies switch from using machines that dialed a high volume of randomly or sequentially generated numbers to using 'predictive dialers' that called a list of pre-determined potential customers. ... The shift in practice was understandable. Why call random telephone numbers when you could target the consumers who showed an interest in your product or actually owed a debt?"
- "The act's prohibition on artificial or prerecorded voices means that telemarketers who dial lists of telephone numbers have three options. They may obtain consumers' consent to robocalls. They may connect each potential customer with a human representative. Or they may face liability under the act. That's a fair balancing of commercial and consumer interests – one Congress is free to revisit but hardly one that is implausible."

Glasser adds another arrow to the quiver of TCPA defendants and defense counsel, and its logic and clarity will likely make it a particularly potent weapon.

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ABOUT THE AUTHOR

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