

Circuit Split Created as Eleventh and Seventh Circuits Narrowly Interpret Definition of Auto-Dialer Under the TCPA

2 min read

Feb 27, 2020

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We now have a split among federal circuits regarding the definition of an automatic telephone dialing system (ATDS), under the Telephone Consumer Protection Act (TCPA), which limits automated calls and text messages. What constitutes an ATDS has been debated both by the FCC and courts for quite some time. In 2008 and 2015, the FCC found that all predictive dialers were automated telephone dialing systems under the TCPA. In [Marks v. Crunch San Diego](#) in 2018, the Ninth Circuit, held that the TCPA applies to devices with the capacity to automatically dial telephone numbers from a stored list or devices that dial telephone numbers produced from a random or sequential number generator. Now, in [Glasser v. Hilton Grand Vacations](#) and [Gadelhak v. AT&T Services, Inc.](#), the Eleventh and Seventh Circuits have taken the opposite approach and found that an ATDS only includes equipment that dials randomly or sequentially.

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 Eleventh Circuit’s decision in *Glasser* demands “remember these words” before going into an extremely detailed reasoning of the definition, primarily focusing on the rules of grammar and legislative intent.

After commenting that the statute is not well-drafted, and much scrutiny of the phrase “using a random or sequential number generator,” the court in *Glasser* concluded that this clause

modifies both “store” and “produce.” This is because when two conjoined verbs (“to store or produce”) share a direct object (“telephone numbers to be called”), a modifier following that object customarily modifies both verbs. In *Gadelhak*, the Seventh Circuit agreed, noting it is “certainly the most natural one based on sentence



construction and grammar.” Both courts also found that the comma separating the phrase “to store or product telephone numbers to be called” from the phrase “using a random or sequential number generator” indicates the clause modifies both “store” and “produce.”

The Eleventh and Seventh Circuits both shared the concern that the expansive approach taken by the FCC—and later by the Ninth Circuit in *Marks*—would effectively make every smartphone in America an auto-dialer, and both courts found that such a result went too far. On the other end of the spectrum, if the statute is not interpreted to prohibit devices that automatically call a stored list of numbers, then perhaps nothing will stop telemarketers from inundating individuals with calls. Yet, under the Eleventh Circuit’s view in *Glasser*, telemarketers who dial lists of telephone numbers have three options under the TCPA: (1) they can obtain consumers’ consent to automated calls, (2) they can connect each potential costumer with a human representative, or (3) they can face liability under the TCPA.

With this split between the circuits, the issue may ultimately be decided by the U.S. Supreme Court.

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