

La Boom! Second Circuit Detonates Expanding Circuit Split over Auto-Dialer Definition Under TCPA

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Hinshaw [continues to](#) monitor the deepening circuit split over what constitutes an automatic telephone dialing system (ATDS) under the Telephone Consumer Protection Act (TCPA), which restricts certain automated calls and text messages. To say there has been substantial debate by the courts and FCC concerning what constitutes an ATDS would be putting it lightly. And, just when it seemed a majority position was emerging, the playing field seems to have leveled with the Second Circuit's decision in [Duran v. La Boom Disco, Inc.](#)

The 2003, 2008, and 2015, FCC Orders swept predictive dialers—technology that dials from a preprogrammed list—into the ATDS definition. Then, in *ACA International v. FCC*, the D.C. Circuit Court of Appeals invalidated the FCC Orders (*or did it?*), bringing litigants back to the federal courts, eventually resulting in a circuit split. In [Marks v. Crunch San Diego](#), 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. However, in [Glasser v. Hilton Grand Vacations](#) and [Gadelhak v. AT&T Services, Inc.](#), the Eleventh and Seventh Circuits took the opposite approach and found that an ATDS *only* includes technology that dials randomly or sequentially. Meanwhile, in [Dominguez v. Yahoo](#), the Third Circuit followed *ACA International* and found that the equipment Yahoo used to send text messages—its “Email SMS Service”—did not meet the definition of an auto-dialer because Yahoo's service sent messages only to numbers that had been individually and manually entered into its system by a user. Now, in *La Boom Disco*, the Second Circuit joins the Ninth Circuit, rejects the Eleventh and Seventh Circuit's definition of an ATDS, and also weighs-in on what constitutes “automatic” dialing by applying the as-of-yet undefined “human intervention test.”



Duran’s putative class action stems from his receipt of hundreds of text messages from La Boom Disco, Inc. La Boom sent these text messages through programs called “EZ-Texting” and “Express Text.” The dispute was whether those messages were sent using an ATDS. La Boom argued that the programs required too much human intervention when dialing to constitute an ATDS because they did not dial automatically. A human La Boom-er had to initiate the text campaign by clicking “send.” In granting summary judgment, the Eastern District of New York found that the singular click text campaign—which included hundreds of messages—was sufficient to constitute human intervention, so the programs were not an ATDS. Duran appealed.

The Second Circuit reversed finding that a “single click” that started a campaign of hundreds of messages was not sufficient human intervention to remove the programs from the definition of an ATDS. 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.*”

In assessing the history of the TCPA, the FCC’s prior Orders, and the plain language of the statute—and with a bit of mental gymnastics—the Second Circuit determined that the words “store” and “produce” were not both modified by the use of a “random or sequential number generator.” Contrary to the Eleventh and Seventh Circuit’s findings in *Glasser* and *Gadelhak*, the court found that the word “produce” is modified by the clause after the comma *using a random or sequential number generator*. Focusing on avoiding surplusage and maintaining Congress’ intent that each word in a statute has a purpose, the court determined that each verb in the statute has different meanings. Even though La Boom generated the call list and uploaded it to messaging programs by clicking “send,” as opposed to a software automatically generating the numbers, the programs met the “capacity to store numbers” requirement of an ATDS.

Having found that to “store” numbers uploaded by a human was sufficient to meet the first prong of the definition of an ATDS, the court went further than *Marks*, and dove into the amount of human intervention required to send the text messages from the programs, without defining the term “automatically.” The court focused on the difference between pressing “send” and individually “dialing” a number: “[C]licking ‘send’ is accomplishing a different task altogether, telling the ATDS to go ahead and dial a separate list of contacts, often numbering in the hundreds or thousands.” Therefore, the court found the programs are an ATDS subject to the TCPA.

The Second Circuit has now furthered the circuit split on what constitutes an ATDS under the TCPA, and the emerging majority has subsequently dissipated. This issue may ultimately be decided by the U.S. Supreme Court.

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Topics

TCPA, Telephone Consumer Protection Act, FCC, Circuit Split, Second Circuit Court Of Appeals, Automatic Telephone Dialing System, Auto-Dialer, ATDS, Human Intervention Test