

Second Circuit Expands Liability Under the Telephone Consumer Protection Act (TCPA)

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On April 7, 2020, the New York-based Second Circuit Court of Appeals handed down a ruling that will sweep a wider range of automated telephone calls and text messages under the protections of Telephone Consumer Protection Act (TCPA). Weighing in on an issue that has divided courts across the country, the Second Circuit adopted an expansive interpretation of the term “automatic telephone dialing system” (ATDS) under the TCPA. Because callers must obtain a recipient’s express consent to receive calls or texts placed using an ATDS, litigants and courts have hotly debated what dialing technology constitutes an ATDS. Under the Second Circuit’s ruling, most dialing systems that automatically call or text recipients using a stored list of numbers will now be deemed an ATDS. *Duran v. La Boom Disco, Inc.*, 2020 U.S. App. LEXIS 10861, at *22 (2d Cir. Apr. 7, 2020). In so ruling, the Second Circuit joined the Ninth Circuit and several district courts around the country in becoming a more plaintiff-friendly arena for TCPA lawsuits.

This year, four federal Circuit Courts have weighed in on the scope of technology that constitutes an ATDS. The Eleventh Circuit (Florida, Georgia, and Alabama) and the Seventh Circuit (Illinois, Indiana, Wisconsin) have ruled narrowly: in order for a telephone system to fall under the definition of ATDS, it must have the capacity to make calls or send messages to a “randomly or sequentially generated” list of numbers. Conversely, the Ninth Circuit (California and other western states) has ruled broadly: most systems that have the capacity to automatically dial numbers from any list—even if the list is manually compiled by the caller (a customer list, for example)—will be deemed an ATDS.

The Second Circuit also held that a dialing system is “automatic” even if a human, rather than a computer, chooses the timing of a call or text blast. The Second Circuit’s decision in *Duran* puts companies on notice that there will be more ATDS-related TCPA suits to come, especially on the East and West coasts, where courts have made clear that they have little tolerance for automatically generated calls or texts.

Tip: Now more than ever, companies should consider not only the content and frequency of their calls and texts, but also the tools used to deploy those messages, as well as reviewing their policies for procuring the requisite level of consent that may be required for any particular call or text campaign.

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