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Autodialer Ruling Will Reduce TCPA Flood In 11th Circ.

By **Allison Grande**

Law360 (January 29, 2020, 7:23 PM EST) -- The Eleventh Circuit will no longer be a top destination for robocall class actions, now that the appellate court has cemented a circuit split by dealing a fatal blow to plaintiffs' efforts to broadly define what counts as an autodialer.

In a published decision Monday, a three-judge panel rejected the stance that an "autodialer" as defined by the Telephone Consumer Protection Act includes equipment now commonly used by companies that dials from preexisting call lists.

"This is probably the most significant TCPA decision in a while, because it effectively ends modern-day text messaging and autodialer litigation in the Eleventh Circuit," said Mark Eisen, a TCPA defense attorney at Benesch Friedlander Coplan & Aronoff LLP.

That outcome is significant given that the Eleventh Circuit includes Florida, where a huge volume of TCPA cases seeking uncapped statutory damages of between $500 and $1,500 per occurrence have been filed in recent years.

"The Eleventh Circuit just killed the Florida plaintiff bar's golden goose," said Squire Patton Boggs LLP partner Eric J. Troutman.

Monday's ruling hinged on the meaning of automatic telephone dialing system, which is referred to as an autodialer or an ATDS, under the TCPA. The statute defines the term 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 parties in the consolidated appeal had fought over whether the phrase "using a random or sequential number generator" modifies both "stored" and "produced."

In siding with defendants Hilton Grand Vacations Inc. and Pennsylvania Higher Education Assistance Agency's stance that an autodialer requires random or sequential number generation, the Eleventh Circuit concluded that "in the absence of an ideal option, we pick a better option — in this instance that the clause modifies both verbs."

Other courts — notably the D.C. Circuit in ACA International v. Federal Communications Commission and the Third Circuit in Dominguez v. Yahoo — have similarly embraced narrow autodialer definitions.

But "among the thicket of ATDS-related decisions issued over the last few years," the Eleventh Circuit's opinion "stands as one of the clearest and most thoroughly reasoned," Jaszczuk PC founder Martin Jaszczuk said.

Snell & Wilmer LLP partner Becca Wahlquist added that Monday's opinion is the first to "really dig into the grammar, structure and legislative history of the term and produce a detailed analysis of what it meant in the past and what it now means, and to walk back where the expansion has happened to bring it back to the TCPA's legislative intent."

The new ruling also breaks with the Ninth Circuit's 2018 decision in Marks v. Crunch San Diego, which embraced a broad reading of autodialer that encompasses all devices with the capacity to automatically dial numbers.

The Eleventh Circuit panel found the holding in Marks to be problematic because it gives the term an extremely broad reach, since essentially all modern smartphones can automatically dial telephone numbers stored in a list.

While companies are likely to feel some relief from the ruling, the circuit split also means that the certainty that companies have long sought on what constitutes an autodialer remains elusive.

"Having such a commonsense and firm ruling out of a circuit where TCPA litigation has been running amok for the past decade is a really welcome development for businesses that aren't using aggressive spam dialing or prerecorded voices and yet could still find themselves being sued for hundreds of millions or even billions of dollars in statutory damages," Wahlquist said. "But that doesn't change the fact that the Ninth Circuit decision still leaves the door for liability open."

For businesses with national operations, their compliance paradigms shouldn't shift too drastically in the wake of the latest ruling, "considering the broad ATDS interpretation in Marks v. Crunch will still control across a very large jurisdiction on the other side of the country," added Artin Betpera, a partner at Womble Bond Dickinson who specializes in the TCPA.

Defense attorneys say that they've already seen more TCPA suits being filed in the Ninth Circuit since the Marks decision was issued, and that they would expect even more to head west with the latest Eleventh Circuit ruling.

"This decision means that we're going to see a lot of suits that would otherwise have been filed in Florida ending up in California," Eisen said.

But clarity may be closer than ever.

The U.S. Supreme Court earlier this month agreed to review the constitutionality of the TCPA's autodialer provision, but it is still weighing whether to take up a similar petition from Facebook that raises First Amendment questions as well as the issue of what constitutes an autodialer.

Several attorneys predicted that the circuit split solidified by the Eleventh Circuit's ruling could inspire the justices to grant Facebook's request.

"This makes a grant of certiorari in Duguid v. Facebook (or a follow up case) even more important and, potentially, more likely," Troutman Sanders LLP partners David Anthony and Alan Wingfield said in an email.

"The [autodialer] definition is central to much of the TCPA litigation occurring across the country, so the entire TCPA world is on pins and needles about whether the Supreme Court will take up this key issue," they said.

However, review is far from certain.

While the TCPA case that the high court has already agreed to hear clearly has broader First Amendment implications, the effect of the Eleventh Circuit's ruling and similar disputes over the autodialer definition, by contrast, are "far more confined to the TCPA, which may make it a less attractive case for the Supreme Court to review despite the clear circuit split on the matter," Betpera said.

Monday's ruling may also inspire the FCC to act, as the divide on the autodialer definition "really highlights the need for the FCC to step in and set a national standard to ensure consistency and predictability in the law by adopting the [Eleventh Circuit's] analysis," Betpera said.

Since the D.C. Circuit in ACA International nearly two years ago moved to strike down a 2015 FCC order that broadly defined an autodialer, the now Republican-led FCC has been expected to come out with a new interpretation that takes a narrower view of the term than the invalidated order, which

was issued under Democratic leadership.

Despite multiple rounds of public comment, the FCC has been largely silent on the issue, a stance that could change now that the Ninth and Eleventh circuits have come out in clear disagreement, attorneys say.

"The FCC to a certain extent may be looking for cover from Congress or the courts," Eisen said. "If the FCC can now turn around and cite the Eleventh Circuit decision, that might provide them with a certain amount of cover for a decision that might be politically a little bit hard."

In the meantime, the Eleventh Circuit's ruling is almost certain to have a big impact on future decisions outside its footprint, according to Troutman, the Squire Patton Boggs partner.

These include the Seventh Circuit's impending decision in Gadelhak v. AT&T Services Inc. , which raises the same statutory interpretation issues and was argued before the Eleventh Circuit case that was decided Monday.

"The Eleventh Circuit's ruling is likely to provide a pretty good road map for any court evaluating ATDS technology outside the Ninth Circuit," Eisen said, adding that since the Marks decision, "the number of places that have been receptive to robocall and text messaging litigation has been dwindling."

However, the Eleventh Circuit ruling does provide TCPA plaintiffs with some nuggets to seize on as they continue to press these suits, including the partial dissent by U.S. Circuit Judge Beverly B. Martin.

In a positive development for businesses, the judge agreed with her colleagues that the dialing system used by Hilton Grand required too much human intervention to be considered an autodialer. But she also wrote that she would have held that Pennsylvania Higher Education Assistance Agency was liable for the disputed robocalls because she read the statute to cover equipment that only has the capacity to dial numbers, even if they're not randomly generated.

The dissent means that the loan servicer is likely to have at least one vote in its favor if it seeks en banc review of the ruling, said Anthony and Wingfield, the Troutman Sanders partners.

The panel's ruling also notably addressed the separate issue of whether the district court was correct to award plaintiff Tabitha Evans triple damages for 13 of the calls she received from PHEAA using an artificial or prerecorded voice, which is a separate basis for liability under the TCPA.

The Eleventh Circuit's unanimous backing of this conclusion highlights that there are still plenty of avenues of recovery open to plaintiffs despite the likely demise of the autodialer argument within the circuit, attorneys say.

"[Monday's decision] is positive for industry, but folks shouldn't start popping champagne bottles quite yet," Betpera said. "While the opinion will probably take a bite out of TCPA litigation within the Eleventh Circuit's footprint, the TCPA's rules concerning prerecorded messages, faxes, and calls to numbers on that national do-not-call registry remain untouched, meaning it will be business as usual when it comes to these facets of the TCPA."

Eleventh Circuit Judges William H. Pryor Jr. and Beverly B. Martin and Sixth Circuit Judge Jeffrey S. Sutton sat on the panel for the Eleventh Circuit.

Melanie Glasser, who led the suit against Hilton Grand, is represented by Keith J. Keogh and Timothy J. Sostrin of Keogh Law Ltd. and William P. Howard and Amanda J. Allen of The Consumer Protection Firm PLLC. Evans is represented by Adam T. Hill of Krohn & Moss Ltd.

Hilton Grand is represented by Angela C. Agrusa and David B. Farkas of DLA Piper, Shay Dvoretzky and Jeffrey R. Johnson of Jones Day and Ernest H. Kohlmyer III of Shepard Smith Kohlmyer & Hand PA. Pennsylvania Higher Education Assistance Agency is represented by Derin B. Dickerson and Tejas S. Patel of Alston & Bird LLP.

The consolidated appeals are Melanie Glasser v. Hilton Grand Vacations Co., case number 18-14499, and Tabitha Evans v. Pennsylvania Higher Education Assistance Agency, case number 18-14586, in the U.S. Court of Appeals for the Eleventh Circuit.

--Editing by Brian Baresch and Emily Kokoll.
