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7th Circ. Picks Narrow 'Autodialer' Reading In AT&T Text Row

By **Allison Grande**

Law360 (February 19, 2020, 2:55 PM EST) -- The Seventh Circuit on Wednesday further widened an appellate court divide over what qualifies as an "autodialer," finding that a dialing system AT&T used to distribute unwanted survey text messages doesn't fall under the disputed statutory term.

In a 20-page published decision refusing to revive a putative class action against the telecom giant, the three-judge appellate panel unanimously held that equipment must have the capacity to generate random or sequential numbers in order to be considered an automatic telephone dialing system, or autodialer, under the Telephone Consumer Protection Act.

"The system at issue in this case, AT&T's 'Customer Rules Feedback Tool,' neither stores nor produces numbers using a random or sequential number generator; instead, it exclusively dials numbers stored in a customer database," Judge Amy C. Barrett wrote for the panel. "Thus, it is not an 'automatic telephone dialing system' as defined by the act — which means that AT&T did not violate the act when it sent unwanted automated text messages to [plaintiff] Ali Gadelhak."

The ruling is consistent with the **Eleventh Circuit's decision** late last month in Glasser v. Hilton Grand Vacations, which similarly adopted a narrow reading of the litigation-fueling statutory term. In that case, the panel sided with Hilton Grand Vacations Inc. and Pennsylvania Higher Education Assistance Agency's stance that an autodialer requires random or sequential number generation and doesn't encompass equipment that dials from preexisting lists of numbers.

However, both rulings — as well as more limited but similar holdings out of the Third and D.C. circuits — conflict with the **Ninth Circuit's 2018 decision** in Marks v. Crunch San Diego to embrace a broad reading of "autodialer" that covers all devices with the mere capacity to automatically dial numbers.

AT&T said Wednesday that it was pleased with the Seventh Circuit's decision.

"We have extensive procedures in place to ensure TCPA compliance," the company said in a statement. "This decision affirms that we can continue using tools like customer satisfaction surveys to help ensure we're providing excellent customer service."

Counsel for Gadelhak did not immediately respond to a request for comment.

Defense attorneys not involved in the case applauded the Seventh Circuit for producing what they called a "common-sense" ruling that limits the reach of the statute to the type of genuine spam communications from unknown callers that Congress intended to combat when it enacted the TCPA in 1991.

"The TCPA is the largest cash cow in history for plaintiffs' lawyers, enabling frequent huge multimillion-dollar settlements," Squire Patton Boggs LLP partner Eric J. Troutman said. "Rulings like Gadelhak and Glasser cut down on the ability of consumer lawyers to bring these class actions and limit the statute to truly abusive conduct."

In joining the Eleventh and Third Circuits in holding that a device can only qualify as an autodialer if

it has the capacity to generate random and sequential numbers, the Seventh Circuit "absolves millions of iPhone users from the liability arguably imposed by the Ninth Circuit's reading of the TCPA," Jaszczuk PC founder Martin Jaszczuk added.

"The Seventh Circuit's well-reasoned opinion places an exclamation mark at the end of the sentence drafted by the Eleventh Circuit and italicized by the Third Circuit" in its **June 2018 decision** in Dominguez v. Yahoo, Jaszczuk said.

But while Wednesday's ruling essentially ends autodialer litigation in the Seventh Circuit, these disputes will almost certainly find a new home in the Ninth Circuit, where the Marks decision is already fueling increased filings, defense attorneys say.

"The Ninth Circuit in every respect is an outlier, and plaintiffs lawyers are already looking for any excuse to file cases involving autodialed texts out there as doors are slowly being closed elsewhere," said Mark Eisen, a TCPA defense attorney at Benesch Friedlander Coplan & Aronoff LLP.

This intensifying flood of TCPA litigation seeking uncapped statutory damages of between $500 and $1,500 per violation only highlights the urgent need for the U.S. Supreme Court to weigh in, attorneys say.

"The Supreme Court needs to take up the ATDS question and settle the circuit split, because companies are in the untenable position of facing nationwide TCPA class action lawsuits in the Ninth Circuit that could not be brought in other circuits where many of the plaintiffs and putative class members actually reside," Snell & Wilmer LLP partner Becca Wahlquist said.

The Supreme Court has already **agreed to review** the constitutionality of the TCPA's autodialer provision, but is still weighing whether to take up a similar petition from Facebook that additionally raises the issue of what constitutes an autodialer.

"If the autodialer issue can be tacked onto the constitutionality issue, that would be a pretty simple way to address it and get a uniform interpretation that has been lacking and that businesses have been craving," Eisen said.

Wednesday's ruling may also push the FCC to finally issue its long-anticipated revamped autodialer interpretation to replace a broader reading of the term that was **struck down** by the D.C. Circuit in 2018. The new ruling is widely expected to take a narrower view that's consistent with the recent Seventh and Eleventh circuit holdings.

"The FCC has the power and authority to resolve this issue on a nationwide basis and it should act," Womble Bond Dickinson LLP partner David Carter said, adding that the commission's delay has imposed "undue costs and burdens on American businesses as plaintiffs' attorneys file case after case in the Ninth Circuit."

Like the previous ruling to tackle the issue, Wednesday's ruling centered on the question of whether dialing equipment needs to have the capacity to either store or produce randomly generated numbers or whether it just needs to be able to simply store and dial any numbers to qualify as an autodialer.

Noting that the wording of the disputed provision "is enough to make a grammarian throw down her pen," the Seventh Circuit panel acknowledged that there were at least four different ways to read the autodialer definition, including the two options being pressed by the litigants.

The panel concluded that the superior and "most natural" interpretation "based on sentence construction and grammar" was that the disputed phrase modified both "store" and "produce."

"[This interpretation] is admittedly imperfect," Judge Barrett wrote. "But it lacks the more significant problems of the other three interpretations and is thus our best reading of a thorny statutory provision."

On the other hand, Gadelhak's "ungrammatical interpretation" of the term — which is the reading that was embraced by the Ninth Circuit in Marks — would operate to "create liability for every text

message sent from an iPhone," a result that would be "inconsistent" with the TCPA's overall narrower focus, the panel added.

The Seventh Circuit also separately broke from the Eleventh Circuit when it came to the question of whether unwanted texts produce the type of concrete harm necessary to establish Article III standing.

Although the Eleventh Circuit held in its **2019 ruling** in Saledo v. Hanna that the receipt of a single automated text was insufficient for standing, the Seventh Circuit panel concluded that the harm posed by spam texts is analogous to other privacy invasions that have long been recognized by courts and that the number of texts at issue was "irrelevant" to the injury analysis.

Judges Diane P. Wood, Michael S. Kanne and Amy C. Barrett sat on the panel for the Seventh Circuit.

The proposed class of consumers is represented by Timothy J. Sostrin and Keith J. Keogh of Keogh Law Ltd.

AT&T is represented by Hans J. Germann, Kyle J. Steinmetz, Andrew J. Pincus and Archis A. Parasharami of Mayer Brown LLP.

The case is Ali Gadelhak v. AT&T Services Inc., case number 19-1738, in the U.S. Court of Appeals for the Seventh Circuit.

--Editing by Marygrace Murphy and Emily Kokoll.

Update: This article has been updated to add a comment from AT&T and more information about the ruling and its significance.
