

Defense Victory: Eleventh Circuit Demolishes Expansive TCPA Interpretation – Holds an ATDS Must Randomly or Sequentially Generate Numbers

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On January 28, 2020, the Eleventh Circuit Court of Appeals dealt a body-blow to serial TCPA scammers and everyone else who has disingenuously argued over the past decade that any type of “automated” dialing equipment is regulated by the Telephone Consumer Protection Act (TCPA). *Glasser v. Hilton Grand Vacations Co., LLC*, No. 18-14499, 2020 WL 415811 (11th Cir. Jan. 27, 2020). In a careful analysis, the Eleventh Circuit held that the definition of an “automatic telephone dialing system” (ATDS) is limited to equipment that is capable of generating random or sequential blocks of telephone numbers for dialing, and does not include “automated” dialing equipment that calls telephone numbers from a preset list, such as when a debt collector calls a list of specific debtors.

The significance of *Glasser* cannot be overstated. First, because it is now binding precedent in the Eleventh Circuit, a significant jurisdiction and hotbed of spurious TCPA litigation (we’re looking at you, Florida), particularly when TCPA claims are combined with onerous and oppressive state debt-collection laws (again, we’re looking at you, Florida). Second, the Eleventh Circuit is the first Circuit to directly take on, and then do a complete piece-by-piece disassembling of the Ninth Circuit’s decision in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018), which simply discarded certain portions of the statute it didn’t like, rewrote other portions, and then broadly proclaimed in the name of public policy that “the statutory definition of ATDS ... includes [all] devices with the capacity to dial stored numbers automatically.”

In truth, most courts outside the Ninth Circuit have already rejected the so-called reasoning of *Marks* because it is not well reasoned and is a poor decision (to put it mildly). And the Eleventh Circuit joins good company with the D.C. Second, Third, and Sixth Circuits (albeit in an unpublished decision in the Sixth Circuit) in holding that the statutory definition of an ATDS requires that the equipment be capable of generating random or sequential blocks of telephone numbers.

But *Glasser* is the first Circuit to directly address *Marks*, ultimately concluding that to adopt the Ninth Circuit’s reasoning, a court must perform “surgery” on the grammar of statutory definition of an ATDS. The Eleventh Circuit performed its own corrective surgery by putting each line of *Marks* on the chopping block, and then letting the axe fall in a detailed line-by-line summary of all the ways *Marks* is wrong in its statutory misinterpretation.

In answering the hotly litigated question of what constitute an ATDS, the court opened up with framing the simple issue that an ATDS is defined by the TCPA 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.” 47 U.S.C. § 227(a)(1). The Eleventh Circuit forewarned: “remember these words.”

The key statutory issue identified by the court in *Glasser*: “What to do with the clause: ‘using a random or sequential number generator’?” Does it only apply to both the verbs “to store” and “to produce” in the statutory definition, or simply just “to produce.” The Eleventh Circuit concluded that, by default, the answer is the “clause modifies both verbs.” When “two conjoined verbs (‘to store or produce’) share a direct object (‘telephone numbers to be called’), a modifier following that object (‘using a random or sequential number generator’) customarily modifies both verbs.” Essentially, this means that “to be an auto-dialer, the equipment must (1) store telephone numbers using a random or sequential number generator and dial them or (2) produce such numbers using a random or sequential number generator and dial them.”

The court recognized the somewhat odd proposition of “storing” a telephone number using a random or sequential number generator, but rightly recognized that when the TCPA was enacted in 1991, the dialing systems of the time would generally either produce random or sequential block of telephone numbers for *immediate* dialing, or produce those telephone numbers and then *store* them for later dialing. Plus, the Eleventh Circuit also looked to the relevant legislative history of the ATDS definition, which expressly indicated that the ATDS definition was specifically intended for dialing random blocks of telephone numbers—unlike the Ninth Circuit in *Marks*, which refused to look beyond the broad legislative intent of the TCPA and pretended there was not any specific legislative history on the ATDS definition. The court in *Glasser* also looked to the commonsense proposition that until the FCC attempted to first expand the definition of an ATDS until 2003, there was no dispute by anyone regarding the intended scope and meaning of the ATDS definition.

There is more to the Eleventh Circuit’s reasoning than just the above—addressing other aspects of statutory interpretation, rules of basic grammar, and even First Amendment considerations—and readers would be well advised to read the full decision, which can be found [here](#). But as of now, *Glasser* essentially signals the death knell of ATDS-based TCPA claims in the Eleventh Circuit, and rightly so. As the groundswell of cases rejecting *Marks* continues to grow, this decision could not have come at a better time in advance of the Seventh Circuit’s impending decision on the ATDS issue in *Gadelheh* (stayed tuned for how *Gadelheh* pans out).

Either way, a significant victory not just for the TCPA, but also for common sense statutory construction and basic grammar.

For additional information about *Glasser* and what it means for defendants, marketing companies, and debt collection activity, please contact:

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