

Duran Duran: Second Circuit Complicates TCPA Litigation

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The dust was finally settling. District and Circuit courts around the country were rejecting the Ninth Circuit's overly broad interpretation of the definition of an automatic telephone dialing system ("ATDS") under the Telephone Consumer Protection Act ("TCPA"). TCPA filings have taken a nosedive across the country, and it appeared that the TCPA-well was finally starting to run dry for the Plaintiffs' bar.

Then, on April 7, 2020, the Second Circuit jumped in, holding that the TCPA's ATDS definition applies to any devices that can store phone numbers "*in any way*" and dial those numbers without human intervention. *Duran v. La Boom Disco, Inc.*, No. 19-600-CV, 2020 WL 1682773 (2d Cir. Apr. 7, 2020). Based upon this definition, the Second Circuit vacated the district court's finding of "no ATDS" because the New York nightclub telephone dialing equipment in question stored phone numbers and "required only a human to click" to dial, which is enough to say "automatically." As described by the Second Circuit, it does not matter that the phone number lists are "produced by human-generators rather than mechanical number-generators" because "what matters is that the system can store those numbers and make calls using them."

How did the Second Circuit get there? The decision is not exactly a model of clarity. The Second Circuit agreed that the D.C. Circuit's decision in *ACA Int'l v. FCC* vacated the FCC's 2015 Order on the ATDS definition. But the court concluded that related prior FCC orders from 2003 and 2008 on the definition of an ATDS were still valid, without much explanation except to conclude that the earlier orders allegedly did not suffer from the same internal contradiction of the 2015 Order. One might think that this conclusion would merit some explanation given that the D.C. Circuit in *ACA Int'l* noted that the FCC's prior "declaratory rulings in 2003 and 2008" (plural) had been reopened as part of the appellate review in that case, and as the D.C. Circuit ultimately set aside the FCC's "treatment of those matters" (again, plural) in *ACA Int'l*.

Even more confusing, it raises the question of *why* the Second Circuit would then need to proceed to opine on the statutory definition of an ATDS. After all, if the 2003 and 2008 FCC orders were still valid and binding, that should have been the end of the inquiry, and there wouldn't be a need to address the definition purely as a matter of statutory interpretation.

Nonetheless, the Second Circuit did proceed to that statutory analysis, albeit in half-baked fashion. An ATDS is defined 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 the Second Circuit's view, the word "store" is meaningless if the statute only applies to telephone numbers generated randomly or sequentially, since any "stored" numbers will be the

product of some earlier number generation. So, according to the Second Circuit, this means that the term “store” must be independent and not tied to the requirement that telephone numbers be randomly or sequentially generated. (There are, of course, obvious grammatical, legislative, technological, and historical answers to this issue that seemed to flummox the Second Circuit, which were addressed in depth between the Seventh and Eleventh Circuit’s recent contrary decisions.)

But the Second Circuit then goes even further, trying to tackle what constitutes “human intervention” in making a call. The court held that the act of hitting “send” to initiate a call, by itself, is not sufficient to constitute human intervention because that single click might still be capable of sending thousands of messages simultaneously. The court cabins its discussion to a footnote of what it means to “dial” a single number through features that function like speed-dialing on smart phones versus clicking-to-dial a mass campaign list-which is odd, since that may be the most substantive attempt at analysis in the entire decision. (Though the court carefully ignores how its reasoning applies to “automatic” response functions, like do-not-disturb, on smartphones.) Regardless, the court concludes that when hitting “send” does not initiate a call to a specific associated telephone number, but rather initiates the *process* by which the dialing equipment initiates calling a campaign list, the dialing equipment has the capacity to “dial numbers on their own-which is to say, automatically.”

The Second Circuit’s decision in *Duran* is significant because it is the first Circuit court to side with the Ninth Circuit’s decision in *Marks*-and in some ways, goes even further afield than *Marks*. This pits the Second and Ninth Circuits against the Third, Seventh, and Eleventh Circuits. In the short term, TCPA filings in the Second Circuit can be expected to skyrocket. And in the long term, plaintiffs and attorneys will continue to jostle in the remaining Circuits to try and create the majority position for what seems like the now inevitable SCOTUS review. The Second Circuit opinion can be found [here](#).

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

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