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Call me, maybe? New technology, mobile marketing and the TCPA

BY LIVIA KISER AND NERISSA COYLE MCGINN

Livia Kiser is a partner at Loeb & Loeb LLP, where she co-chairs the firm's Health and Wellness Marketing Compliance Task Force and is a member of the firm's class-action and regulatory defense department. She can be reached at lkiser@loeb.com. Nerissa Coyle McGinn is a partner at Loeb & Loeb focusing on matters involving the convergence of advertising and promotions, emerging media, technology and privacy law as well as intellectual property law. She can be reached on nmcginn@loeb.com.

Mobile marketing is the new frontier, and many companies across many industries are increasingly using technology to communicate with consumers through text messaging. As mobile campaigns proliferate, so do class actions asserting violations of the Telephone Consumer Protection Act for "text-spamming" — sending unsolicited promotional text messages without consent of the recipients.

Courts throughout the country are wrestling with applying the TCPA, a statute more than two decades old, to new technology, often arriving at divergent interpretations and inconsistent results. Even the Federal Communications Commission, charged with implementing the statute, has acknowledged both the explosion of lawsuits and the murky state of the law.

In a March 2014 blog post, FCC Commissioner Michael O'Reilly noted the backlog at the FCC with dozens of petitions seeking clarification concerning the legality of particular services or methods of communication: "It is very troubling that legitimate companies feel that they have to ask the government for its blessing every time they need to make a business decision in order to avoid litigation."

After the FCC's most recent set of amendments, the rules implementing the TCPA now prohibit companies from initiating marketing texts made using an automated telephone dialing system (ATDS) — otherwise known by the somewhat inaccurate term of "autodialer" — unless the recipient has given prior express written consent. While the most common dispute in litigation centers on consent, defendants are increasingly raising a fundamental threshold issue — whether their dialing technology constitutes an ATDS.

The TCPA defines an ATDS 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 a 2012 declaratory ruling, the FCC explained that the definition covers any equipment with "the specified capacity to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists."

In a number of recent cases, including one in the Northern District of Illinois, companies hit with TCPA suits have emphasized that they're not "spamming" random numbers but, instead, using automated technology to send text messages to phone numbers provided by existing customers who have given written consent.

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This argument is not always successful. While the 2012 FCC ruling included the "capacity to generate" language, the FCC did not expressly overrule its 2003 declaration that effectively equated autodialing with predictive dialing.

In that ruling, the FCC interpreted the term ATDS to include a predictive dialer — hardware that has the capacity to randomly generate and dial sequential telephone numbers when paired with certain software, even if that capacity has not been enabled or is being used.

A minority of courts still regard the 2003 FCC ruling as dispensing with the requirement that an ATDS generate random or sequential phone numbers — and as controlling legal precedent. These courts have concluded that any equipment that can dial lists of numbers without human intervention qualifies as an autodialer, despite the fact that both the statutory text and the 2012 ruling refer to generating numbers, not just automatically dialing numbers that have already been programmed into a system.

Taken to its logical conclusion, this expansive interpretation would mean that many technologies — including today's smartphones — would qualify as autodialers. In *Sterk v. Path Inc.*, the Northern District of Illinois, adopting the broad minority interpretation of ATDS, has suggested that this "would not be [such] an absurd result."

Plaintiff Kevin Sterk brought a putative class-action suit against social networking platform Path, alleging that he received an unsolicited promotional text message from Path after a contact of his joined the platform.

When users create Path accounts, they consent to Path uploading their phone contacts into Path's system. On cross-motions for summary judgment, Path argued that the equipment that it used to send automatic promotional texts only had the capacity to send texts to numbers on the furnished contact lists. Based on Sterk's admissions that Path did not possess any equipment with the capacity to generate random or sequential phone numbers, Sterk could not succeed on his TCPA claim.

The U.S. District Court granted the plaintiff's motion for partial summary judgment on the limited issue of whether Path transmitted the text using an ATDS, not only adopting the expansive language in the 2003 FCC ruling but holding that a broad interpretation was consistent with congressional intent.

According to the judge, the FCC in its 2003 ruling emphasized that the main requirement for a system to qualify as an ATDS is not the capacity to generate random or sequential numbers, but the ability to dial numbers without human intervention. The court found it undisputed that the equipment Path uses initiates the texts

from stored lists without human intervention and was therefore comparable to the predictive dialers that the FCC has found to constitute an ATDS.

Addressing Path's argument that this approach was overly broad and would make calls made from ordinary smartphones violations of the TCPA, the court stated: "If a person used a cellphone to send countless unsolicited text messages that harmed the public welfare in such a fashion, it would not be an absurd result to find that the cellphone user had violated the TCPA."

Path is seeking an immediate appeal of the district court's order, asking the 7th Circuit to provide some clarity on what constitutes an ATDS. Path argues that Congress intended the TCPA to apply to technology that can generate phone numbers, not to equipment that only automatically places calls to a list of numbers.

"Unless corrected by this court," Path argues, "the ruling below will subject every call or text from a cellphone, mobile device or computer to another cellphone to potential TCPA liability."

Sterk counters that the 7th Circuit should uphold the district court's order, in part because "spamviting" is exactly the kind of abusive telemarketing practice that Congress meant to prohibit by enacting the TCPA.

As the FCC has acknowledged, until the commission works its way through the backlog of petitions on its docket, the courts are left to grapple with issues of statutory interpretation and technology that will likely continue to have both confusing and far-reaching impact, leaving companies that want to market using the latest in mobile technology operating in treacherous territory.