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TCPA Rulings Give Cos. Liability Shield, But No Knockout

By **Allison Grande**

Law360 (July 6, 2018, 10:38 PM EDT) -- The Second and Third Circuits recently offered a boost to companies fighting spam call and text suits by backing narrow definitions of what constitutes an autodialer under the Telephone Consumer Protection Act, but differences in the ways the appellate courts reached their conclusions highlight lingering uncertainty that attorneys say sorely needs to be resolved by the Federal Communications Commission.

As the flood of TCPA class actions has continued to grow in recent years, a primary point of contention has been over the threshold issue of whether plaintiffs have alleged enough to prove that the company being sued placed the offending calls or texts using an automatic telephone dialing system, or ATDS. The statute defines such a system as "equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers."

The FCC in a 2015 declaratory ruling broadly interpreted that definition to cover any equipment that has the theoretical or latent capacity to dial random or sequential numbers, even if it is not currently being used for that purpose. The ruling sparked ACA International, a trade group for the debt collection industry, and several other companies to bring a challenge to the D.C. Circuit, which **earlier this year** found the commission's definition to be overbroad but failed to offer an alternative definition of autodialer.

The lack of resolution in the D.C. Circuit's order has led some district courts in recent months to embrace a narrow definition of autodialer, while others have essentially ignored the appellate court's ruling and looked to prior FCC orders to back a broader interpretation.

But with decisions issued within three days of each other late last month, the Second and Third Circuits provided a firm endorsement to arguments raised by defendants Time Warner Cable Inc. and Yahoo Inc., respectively, that equipment needs to have the current — and not the theoretical — capacity to act as an autodialer in order for TCPA class actions with massive statutory damage potentials to move forward, defense attorneys said.

"With these rulings, the Second and Third Circuits are going back to the basics, back to the plain statutory interpretation, and putting aside what the FCC has done in the past, to bring the TCPA back to earth," said Benesch Friedlander Coplan & Aronoff LLP attorney Mark Eisen.

By being willing to start with a clean slate devoid of FCC guidance and focusing on the definition of "autodialer" drafted by Congress for inclusion in the 1991 statute, the appellate courts essentially gave a wide range of companies that regularly find themselves caught up in litigation for calls and texts to customer-provided numbers powerful ammunition to strike down these claims — which carry the potential for statutory damages

of between $500 and $1,500 per violation — in the early stages of litigation, according to attorneys.

"It's an important set of ruling for defendants because it provides a basis to challenge this overexpansive application of the TCPA," Eisen said. "We are long removed from the situation where companies are literally generating random numbers and dialing them en masse to solicit customers. That doesn't happen anymore. The 2015 FCC ruling effectively brought any and all modern technology under the TCPA, which put companies that were trying to contact their own customers in a difficult spot, and these rulings will be very helpful for defendants to rein that in."

However, while the rulings do embrace a more limited definition of autodialers expected to be widely beneficial to defendants, the approaches the appellate panels took to reach their similar conclusions illustrate the lingering uncertainties that companies face and why TCPA litigation isn't going away anytime soon, attorneys say.

"While the Second and Third Circuits both embrace the present capacity standard, they take very different views of what present capacity is and what's needed to determine it," said Christine Reilly, a Manatt Phelps & Phillips LLP partner who heads the firm's TCPA compliance and class action defense practice group. "And those differences are significant because it makes it more difficult to provide guidance to companies trying to comply with the standard."

In the **Third Circuit case**, where Yahoo was accused of using an ATDS to send plaintiff Bill Dominguez 27,800 unwanted unwanted texts alerting him of emails over the course of 17 months after he purchased a cellphone with a reassigned number that had belonged to someone who had subscribed to the service, the appellate panel focused on whether the SMS service used by Yahoo had the present capacity to dial random or sequential numbers and and to what extent human intervention was involved in inputting the numbers that were contacted.

The Second Circuit, on the other hand, refused to consider the random or sequential number analysis in determining the present capacity for the equipment that plaintiff Araceli King claimed Time Warner used to contact her cellphone 153 times without her consent to be an autodialer. Instead, the court homed in on what needed to be done to activate the equipment's capacity to generate random or sequential numbers, finding in remanding the dispute for further consideration that an ATDS "does include devices whose autodialing features can be activated, as the D.C. Circuit suggested, by the equivalent of 'the simple flipping of a switch'" and noting that "within those bounds, courts may need to investigate, on a case-by-case basis, how much is needed to activate a device's autodialing potential in order to determine whether it violates the TCPA."

"In looking at the Second Circuit decision, it looks like those counseling defendants about what is an autodialer will need to figure out on a case-by-case basis how much is needed, and it's going to be hard to explain to clients where that line is," Reilly said.

Eisen said that the Second Circuit's decision, which was issued June 29, could be read to put a wedge between equipment that's structured in a way that ATDS capabilities can be turned on with a simple switch, and machines that need to be entirely reprogrammed or restructured in order to make them into autodialers.

"After the D.C. Circuit's ruling, we still don't know how much capacity is enough capacity, but we do know what's going too far, and it's too far to say anything that is technologically feasible of becoming an autodialer is covered," Eisen said. "The trend in courts seems to be heading toward whether it's so easy to turn it into an autodialer that it's like flipping a switch, which isn't the case for most modern-day equipment."

The Third Circuit's ruling was issued June 26 and goes against an earlier ruling that a separate Third Circuit panel issued in October 2015 after the FCC's declaratory ruling but before the D.C. Circuit decision that struck down the FCC's broad autodialer definition. The Third Circuit decision provides a firmer hook and more clarity for companies, given its close tracking of the D.C. Circuit decision and its reliance on the original statutory definition of ATDS, attorneys say.

"The Third Circuit's ruling is significant because it's the first appellate court to offer guidance on what exactly the ACA International decision from the D.C. Circuit means," said Brian Hays, chair of Locke Lord LLP's TCPA litigation and compliance section. "What's important here is the courts are finally going back to the plain language of the statute, which clearly requires an ATDS to dial random or sequential numbers, and are applying that language to find that this new technology is not an ATDS."

The Yahoo decision "validates the work of courts across the country — like the district court here — that have struggled to apply the FCC's now-rejected and nearly boundless definition of an autodialer's 'capacity' in a rigorous manner to equipment and conduct that the statute was never meant to regulate," Drinker Biddle & Reath LLP partner Michael P. Daly and counsel Marsha J. Indych said in a joint email.

"The Third Circuit decision ... exemplifies what will happen in TCPA cases across the country where plaintiffs with claims that were never intended to be governed by the TCPA are unable to establish that the equipment used to contact them has both the capacity to randomly or sequentially generate telephone numbers and uses that capacity to dial those numbers," the attorneys said.

Eckert Seamans Cherin & Mellott LLC member Louis DePaul agreed that the Third Circuit's ruling was likely to "result in matters being resolved more quickly" given that the panel's ruling made it easier for the parties "to understand precisely what constitutes an ATDS and what does not."

The companies that stand to benefit most from the ruling are likely to be those that are sued not for placing prerecorded calls — which are still covered by the TCPA — or doing cold-call telemarketing, but for calling customer-provided numbers, according to Snell & Wilmer LLP partner Becca Wahlquist. She particularly cited the Third Circuit's rejection of several expert reports that Dominguez submitted to back up his claims that an ATDS was used as being "really rewarding," given that many of these experts, including one who regularly analogizes the ATDS issue with a gun having the capacity to be modified into a semiautomatic, "have been criss-crossing the country claiming every system that someone may use that has a connection to a computer might be an ATDS."

"It's refreshing to read a court decision about ATDS that looks at the actual language in a statute and applies it in a way that inserts common sense and rationality into a situation that has been really damaging to American businesses for quite some time," Wahlquist said.

But despite the boost, Wahlquist noted that she wasn't convinced that the plaintiffs bar would roll over, and that it was more than likely that they would vigorously argue that the Third Circuit's interpretation was incorrect and that pronouncements made by the FCC prior to its invalidated 2015 decision that construed the autodialer term broadly should apply in other circuits.

"While I'm happy to see the Third Circuit's decision, I don't think it ended anything," she said. "There's too much money at stake and too much pending litigation, so we'll likely see a lot of creative arguments from the plaintiffs bar about why the Third Circuit was wrong."

These lingering uncertainties sparked by the recent appellate court rulings drive home the

need for the FCC, which is now led by the Republican commissioner who sharply dissented on the 2015 order and which recently held a public comment period to solicit input on new rulemaking on the autodialer definition in light of the D.C. Circuit decision, needs to weigh in again soon, attorneys say.

"We'd love to see the FCC come in here and make a clear standard that everyone can understand and interpret and give proper guidance to companies to avoid what can be catastrophic exposure under the TCPA," Reilly said.

While most of the FCC's prior attempts to lend clarity to the autodialer issue have fallen flat — including its attempt to cement a broad definition in 2015, "it will be interesting to see how decisions like Dominguez inform the FCC's future rulemaking in this regard," said Jaszczuk PC partner Margaret Schuchardt.

Attorneys will also be watching to see if appellate court rulings do anything to spur Congress to amend the TCPA to explicitly address the kind of predictive dialers — which dial preloaded lists of numbers and don't generate random ones — that are far more common today, attorneys say.

"What the D.C. Circuit was implying and what the Third Circuit is saying a little more explicitly is that changing language of a statute to apply to new technology is something Congress should do," Hays said. "I think it adds more pressure to Congress to enact legislation pending before it now that would change the definition of automatic dialer to include dialing from list of numbers."

However, many experts have little faith that Congress will act on the issue, especially when the FCC has announced that it is aware of the autodialer uncertainty created by the D.C. Circuit decision and is taking action to issue new guidance. Until then, attorneys will have their sights set on the FCC, which currently has only four commissioners, as well as other appellate courts, including the Ninth Circuit, which is slated to issue a decision soon on the autodialer issue in **a dispute between** Jordan Marks and Crunch San Diego LLC.

"While what the FCC eventually does on this will be very important and a new ruling is likely to be coming faster than it took to get the 2015 order, in the short term, the appellate courts are the ones that are going to be driving the bus on this," Eisen said.

King is represented by Stephen Taylor and Sergei Lemberg of Lemberg Law LLC. Dominguez is represented by Gerald E. Arth, Abraham C. Reich and Robert S. Tintner of Fox Rothschild LLP and James A. Francis, David A. Searles and John Soumilas of Francis & Mailman PC.

Time Warner is represented by Matthew A. Brill, Mathew T. Murchison and Alexandra P. Shechtel of Latham & Watkins LLP. Yahoo is represented by Ian C. Ballon, Lori Chang and Brian T. Feeney of Greenberg Traurig LLP.

The cases are King v. Time Warner Cable Inc., case number 15-2474, in the U.S. Court of Appeals for the Second Circuit, and Dominguez v. Yahoo Inc., case number 17-1243, in the U.S. Court of Appeals for the Third Circuit.

--Editing by Jill Coffey and Alanna Weissman.