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TCPA Class Actions – Eleventh Circuit Narrows Scope of TCPA, Splitting with Ninth Circuit

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Takeaway: The recent explosion in telemarketing calls has been driven by telephone equipment that allows companies to automatically dial a stored list of potential customers. In *Glasser v. Hilton Grand Vacations Co., LLC,* No. 18-14499, 2020 WL 415811, at *1 (11th Cir. Jan. 27, 2020), the Eleventh Circuit held that the definition of "automatic telephone dialing system" in the Telephone Consumer Protection Act (TCPA) does not include this type of equipment, but instead covers only equipment that automatically dials randomly or sequentially generated telephone numbers. By significantly narrowing the scope of the TCPA's applicability to automated dialing systems, *Glasser* puts the Eleventh Circuit in direct conflict with the Ninth Circuit's conclusion (in *Marks v. Crunch San Diego, LLC,* 904 F.3d 1041, 1049 (9th Cir. 2018)), that any device with the capacity to dial telephone numbers from a stored list constitutes an auto-dialer under the TCPA.

In *Glasser*, two named plaintiffs (Glasser and Evans) filed separate putative class actions alleging that Hilton violated the TCPA by placing more than a dozen calls to their cell phones using an "automatic telephone dialing system" (auto-dialer) without their prior express consent. But Hilton argued the system it used to dial the plaintiffs—which targeted a pre-set list of individuals interested in buying vacation properties—did not constitute an auto-dialer. The district courts split—the Northern District o Georgia said that Hilton used an auto-dialer, while the Middle District of Florida said it did not.

After confirming that an unwanted phone call constitutes a concrete injury under Article III, the Eleventh Circuit engaged in a deep statutory analysis of the relevant provision of the TCPA. Section 227(a)(1) defines an auto-dialer 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." The Court of Appeals addressed whether that language applies to telephone equipment that automatically dials numbers from a stored list, as opposed to only a randomly generated list of numbers.

For the Eleventh Circuit, the answer turns on whether the clause "using a random or sequential number generator" modifies both the verbs "store" and "produce" or only the verb "produce." Hilton argued the clause modifies both verbs—an auto-dialer must both (1) store telephone numbers using a random or sequential number generator and dial them and (2) produce telephone numbers using a random or sequential number generator and dial them. The plaintiffs argued that that the clause only modified "to produce," so the equipment must have the capacity to (1) store telephone numbers and dial them *or* (2) produce numbers using a random or sequential number generator.

The Eleventh Circuit agreed with Hilton, finding that a device that dials numbers from a stored list (but does not generate those stored numbers using a random or sequential number generator) does not constitute an auto-dialer. Instead, an auto-dialer must store or produce numbers using a random or sequential number generator and dial them. Recognizing that "[c]larity . . . does not leap off the page,"

the Court of Appeals analyzed the statute using grammatical rules, context, history, contemporaneous understanding, and various canons of statutory construction. 2020 WL 415811, at *2-*7

The Eleventh Circuit focused primarily on grammar and the practical impact of shifting the focus of the TCPA away from its original purpose. First, the *Glasser* court found that the approach endorsed by the plaintiffs (and the Ninth Circuit) "looks more like 'surgery' . . . than interpretation." *Id*. at *6. Especially given the comma separating the modifier ("using a random or sequential number generator") from the rest of the sentence, the court found no easy way to justify reading the modifier to alter only the second antecedent ("to produce"). *Id*. The court explained that plaintiffs' approach required "separat[ing] the statute's two verbs ('to store or produce'), plac[ing] the verbs' shared object ('telephone numbers to be called') in between those verbs, then insert[ing] a copy of that shared object into the statute, this time after the now separate verb 'to produce' to make clear that 'using a random or sequential number generator' modifies only 'to produce.'" *Id*.

The Court of Appeals also addressed the practical implications of its ruling.It determined that the statute was originally intended to regulate devices that could either (1) store randomly-generated numbers for later dialing or (2) immediately dial randomly-generated numbers.Had Congress intended for the statute to apply to numbers dialed from a pre-selected list, there would be no reason to make it unlawful to call "any emergency telephone line," including any "911 line." *Id*. at *4 (quoting Section 227(b)(1)).No telemarketer would intentionally include 911 on a stored list.

The court explained that the plaintiffs' interpretation of the statute did not appear until 2003, when the FCC extended § 227 to equipment that "merely dialed numbers 'from a database of numbers'—that merely stored numbers and called them." *Id*. at *4. Although the Eleventh Circuit noted that this expansion coincided with a shift in technology, it concluded that the FCC went too far. Expanding the statute to regulate any equipment with the capacity to automatically dial telephone numbers from a stored list could sweep in every day technology like smartphones, Siri, and Alexa. Although Alexa does not store or produce numbers using a random number generator, it does allow users to make automated calls from a stored list. *Id*.

The Eleventh Circuit rejected the plaintiffs' argument that its limited reading of the TCPA would allow telemarketers "to inundate citizens with solicitations and scams." *Id*. at *7. It explained that, because the TCPA still prohibits the use of artificial or prerecorded voice calls, a telemarketer who dials from a stored list of telephone numbers must either (1) obtain consumers' consent or (2) connect each potential customer to a human representative.

In dissent, Judge Beverly Martin defended the Ninth Circuit view advocated by the plaintiffs. She pointed out that it makes little sense to interpret the law to apply to a device that *stores* telephone numbers by way of a random number generator. In addition, the majority's slippery slope examples (like smartphones and Alexa) require human intervention and do not allow users to simultaneously dial multiple numbers.

Bottom line: At least in the Eleventh Circuit – and at least for now – *Glasser* significantly narrows the scope of the TCPA. But while *Glasser* will likely have a dispositive effect on dozens of pending cases in the Eleventh Circuit, it should not give telemarketers comfort. Until the Supreme Court clarifies the meaning of the statute, telemarketers should assume that putative plaintiffs will bring suit in states where the more expansive, Ninth Circuit interpretation of "auto-dialer" applies.