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Sixth Circuit Tips the Scale in Split Over What Constitutes an Autodialer Under the TCPA

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The Sixth Circuit has joined the Second and Ninth Circuits in their broad interpretation of the Telephone Consumer Protection Act's (TCPA) autodialer provision. In doing so, it has tipped the scale in a circuit split that is ripe for review by the U.S. Supreme Court.

The TCPA contains an autodialer ban, which generally makes it a finable offense to use an automatic telephone dialing system (ATDS) to make unconsented-to calls or texts. 47 U.S.C. § 227(b)(1). In turn, the TCPA defines 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."

Id. § 227(a)(1).

The ATDS definition was at issue in *Allan v. Pennsylvania Higher Education Assistance Agency*. There, it was undisputed that the two plaintiffs had received unwanted calls to their cell phones from their loan servicer, Pennsylvania Higher Education Assistance Agency (PHEAA), regarding their student loan debt. The calls placed to their phones were automated. PHEAA used an Avaya Proactive Contact dialer, which did not randomly or sequentially generate numbers to dial, but did create a calling list based on a stored list of accountholder numbers. The Avaya system would place the calls from that list and then connect the call recipient to an operator when a voice was detected. This type of equipment is called a "predictive dialer."

A Michigan district court had granted the two plaintiffs summary judgment, and PHEAA's ensuing appeal dealt, in relevant part, with whether the Avaya system qualified as an ATDS. The Sixth Circuit held that, when examined against the larger context of the autodialer ban, the autodialer definition can be read only in the following way:

An ATDS is “equipment which has the capacity—

> (A) to store [telephone numbers to be called];
>
> 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).

Under this interpretation, the Avaya system qualified as an ATDS because it stored numbers and dialed those numbers. Thus, summary judgment in the plaintiffs’ favor on this question was affirmed. The *Allan* decision comes only months ahead of a U.S. Supreme Court case that will likely resolve the circuit split over the TCPA’s ATDS definition, *Facebook, Inc. v. Noah Duguid, et al.*. As the majority of class litigation under the TCPA centers on whether a company being sued used an ATDS, the Supreme Court’s decision could be of great consequence to TCPA litigants and practitioners.

In making this holding, the Sixth Circuit acknowledged the circuit split on the issue of whether autodialer devices like the Avaya system are covered by the TCPA. Its view that the Avaya system qualified as an ATDS aligned with the Second and Ninth Circuits’ interpretation of the statute and departed from the Seventh and Eleventh Circuits’ reading.

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