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Danielle Waltz Esq.

Jackson Kelly

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Danielle Waltz, Esquire

Jackson Kelly
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The Telephone Consumer Protection Act of 1991

DANIELLE WALTZ, JACKSON KELLY
What is the Telephone Consumer Protection Act?


What is the Telephone Consumer Protection Act? (continued)

More specifically, according to the Southern District of West Virginia, the TCPA creates a remedy for:

1. **Automatic Telephone Dialing System (or an ATDS) calling a “cellular telephone or other service for which the receiver is charged for the call”**

2. “Using artificial or prerecorded voice messages to call residential telephone lines without prior consent.”

3. “Unsolicited advertisements to fax machines.”

4. **Automatic Telephone Dialing System from engaging “two or more of a business’ telephone lines simultaneously.”**

Who can sue?

The Attorney General may “[b]ring an action on [behalf] of state residents [if he] has reason to believe that any person has engage...in a pattern or practice” of violating the TPCA. 47 U.S.C. § 227(g)(2).


Exception for Consenting Parties


AND...

No liability would attach if “the number [autodialed] in fact has been reassigned to another person who has not consented.” ACA International v. FCC, 885 F.3d 687, 693 (D.C. Cir. 2018).

BUT...

 “[A] consenting party can revoke her consent to receive autodialer calls...whether orally or in writing—‘that clearly expresses a desire not to receive further messages.’” ACA International v. FCC, 885 F.3d 687, 693 (D.C. Cir. 2018)(citing 2015 Declaratory Ruling, 30 FCC Rcd. At 7996 ¶ 63).
Who has jurisdiction over a TCPA claim?


What about Article III Standing?

In 2016, the Northern District of West Virginia granted a stay in *Mey v. Got Warranty*, a case involving a TCPA claim, in light of the pending *Spokeo* decision.

After the *Spokeo* decision was handed down, the Northern District ruled that “unwanted phone calls cause concrete harm...by depleting limited minutes that the consumer has paid for or by causing the consumer to incur charges for calls. In addition, all ATDS calls deplete a cell phone’s battery, and the cost of electricity to recharge the phone is also a tangible harm. While certainly small, the cost is real, and the cumulative effect could be consequential.” *Mey v. Got Warranty*, 193 F.Supp.3d 641, 645 (N.D.W. Va. 2016).
Open Questions

What is an Automatic Telephone Dialing System?

According to the statute, an ATDS is:

“equipment which has the capacity...to store or produce telephone numbers to be called, using a random or sequential number generator... and [which has the capacity] to dial such numbers.” 47 U.S.C. § 227(a)(1)(A), (B).

According to the Northern District of West Virginia, an ATDS is:


According to a 2015 declaratory ruling by the FCC (overruled by District of Columbia Court of Appeals in ACA international) an ATDS is:

Defined by its “potential functionalities” and not its “present capacity.” 2015 Declaratory Ruling, 30 FCC Rcd. At 7974 ¶ 16. But the FCC failed to “clarify that a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention.” 2015 Declaratory Ruling, 30 FCC Rcd. At 7976 ¶ 20.
Potential Impact

Why is this a big deal? Because a broad definition of ATDS “could potentially sweep in smartphones because they may have the capacity to store telephone numbers to be called and to dial such numbers through the use of an app or other software.” *ACA International v. FCC*, 885 F.3d 687, 697 (D.C. Cir. 2018)(citing 2015 Declaratory Ruling, 30 FCC Rcd. at 7976 ¶ 21).


How to calculate damages?

Up to $500 for “each such violation.” See 47 U.S.C. § 227(G)(3)(B).

Does “each such violation” modify “telephone call within any 12-month period,” meaning that damages are calculated per call or modify “in violation of the regulations,” meaning that more than one violation can occur per call (measured by amount of rings per call)?


But federal courts in West Virginia and the 4th Circuit have not addressed this issue.
Agency Law

In order to prove vicarious liability, a plaintiff must show that the defendant “controlled or had the right to control [the alleged agent] and, more specifically, the manner and means of the solicitation campaign that was conducted.” *Mey v. Pinnacle Security, LLC*, 2012 WL 4009718 at *5 (N.D.W. Va. 2013)(holding that the plaintiff did not adequately show defendant's “ability to control the manner and means of the calls made on its behalf.”)

But...