The Voice of the Defense Bar

The Business Suit

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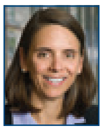

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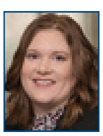

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In This Issue

Back to Contents

From the Editor

By C. Bailey King, Jr.

It seems as though another year has flown by. As you prepare for the holiday season with your family, push to collect your outstanding receivables before year end, and begin making plans for your practice next year, I hope you can find time to sit by the fire to read this latest issue of the *Business Suit* and catch up with your friends in the Commercial Litigation Committee.

In it, you will find a farewell from our outgoing chair, Michelle Thurber Czapski, who has put so much effort into this committee in order to make membership rewarding for all of us. We certainly appreciate her leadership and, along with her, look forward to Tracey Turnbull taking the reins next year. We also have a Membership Minute from Matthew Murphy encouraging us to give the "gift" of DRI membership to our colleagues this holiday season. Then, Paul Tschetter gives us a quick update on recent decisions from the Eight Circuit. And finally, we have three stellar articles from our members that highlight the depth and breadth of our committee's expertise: Jeff Sheehan's examination of where the Supreme Court may go in the antitrust field, Stacy Moon's practical guidance on how to help our clients for managing software licenses, and Eric Hurwitz's analysis of automatic telephone dialing systems under the TCPA.

What I think each of these submissions shows is how talented, fun, and interesting all of our committee members. As we approach Thanksgiving, I am reminded how grateful I am for those of you I know, and how hopeful I am that I get a chance to meet the rest of you at an upcoming meeting.

C. Bailey King, Jr., is a partner in the Charlotte, North Carolina, office of Bradley Arant Boult Cummings LLP, where he represents businesses in a variety of matters, including trade secret misappropriation and intellectual property infringement disputes, securities and investment fraud claims, and other contractual and commercial disputes. He has handled numerous complex bet-the-company cases, and has litigated matters in state and federal courts across North Carolina. He also has significant experience in the North Carolina Business Court. Bailey has been recognized in The Best Lawyers in America in commercial litigation, and has been listed in North Carolina Super Lawyers for business litigation since 2016. He is a frequent author and presenter on issues related to trade secret misappropriation, securities law, and other litigation-related topics.

From the Chair

By Michelle Thurber Czapski

For the past two years, it has been my privilege to lead this dynamic committee as its chair, and for the two years before that, I served as vice chair under "they-broke-the-mold-with-this-guy" Chris Sheean. That's kind of a long time. 14.8 percent of the time I've been practicing law, to be exact. Almost 8 percent of the time I've been on this Earth. That's a lot of conference calls, seminars and meeting agendas. But, when I look back on my time in CLC leadership, it isn't the stress of getting the seminar brochure details exactly right that sticks in my mind; it is the people I have had the privilege to get to know, to work worth, to rely on, to be surprised by, and to be grateful for.

Because, let me tell you what it is like to be chair…you care. You sweat the small stuff and the big stuff and you want everything to be perfect. All while representing your own clients and practicing commercial litigation yourself. So, you wonder how the newsletter content is coming together while you are rushing off to a deposition. You call a perspective seminar speaker while waiting for the mediator to meet with your opposing counsel. You flyspeck publications content while on a plane to a distant court appearance. All of this goes so much more smoothly and your blood pressure is so much lower if you have a great team supporting the committee, as we have been so fortunate to have as long as I have been involved in the CLC. The women and men involved in the CLC, especially the SLG and subcommittee leaders, are as energetic and creative a bunch as I have ever had the privilege of knowing. They are committed, they are talented, and they are fun. These fine folks have made my job of chair much easier and more rewarding. They just don't let you down.

They have taught me plenty as well, as we have shared our expertise in our various specialties, in our seminar and Annual Meeting presentations, publications content, and social media posts. And, the enhancement of my practice doesn't stop with knowledge, as my CLC colleagues have been a terrific source of referrals, and I always do the same if I can.

I've purposely avoided naming any names so far because there are so many great contributors to the Commercial Litigation Committee, and I don't want to leave anyone out. But, we must talk about Tracey. For those of you who don't know, Tracey Turnbull served as vice chair during my term as chair, and membership chair and seminar chair before that. Tracey is as good as it gets. She is tireless, thoughtful, and has a keen eye for detail. She is also an inspiring motivator, which is such an important characteristic in a volunteer organization. So, it is absolutely fitting that Tracey succeed me as chair of the CLC and I know that she will do a wonderful job.

Dwight Stone, our fantastic former Membership Chair, has been named as our new CLC vice chair. Dwight has always been one of our strongest leaders, so I know that he will make an excellent vice chair.

As for me, if you missed the Annual Meeting, you may not have seen that Tracey has appointed me as the chair of the Bourbon SLG, so I won't be just riding off into the sunset. With fewer committee details to worry about, I'll have plenty of time to research where to conduct our next seminar after-party.

Finally, I would like to offer my heartfelt thanks to each and every member of the Commercial Litigation Committee for the opportunity to have served as your chair. It has been an honor, and enormously rewarding. If your travels ever take you to Detroit, please give me a shout; I'm always happy to network with fellow CLC members.

Cheers!

Michelle Thurber Czapski is a member with Bodman PLC, where she specializes in the defense of life, health, disability and ERISA cases, insurance coverage matters, class actions, and commercial litigation. Ms. Czapski is based in Bodman PLC's Troy, Michigan, office, where she chairs the firm's Insurance Practice, leads the firm's attorney training program, and is a member of Bodman's ethics committee. She has served as lead trial counsel in matters across the country and has appeared in courts in numerous jurisdictions. She is active in DRI and the Life, Health and Disability Committee, and served as program chair of the 2016 Life Health Disability and ERISA Seminar. Ms. Czapski is the immediate past chair of the DRI Commercial Litigation Committee.

Membership Minute

This Holiday Season, Give and Get the Gift of DRI

By Matthew Murphy

At this time of year, we often hear things like "it is not the gift but the thought that counts," and "it is better to give than to receive." Well, convince a colleague to join DRI this holiday season and you are giving a truly meaningful gift and will receive something in return too!

What they get:

As a new DRI member, your colleague will gain [http://dri.org/membership/benefits]numerous benefits, including access to: (1) DRI's online communities and expert database; (2) a wealth of practice focused articles, books, and CLE materials; (3) a nationwide network of potential referral sources; (4) practice specific seminars and webinars (plus a $100 CLE credit for new members, a $500 CLE credit for lapsed members, or, if they are a new lawyer, one free seminar and a $100 CLE credit); and (5) innumerable publishing and leadership opportunities to help raise their professional profile.

What you get:

For recruiting a new DRI member, you will receive: (1) a $100 certificate towards the cost of your next seminary (that's $100 for *each* new member you recruit); and (2) the gratitude of your fellow Commercial Litigation Committee members!

So, this holiday season, I urge you to give and get the gift of DRI! Just make sure that your recruit lists the CLC as the referring committee and yourself as the referring member so we receive the proper credit. In fact, in the spirit of giving, why don't you make it even easier by filling out those fields before sending the membership application to them?

If you have any questions about recruiting new members or about DRI's membership benefits and incentives, please feel free to call or email me. If you need other gift ideas for your colleagues, I probably won't be nearly as helpful, but I'm still happy to brainstorm ideas!

Matthew C. Murphy is a shareholder in Nilan Johnson Lewis PA's Minneapolis office, concentrating on product liability, mass torts, and commercial litigation, and white-collar criminal defense. He is the membership chair for the DRI Commercial Litigation Committee.

Recent Cases of Interest

Eighth Circuit Case Update

By Paul W. Tschetter

Shockley v. PrimeLending, 929 F.3d 1012 (8th Cir. 2019)

Clear language of contract providing disputes would be settled by binding arbitration is not sufficient to bind the parties without evidence of actual agreement to arbitrate.

Jennifer Shockley was employed by PrimeLending from June 2016 to July 2017. PrimeLending maintained a computer network accessible by its employees which contained employment-related information. At the start of her employment, Shockley accessed the network using a computer mouse to open the various documents. Clicking on the Handbook in the system automatically generated an acknowledgement of review and a pop-up window containing a hyperlink to open the full text of the Handbook. That Handbook contained an arbitration provision. The same process was completed in the computer network again in February of 2017.

Shockley did not recall reviewing the Handbook and there was no evidence that she ever opened or reviewed the Handbook's full text. The Eighth Circuit found that the pop-up generated by the system advising her that by entering into the system she thereby acknowledged her review of the materials was not sufficient acceptance of PrimeLending's offer to enter into binding arbitration. Further, the Court noted that mere continuation of employment did not "manifest the necessary assent to the terms of arbitration." Therefore, the district court's denial of PrimeLending's motion to compel arbitration of Shockley's Fair Labor Standards Act claims was affirmed.

While this decision does not necessary address one of the many open and often litigated issues related to arbitration, the holding is a notable reminder that even the clearest language in an arbitration clause is unenforceable if you cannot show the parties actually agreed to it.

Walmart Stores East, LP v. Acosta, 919 F.3d 1073 (8th Cir. 2019)

Volunteers for the injury response team tending to workers in a distribution center are subject to OSHA's mandate that certain workers receive vaccinations.

The Occupational Safety and Health Administration ("OSHA") cited Wal-Mark Stores East, L.P., for two purported violations of OSHA's regulations by failing to provide hepatitis B vaccinations to employees who voluntarily served on a Serious Injury Response Team (SIRT) in a Florida distribution center.

Members of the SIRT team are employees who would volunteer as a secondary duty to respond to medical incidents and provide routine first-aid care unless and

Back to Contents

until emergency personnel arrived at the scene. 29 C.F.R. §1910.1030(f) generally required Wal-Mart to make the hepatitis B vaccine available to willing SIRT members after they were provided information related to hepatitis B and the vaccination within 10 working days of initial assignment. If the employee elected to be vaccinated, the regulation further required Wal-Mart to ensure the vaccine was provided. Upon receiving complaints about the Florida distribution center, OSHA conducted an inspection of the facility and proposed a fine of $5,000. A second citation was also issued, proposing a fine of $25,000. On appeal, the administrative law judge imposed a fine of $1,000 for the first citation and a penalty of $25,000 for the second—noting it was a repeat violation.

Wal-Mart appealed both citations, asserting that it should fit within the collateral duty exemption to the regulation. In rejecting Wal-Mart's argument, the Eighth Circuit found that substantial evidence supported the finding that the employees' required response to injury was not simply "collateral" in light of evidence that great majority of first aid administered by employer's serious injury response team occurred in a room separated from main work area and described as "the image of a modern-day clinic."

Janvrin v. Continental Resources, Inc., - - F.3d - - , 2019 WL 3916532 (8th Cir. Aug. 20, 2019)

Evidence was sufficient to find oil producer's conduct in requesting equipment supplier stop using owner of hauling service was improper and intentional interference with a business relationship.

In 2010, Jerry Janvrin recognized an opportunity in the oil business and organized J&J Trucking to haul materials for oil equipment suppliers on an as-needed basis. Roughly 96 percent of J&J's income came from CTAP, an equipment supplier having several supply terminals, including one in Bowman, North Dakota. CTAP's largest customer in the region from 2010 to 2014 was Continental, a top-10 oil producer in the United States. Continental alone accounted for roughly 60 percent of CTAP's business from the Bowman terminal.

During a February 2014 blizzard, a Continental pick-up driver struck and killed two cows belonging to Janvrin's relatives in rural South Dakota. Upon hearing of the accident, Janvrin, frustrated with drivers going too fast for the rural conditions and recalling that he had lost several sheep on that road in the past, called the local newspaper, which published an article about the cow-truck collision and paraphrased his remarks. Within hours of his published remarks being distrusted, Janvrin received a call from CTAP informing him that he had been removed from the Bowman terminal lineup.

Janvrin filed a tortious interference claim in state court, alleging that Continental had pressured CTAP to end its business relationship with J&J in retaliation for Janvrin's newspaper comment. The case was removed to the Federal District of South Dakota, where, in 2017, a jury returned a verdict for Janvrin, awarding him $123,669 in compensatory damages and $123,669 in punitive damages. Continental appealed, arguing the evidence at trial was insufficient to support the jury's verdict and that the District Court had improperly instructed the jury that Continental had the right to refuse to do business with Janvrin, but that it could not interfere with Janvrin and CTAP's business relationship.

Though the Eighth Circuit noted the evidence was "not overwhelming," it nevertheless upheld the District Court's denial of Continental's motion for judgment as a matter of law. Continental's director testified that he spoke with the vice-president of CTAP—with whom he had a long-standing relationship, asking that Janvrin be prohibited from delivering to certain Continental sites. CTAP employees testified that they were then instructed to remove Janvrin from the delivery schedule entirely. Further, there was evidence that a supervisor at Continental had bragged about shutting down a trucking company, while both Continental and CTAP ignored Janvrin's post-termination inquiries. Thus, the evidence was sufficient to find Continental's conduct was improper and intentional interference with the business relationship between Janvrin and CTAP.

Finally, the Eighth Circuit found the District Court's instruction on tortious interference proper, as it recognized Continental's right to refuse to do business with Janvrin and at the same time precludes Continental from interfering with the third-party Janvrin-CTAP relationship. Continental stressed that it must be permitted to exercise its "absolute rights" even if doing so happens to affect a third-party relationship, but the Eighth Circuit disagreed, citing the Restatement (Second) of Torts, noting parties are still not permitted to improperly interfere under the circumstances.

Paul W. Tschetter is a partner at Boyce Law Firm, LLP in Sioux Falls, South Dakota. His practice focuses on shareholder disputes, creditors' rights, and various aspects of construction law, including construction/design litigation. He can be reached at pwtschetter@boycelaw.com.

Textualism and Uncertainty in Antitrust After *Apple v. Pepper*

By Jeffrey W. Sheehan

The U.S. Supreme Court's newest Justices are both known as textualists and conservatives, but their conflicting opinions in *Apple v. Pepper*, 139 S. Ct. 1514 (2019), flag antitrust as a potential area of doctrinal turbulence in the coming terms. They also amplify uncertainty over new applications of century-old statutes and decades-old precedent. One of the conservative textualists authored a majority opinion joined by all four liberal Justices. The other authored a policy-driven dissent for the remaining conservative Justices that largely ignored the statutory text. As *Apple* demonstrates, the conservative Court majority—and even its committed textualists—have competing visions of the statutes and doctrines at the heart of antitrust law.

Apple presented the question of whether consumers have standing to sue an alleged antitrust-violating retailer who sold them a product at an inflated price set by third parties. Writing for the Court with the support of the four liberal Justices, Justice Kavanaugh held that the third parties' pricing decisions should not prevent consumers in privity with an alleged antitrust violator from filing suit. Justice Gorsuch, joined by the remaining conservative Justices, dissented.

The case turned on a "pass-through" doctrine the Court read into the Clayton Act of 1914 in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), to "simplif[y] administration" and "improve[] antitrust enforcement." That doctrine prevents plaintiffs from seeking damages against antitrust violators more than one step removed in the stream of commerce. Traditional applications of the doctrine prevent consumers from reaching over a retailer whose suppliers engage in anticompetitive practices to seek damages from the alleged antitrust violators upstream. Anyone injured has standing to seek injunctive relief, but antitrust violators are only liable for damages suffered by "direct purchasers."

Apple asked the Court to extend that doctrine to block Pepper from seeking damages over purchases of smartphone software applications ("apps") purchased in Apple's App Store, the only marketplace for apps compatible with Apple's devices. Problematically for Apple, Pepper and every other App Store customer purchased these apps directly from Apple. Apple charged third-party developers an annual membership fee, decided which apps could appear for sale in the App Store, and collected customers' payments. Beyond that, however, Apple allowed developers to set the prices for their apps (as long as those prices ended in 99 cents) and remitted 70 percent of each transaction to the developers. Apple argued that the pass-through doctrine should apply because app developers ultimately set the prices the consumers paid, and any impact of Apple's policies on the developers' pricing decisions was more than one step removed from the consumers' purchases.

Kavanaugh was not persuaded. Instead, he began with "the broad text of §4" of the Clayton Act and found authority that "'any person' who has been 'injured' by an antitrust violator" may sue for damages. He confirmed that reading with precedent "consistently stat[ing] that 'the immediate buyers from the alleged antitrust violators' may maintain suit against the antitrust violators." Consumers were allegedly harmed by anticompetitive practices, and the Court was not willing to read any limitations into the broad statutory text to withhold standing from consumers who purchased a product directly from the retailer who allegedly influenced the market through anti-competitive practices.

By contrast, Gorsuch accepted Apple's pass-through characterization by emphasizing precedent and policy preferences grounded in proximate cause. He viewed the App Store as a marketplace where "plaintiffs bought apps from third-party developers (or manufacturers) in Apple's retail Internet App Store, at prices set by the developers." The dissent acknowledged that "the plaintiff app purchasers happen to have purchased directly from Apple," but argued that focusing on privity "exalts form over substance." Gorsuch found "[n]o antitrust reason" to treat transactions differently based on whether Apple or the developers stand in privity with the purchasers. Neither, however, did the dissent offer any detailed analysis to support the argument that the plaintiffs' alleged damages were not proximately caused by Apple's policies.

Kavanaugh's majority agreed with the dissent that standing should not turn on formalism, but reached the opposite conclusion. The dissent reasoned that *Illinois Brick* would have protected Apple if it had influenced the market without standing between the developers and the consumers and would have extended the doctrine to protect Apple. The majority, however, seemed prepared to abandon the privity requirement entirely rather than "allow a monopolistic retailer to insulate itself from antitrust suits by consumers" through formalistic restructuring. Absent a textual hook for the limitation on standing, the majority was unwilling to "create an unprincipled and economically senseless distinction among monopolistic retailers and furnish monopolistic retailers with a how-to guide for evasion of the antitrust laws."

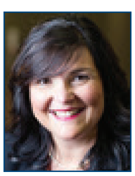
The lack of a firm textualist foundation is not surprising in an antitrust decision, given that a literal reading of the statutory bans on all contracts in restraint of trade would prohibit virtually all contracts and business relationships. It raises questions, however, particularly in combination with state and federal authorities' renewed scrutiny of Big Tech's impact on innovation and pricing and the Court's uncertain commitment to stare decisis. Innovators in this area need to consider not only *whether* their plans conform to precedent distinguishing pro-competitive and anti-competitive restraints, but also *how* to persuade the courts and the executive branch that those distinctions are more than "unprincipled and economically senseless" formalism.

Beyond the precise holding and the reasoning of the conflicting opinions, *Apple* expands a set of 5-4 majorities in which one textualist Justice's interpretation leads to the same judgment as the interpretive approaches of the four liberal Justices. These majorities have emerged in cases interpreting criminal statutes, *United States v. Davis*, 139 S. Ct. 2319 (2019) (Gorsuch, J.), and statutory provisions governing federal jurisdiction to remove class actions from state courts, *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743 (2019) (Thomas, J.). Add antitrust to the list. Given the breadth of the literal statutory prohibitions and the common-law development of pragmatic doctrines distinguishing pro-competitive restraints from anti-competitive ones, this one bears watching.

Jeffrey W. Sheehan is an associate in Bradley Arant Boult Cummings, LLP's Nashville, Tennessee office. Jeff's practice focuses on commercial and appellate litigation in state and federal courts.

Over-Deployment of Software (or—IT Ordered What? When?)

By Stacy Linn Moon



Clients are experiencing this scenario more and more frequently. The IT department of a client received a letter from a software company asking to perform an audit of the software deployment. To do so, it will send a script written by it to the computer system, and the script will audit the use of the software. IT, probably with little to no qualms, agrees. Three months later, the software company sends the client a bill for $150,000 for over deployment of software, and possibly alleging pirating software. At this point, IT decides to get the legal department, and counsel gets first notice of the issue.

Unfortunately, this scenario is not something created by an over-active law professor's imagination for an exam. Instead, it is an issue becoming more common as software companies realize they may have an alternate form of income. The question for legal departments and outside counsel is whether these claims are scams or legitimate. The answer, predictably, is "it depends."

In a recent situation, Quest Software audited Nike, Inc., under similar circumstances. After the audit, Quest sent a multi-million-dollar demand to Nike and claimed Nike had also pirated software and installed it on unauthorized servers. Nike performed its own audit; identified what it contended was the over-deployment of the software and made a counteroffer. Quest filed suit, alleging more than $15 million in breach of contract, interest, over-deployed licenses, maintenance fees, and treble damages for allegedly pirated software.

Nike responded, admitting approximately $350,000 in over-deployment and license fees. It denied owing interest. It denied owing anything for freeware (which Quest also claimed), and it denied any multiplier of damages because none of its software was pirated.

These types of audits are on the rise, and Quest in particular, has recently been identified as a company that increased its audits. See http://www.redwoodcompliance.com/quest-software-license-audits-rise/ (last reviewed Nov. 6, 2019). As clients see more of these audit requests, they need guidance on how to prevent surprises; handle the audit; and respond to any demands.

Companies Hate Surprises

How can a lawyer help her client avoid a multi-million-dollar surprise bill for over-deployed software? As with most areas of the law, being proactive is the answer. And the easiest way to be proactive is to maintain proper controls and records. Companies should limit and record who can order software, and who can upload software – particularly to a server. (Most companies express these limitations in terms of cybersecurity. Enforcing them helps ensure companies can avoid nasty computer viruses but also keep track of what software is deployed where.) IT must keep track of what software is loaded onto which servers. When a server is moved or its purpose is changed, IT should have written policy and protocols for recording the information and confirming software that is not needed on the server is removed. When a server is shifted from one department to another, or even one entity to another, IT should record what software was on the server; what software was removed; how many computers connect to the server when the software was installed; and how many computers connect to the server for its new purpose.

Legal and outside counsel should not assume IT is aware of the increase in audits. Accordingly, they should warn IT that it might see similar requests and ask that those requests be forwarded for legal review *before* any access is provided. Companies should limit access to the servers and computer systems to the best of their ability. Further, companies should perform their own audits. The software license might allow the software company to have an audit, but companies should have the ability to perform he audit for the software company. If necessary, companies could hire a neutral company with no stake in the result of the audit.

These methods should reduce the likelihood of any unpleasant surprises from an audit.

Defending a Claim for Over-Deployment

If a client receives a bill for over deployment of software (and worse yet, pirated) software, the client can reduce, if not eliminate, the claimed amounts.

First, and probably most obviously, clients should read the license. Does the license define "user" as everyone with access to the server or as anyone who actually used the software? Particularly in cases in which forgotten software remains on a server that IT has repurposed, that definition is critical. Additionally, for those situations in which "user" requires actual opening or use of the software, IT should be able to identify who used the software in a given time period, how often, and even when. Frequently, the actual definition of "user" is more restricted than the definition of "user" forming the basis of the claim for over deployment.

Additionally, by reading the license, counsel may be able to limit the claimed amount to the statute of limitations. No matter how over deployed the software may have been six years ago, if the statute of limitations for breach of contract in the jurisdiction whose law controls the license is only four, the software company is limited to four years of damage.

If the license allows for "annual" audits, and the software company waited eight or nine years to perform an audit, an argument can be made that the software company should have acted more diligently. While not always a strong legal argument, the argument can be used to eliminate any claim for interest. Additionally, the license may only allow for interest from the date of a demand, rather than for the entire time period of the alleged over deployment.

Finally, the software companies have been known to seek the cost of annual maintenance of the software. However, if the software has not been used for years, and if the software company has not provided any maintenance or updates, then the client can use that information to avoid the claim for over-due maintenance fees.

How Do I Settle This Thing?

Once the client and software company reach an agreement on a number, the question becomes how to actually settle and enforce the settlement agreement. Clients should demand a confidentiality provision. Frequently, clients settle with one software company and, strangely, another software company requests an audit for the first time in ten years. Although confidentiality provisions may be difficult to enforce, they do provide some penalty in the event the client can establish the software company violated it.

Clients should also involve IT in the settlement process. Before agreeing to remove or do anything, clients should confirm with IT that the agreement can be done. And then, once the agreement is signed, they must follow up with IT to make sure the over deployed software has been removed and is no longer deployed. Clients need to remember that so long as they have a license, the possibility of an audit looms over them. Without IT involvement, this same issue can arise again.

Back to Contents

Conclusion

Clients needs to know this threat exists and be proactive to neutralize it before receiving a multi-million-dollar demand. Record-keeping and cooperation between legal and IT are essential. And, if a software company sends a demand for over deployed software, clients should not be afraid to push back.

Stacy L. Moon, Senior Counsel in the Birmingham, Alabama, office of at Gordon Rees Scully Mansukhani, LLP, is a litigator with 20 years of experience. Her practice focuses on commercial litigation, employment law, and construction disputes. She also practices in the area of government liability, including excessive force cases. She is immediate past chair of the law practice management committee, and she is an active member in the commercial litigation, employment law, and litigation skills committees.

Definition of an Automatic Telephone Dialing System Under the TCPA

By Eric M. Hurwitz

In 2016, the number of households using only cellular telephones surpassed those with a landline. *See* https://www.marketingcharts.com/demographics-and-audiences/youth-and-gen-x-77051. This statistic correlates with another fact—the number of lawsuits for violating the Telephone Consumer Protection Act, 47 U.S.C. §227 ("TCPA"), has remained high for the past several years as more businesses place calls to cellular telephones instead of landlines. *See* https://webrecon.com/webrecon-stats-for-dec-2018-2018-ends-with-a-whimper/.

The TCPA regulates the methods of placing calls cellular telephones. Under the act, it is unlawful make any call to a cellular telephone, other than for emergency purposes or with the prior express consent of the called party, using an "automatic telephone dialing system" ("ATDS") or artificial or prerecorded voice. 47 U.S.C. §227(b)(1).

Historically, the Federal Communications Commission ("FCC"), the agency with regulatory oversight of the TCPA, has taken an overly-expansive interpretation of an ATDS in a way broader than the plain text of the statute. The FCC's interpretation has been challenged in the courts, leading to the current dilemma—the definition of an ATDS now depends on where the case is venued, with a circuit split on the issue. This article addresses the changing definition of an ATDS over time and the current circuit split, which only the FCC or the Supreme Court can resolve.

The ATDS Provisions of the TCPA

The TCPA defines an ATDS as "equipment which has the capacity — (A) store 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). This definition has been lifted almost verbatim into the FCC's implementing regulations. *See* 47 C.F.R. §64.1200(f)(2) ("The terms automatic telephone dialing system and autodialer mean 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 plain text of the statute and regulation thus contemplates that an ATDS can generate random or sequential numbers, and then dial those numbers. The FCC's earliest guidance tracked this requirement. In a 1992 Order, the FCC explained that "the prohibitions of §227(b)(1) clearly do not apply to functions like 'speed dialing,' 'call forwarding,' or public telephone delayed message services (PTDMS), because the numbers called are not *generated in a random or sequential fashion*." *See Rules & Regulations Implementing Tel. Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, 1992 WL 690928 at * 17, ¶ 47 (FCC Oct. 16, 1992) (emphasis added). Unfortunately, the FCC's clarity was short-lived, and its later orders led to a significant broadening of an ATDS to include any device that had the capacity, current or latent, to dial numbers automatically without human intervention.

The FCC's Changing Rulings Regarding an ATDS

In 2003, the FCC issued new guidance that significantly expanded the definition of an ATDS in a way not contemplated under the statutory or regulatory text. *See Rules & Regulations Implementing Tel. Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 2003 WL 21517853 (FCC July 3, 2003). The FCC analyzed whether the definition should include "predictive dialers," systems that can automatically

Back to Contents

call telephones from a pre-selected list of numbers, unlike earlier technology that used no list but simply generated numbers to be called randomly or sequentially. The FCC defined a predictive dialer as "[a]n automated dialing system that uses a complex set of algorithms to automatically dial consumers' telephone numbers in a manner that 'predicts' the time when the consumer will answer the phone and a telemarketer will be available to take the call." *Id*. at *45, ¶ 131.

The 2003 Order moved away from random or sequential number generation, instead stating that "[t]he principal feature of predictive dialing software is a timing function, not number storage or generation. *Id.* at *45-46, ¶¶ 131-132. The FCC determined that a predictive dialer's utilization of a pre-selected list of numbers to be called did not preclude the dialer from qualifying as an ATDS. *Id*. at *45, ¶ 133 ("to exclude [a predictive dialer] from the definition of [an ATDS] simply because it relies on a given set of numbers would lead to an unintended result"). The FCC added that "[t]he basic function of such equipment" is "the capacity to dial numbers without human intervention." *Id.*

In 2008, the FCC issued ATDS guidance that largely tracked its prior 2003 Order. *In re Rules and Regulations Implementing the TCPA, Request of ACA Int'l for Clarification and Declaratory Ruling*, 23 FCC Rcd. 559, 2008 WL 65485 at *4, ¶ 13 (FCC January 4, 2008). In response to a petition concerning predictive dialers, the FCC stated that "the basic function of such dialing equipment, had not changed—the capacity to dial numbers without human intervention." *Id.* The FCC concluded that "a predictive dialer fails within the meaning and definition of autodialer and the intent of Congress." *Id.* at ¶ 12-13.

In July 2015, the FCC issued an omnibus ruling concerning several TCPA issues, including the definition of an ATDS. *In re Rules and Regulations Implementing the TCPA*, 30 FCC Rcd. 7961, 2015 WL 4387780 (FCC July 10, 2015) (the "2015 Omnibus Ruling"). The FCC concluded that the definition of an ATDS includes equipment that has no *current* capability of generating and calling numbers randomly and sequentially, so long as that equipment has a *latent* capacity to do so. *Id.* at *5 – 7, ¶¶ 12-15. As one court explained the FCC's conclusions, "the 2015 FCC Declaratory Ruling held that predictive dialers were still a form of an ATDS, but expanded the definition to include systems that *could potentially engage* in this type of dialing." *See Fleming v. Associated Credit Servs., Inc*., 342 F. Supp. 3d 563, 572 (D.N.J. 2018) (emphasis added).

ACA Int'l v. Fed. Communications Comm'n ("ACA Int'l")

Various organizations challenged the FCC's 2015 Omnibus Ruling in the United States Court of Appeals for the District of Columbia Circuit. *See ACA Int'l v. Fed. Communications Comm'n*, 885 F.3d 687 (D.C. Cir. 2018). The Court found that the agency's definition of "capacity" was impermissibly expansive. *See id*. "The D.C. Circuit noted, for example, that virtually any smartphone would fall within the definition of an ATDS, because, through the downloading of an app, it could be converted to dial automatically." *Fleming*, 342 F. Supp. 3d 563, 572 (*citing ACA Int'l*, 885 F.3d at 700). The D.C. Circuit therefore concluded that the FCC's interpretation of an ATDS was not the product of reasoned decision-making given the language of the TCPA:

> A basic question raised by the statutory definition is whether a device must itself have the ability to generate random or sequential telephone numbers to be dialed. Or is it enough if the device can call from a database of telephone numbers generated elsewhere? The Commission's ruling appears to be of two minds on the issue.
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> ...
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> So which is it: does a device qualify as an ATDS only if it can generate random or sequential numbers to be dialed, or can it so qualify even if it lacks that capacity? The 2015 ruling, while speaking to the question in several ways, gives no clear answer (and in fact seems to give both answers). It might be permissible for the Commission to adopt either interpretation. But the Commission cannot, consistent with reasoned decision-making, espouse both competing interpretations in the same order.

ACA Int'l, 885 F.3d at 701–703. As a result, the Court rolled back that portion of the 2015 Omnibus Ruling as it relates to a system's "capacity." Under the Hobbs Act, this ruling was binding on all federal circuits. *See Pinkus v. Sirius XM Radio, Inc*., 319 F. Supp. 3d 927, 933 (N.D. Ill. 2018).

Many courts have held that the FCC's earlier 2003 and 2008 Orders also cannot survive the D.C. Circuit's decision in *ACA Int'l. See, e.g., Espejo v. Santander Consumer USA, Inc.,* No. 11 C 8987, 2019 WL 2450492, at *5, n.2 (N.D. Ill. June 12, 2019) (collecting cases in which court decided that *ACA Int'l* invalidated the 2003, 2008, and 2015 FCC guidance); *Gary v. TrueBlue, Inc*., No. 17-10544, 2018 WL 3647046, at *6 (E.D. Mich. Aug. 1, 2018) ("Applying *ACA Int'l*, the FCC's rulings—including the ATDS definition which covered equipment that can only dial numbers from a set list—are no longer valid."); *Richardson v. Verde Energy USA, Inc*., 354 F. Supp. 3d 639, 648 (E.D. Pa. 2018) ("The 2003 and 2008 Orders are therefore invalid and no longer binding on this Court as to whether predictive dialers qualify as ATDSs"). These courts have held that "only the statutory definition of an ATDS as set forth by Congress in 1991 remains" and that after *ACA Int'l,* "we must begin anew to consider the definition of AIDS under the TCPA." *Marks v. Crunch San Diego, LLC,* 904 F.3d 1041, 1049-50 (9th Cir. 2018).

In contrast, a minority of courts have held that the FCC's 2003 and 2008 Orders remain good law after *ACA Int'l. See, e.g., O'Shea v. Am. Solar Solution, Inc*., No. 14-894, 2018 WL 3217735, at *2 (S.D. Cal. July 2, 2018) ("The ACA decision left intact the holding of both the FCC's 2003 and 2008 Order that a [predictive dialer] is an ATDS."). These courts continue to hold that a predictive dialers is still an ATDS under the TCPA, even if the system cannot generate random or sequential numbers.

The Current Circuit Split

In 2018, the Third Circuit confirmed that an ATDS must be able to randomly or sequentially generate telephone numbers and then dial them, as opposed to simply storing telephone numbers and dialing from a list. *Dominguez v. Yahoo, Inc*., 894 F.3d 116, 121 (3rd Cir. 2018). The Court found that the TCPA's "random or sequential" requirement cannot be read out of the ATDS definition, and that the FCC's earlier administrative rulings did not, and could not, eliminate those statutory requirements. *Id.* at 120. The Third Circuit therefore held that a system must have the "present capacity to function as an autodialer *by generating random or sequential numbers and dialing those numbers*." *Id*. (emphasis added).

Other courts have followed this rationale. *See, e.g., Pinkus*, 319 F. Supp. 3d at 939 (stating that the "plain text shows . . . that equipment qualifies as an ATDS only if it has the capacity to function by generating random or sequential telephone numbers and dialing those numbers"); *Thompson-Harbach v. USAA Fed. Sav. Bank*, No. 15-CV-2098-CJW-KEM, 2019 WL 148711, at *14 (N.D. Iowa Jan. 9, 2019) (finding that a system's capacity to randomly or sequentially generate telephone numbers and dial them is a "critical feature" necessary to bring the device into the scope of the TCPA).

The Ninth Circuit reached the opposite result in *Marks v. Crunch San Diego, LLC,* 904 F.3d 1041 (9th Cir. 2018). The Court agreed that the FCC's prior orders over the meaning of an ATDS were no longer binding after *ACA Int'l,* and that the starting point is the statute itself. *Id.* at 1049. The Court then reached a different interpretation from the Third Circuit in *Dominguez.* The Ninth Circuit determined that the statutory definition "is not susceptible to a straightforward interpretation based on the plain language alone. Rather, the statutory text is ambiguous on its face." *Id.* at 1051. Based on this claimed ambiguity, the Ninth Circuit reasoned that the TCPA as originally enacted indicates "that Congress intended to regulate devices that make automatic calls. Although Congress focused on regulating the use of equipment that dialed blocks of sequential or randomly generated numbers—a common technology at that time—language in the statute indicates that equipment that made automatic calls from lists of recipients was also covered by the TCPA." *Id.* The Court then concluded that the phrase "using a random or sequential number generator" modifies only the phrase "to produce numbers," and not the phrase "to store numbers." Effectively, then, the Court rewrote the statute as follows: "the term automatic telephone dialing system means equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers." *Id.* at 1052.

As other courts have recognized, the Ninth Circuit's conclusion is not grammatical correct because the phrase "using a random or sequential number generator" modifies the phrase "telephone numbers to be called," not the words "store" or "produce." *See, e.g., Pinkus*, 319 F. Supp. 3d at 939 (discussing correct grammatically reading of statutory text. Therefore, whether the numbers are "stored" or "produced," the modifying clause is the same for both—the telephone numbers were generated randomly or sequentially.

Even so, *Marks* is binding law in the Ninth Circuit, and reflects a clear circuit split with the Third Circuit. In light of *Marks*, on October 3, 2018, the FCC issued a public notice seeking comment on the ATDS definition. *See* https://docs.fcc.gov/public/attachments/DA-18-1014A1.pdf. The FCC stated, "We seek further comment on how to interpret and apply the statutory definition of automatic telephone dialing system, including the phrase "using a random or sequential number generator," in light of the recent decision in *Marks*, as well as how that decision might bear on the analysis set forth in *ACA International*." *Id.* The FCC has not yet promulgated any new guidance following the receipt of comments. Meanwhile, courts continue to reach varying results on the interpretation of an ATDS.

Conclusion

Without any definitive FCC or Supreme Court guidance, a business placing calls faces a clear dilemma—due to the circuit split, its potential liability may depend on where the called party is located. Equipment that is not an ATDS for calls made to a Pennsylvania customer may be an ATDS for calls made to a California customer.

While the industry waits for much needed clarity, there are concrete steps businesses can take to limit TCPA exposure. These include implementing formal training, processes, and policies to comply with the TCPA. Policies and training should include ways to capture the consent of the called party, and best practices to capture any possible revocations of consent. Businesses should also minimize calls to wireless numbers unless they can verify consent. They should also consider technology that cannot generate random or sequential numbers, or better yet, technology which requires an actual human decision to place call. For example, many companies use "preview" or "clicker agent" dialing where an account appears on an agent's screen for review, and the agent must push a button on the screen to start the call. Finally, businesses should require all third-party vendors and marketing partners to comply with the TCPA and require indemnification to protect against vicarious liability claims. These steps will go a long way to minimize TCPA risk, particularly so long as many jurisdictions continue to construe the meaning of the ATDS overbroadly.

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