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results matter

District of Kansas Holds a Device that Dials from Stored Customer Database is Not an ATDS

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On April 13, 2020, the District Court of Kansas in *Hampton v. Barclays Bank Delaware*, No. 18-4071-DDC-ADM, 2020 WL 4698476 (D. Kan. Aug. 13, 2020), joined the Seventh and Eleventh Circuits in holding that devices that exclusively dial numbers stored in a customer database do not qualify as autodialers under the TCPA.

The Plaintiff, Anthony Hampton ("Plaintiff"), asserted numerous claims against multiple defendants, including a TCPA claim against Marketplace Loan Grantor Trust, Series 2016-LD1's ("Marketplace"). Specifically, Plaintiff claimed Marketplace violated the Telephone Consumer Protection Act ("TCPA") by using an automatic telephone dialing system ("ATDS") to call his cell phone without his consent.

Subject to certain exceptions, the TCPA prohibits using an ATDS to call a cell phone. *See*47 U.S.C. § 227(b)(1)(A)(iii)). An ATDS is defined 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). Recently, a circuit split has emerged as to whether a device that dials numbers from a stored list qualifies as an autodialer. *See Hampton*, 2020 WL 4698476, at *25.

The system at issue in *Hampton* was "a cloud-based calling system from Five9 (the 'Calling System')." *Id.* at *23. The Calling System did not use and did not have the capacity to use a random or sequential number generator. *See id.* "[T]he Calling System use[d] lists of phone numbers generated from customer records" that were "most often, contained in spreadsheets and uploaded to the Calling System." *Id.* Additionally, the Calling System did not use recorded messages or artificial voices, and all messages were left by live representatives. *See id.*

As the Tenth Circuit has not yet addressed "whether devices that exclusively dial numbers stored in a customer database qualify as automatic telephone dialing systems," the District Court of Kansas analyzed how the Third, Seventh, Ninth, and Eleventh Circuits have decided the question before

predicting how the Tenth Circuit would decide the question. *See id.* at *24.

The Court explained that both the Seventh and Eleventh Circuit decisions, *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458 (7th Cir. 2020) and *Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301 (11th Cir. 2020), "exhaustively analyze the statute's text" while the Ninth Circuit decision, *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018), found the statutory language was ambiguous and did not reach a conclusion about it. Following the Seventh and Eleventh Circuits' lead, the Court observed that "the statute prohibits devices with the *capacity* to dial random or sequential numbers, even though that same device also potentially could be used to call phone numbers stored in a database." *Hampton*, 2020 WL 4698476, at * 29. The Court further observed that the 11th Circuit's interpretation was supported by the legislative history and that Congress's decision not to amend the TCPA in 2015 did not equate to approval of the FCC's 2015 Order, which "explained that (1) a device's 'capacity' means its 'potential functionalities with modifications such as software changes,' and (2) predictive dialers qualify as autodialers. *Id.* at *24 (citations and internal quotations omitted); *see id.* at *29.

The Court thus concluded that "[t]he uncontroverted summary judgment facts show that the Calling System exclusively used phone numbers taken from a database of customers and thus lacked the capacity to function as an ATDS." *Id.* at *30. Because the Court predicted that the Tenth Circuit would follow the Seventh and Eleventh Circuits, which exclude this type of device from the definition of an ATDS, the Court granted summary judgment in favor of Marketplace on Plaintiff's TCPA claim. *See id.*

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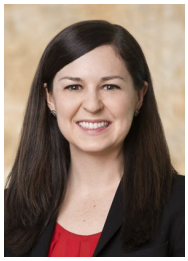

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