

## Dominguez v. Yahoo, Inc.

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894 F.3d 116 (3d Cir. 2018)

### I. INTRODUCTION

In *Dominguez v. Yahoo, Inc.*,<sup>1</sup> the Third Circuit Court of Appeals affirmed the district court's grant of summary judgment dismissing the Plaintiff's lawsuit alleging that Yahoo had violated the Telephone Consumer Protection Act (TCPA) by inundating him with thousands of text messages without his consent.<sup>2</sup> In doing so, the court applied the D.C. Circuit's recent decision in *ACA International v. FCC*, which was issued while the appeal of this case was pending.<sup>3</sup>

### II. BACKGROUND

In 1991, Congress passed the Telephone Consumer Protection Act to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of . . . automatic dialers."<sup>4</sup> The Act delegated to the FCC the authority to promulgate additional regulations as necessary.<sup>5</sup> The FCC has subsequently issued declaratory rulings to clarify its interpretation of the statute.<sup>6</sup>

In December 2011, the Plaintiff purchased a cell phone and new telephone number.<sup>7</sup> The telephone number was previously used by a subscriber to Yahoo's email-notification service, which texted users whenever an email was sent to the subscriber's email address.<sup>8</sup> The telephone number's prior owner never changed the forwarding information for the email-notification service, and, consequently, the Plaintiff received all text messages related to his the Yahoo subscription.<sup>9</sup>

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1. 894 F.3d 116 (3d Cir. 2018).

2. *Id.* at 121.

3. *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

4. S. REP. NO. 102-178, at 1 (1990).

5. 47 U.S.C. § 227(b)(2).

6. See, e.g., *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (2003 TCPA Order)*, 18 FCC Red 14014, 14115; *2015 TCPA Order*, 30 FCC 7961, 7694, ¶ 16.

7. *Dominguez v. Yahoo, Inc.*, 629 Fed. Appx. 369, 370 (3d Cir. 2015).

8. *Id.*

9. *Id.*

The Plaintiff tried a number of options to stop the messages, but they were all to no avail. He initially replied “stop” and “help” to the messages, followed by contacting Yahoo’s customer service line directly with his grievances, but Yahoo informed him that they could not stop the messages.<sup>10</sup> He even called Yahoo’s customer service again with a representative from the FCC, but this was unsuccessful as well.<sup>11</sup> Having exhausted his options, the Plaintiff filed complaints with the FCC and FTC.<sup>12</sup>

The Plaintiff received 27,809 text messages over the course of the 17 months with his new cell phone and reassigned telephone number.<sup>13</sup> In order to stop the calls, the Plaintiff decided to file a putative class action lawsuit under the TCPA.<sup>14</sup> The Act makes it unlawful to send calls or text messages “using any automatic telephone dialing system ... to any telephone number assigned to a ... cellular telephone service” without the owner’s prior express consent.<sup>15</sup> The key inquiry in this case was whether the system Yahoo used to contact the Plaintiff constituted an automatic telephone dialing system (ATDS) for the purposes of the TCPA.<sup>16</sup>

In order to be classified as an ATDS, a device must have the capacity to (A) store or produce telephone numbers to be called, using a random or sequential number generator; and (B) dial such numbers.<sup>17</sup> The District Court granted Yahoo’s motion for summary judgment on the grounds that their email-notification service did not fit within the prescribed definition.<sup>18</sup> The Plaintiff subsequently appealed.<sup>19</sup> However, the FCC issued a declaratory ruling (2015 TCPA Order), which held that “the capacity of an [ATDS] is not limited to its current configuration but also its potential functionalities.”<sup>20</sup> In light of this ruling, the Third Circuit remanded the case to consider whether the email-notification service was an ATDS based on its potential capacity.<sup>21</sup>

The Plaintiff amended his complaint to allege that the email-notification service was an ATDS based on its potential capacity.<sup>22</sup> He also included expert reports to demonstrate the latent capacity of Yahoo’s service to function as an ATDS.<sup>23</sup> Nonetheless, the District Court granted Yahoo’s

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10. *Id.* at 370-71.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *ACA Int’l v. FCC*, 885 F.3d 687, 692 (D.C. Cir. 2018) (quoting 47 U.S.C. § 227(b)(1)(A)(iii)).

16. *See Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 117 (3d Cir. 2018).

17. 47 U.S.C. § 227(a)(1)(A)-(B).

18. *Dominguez v. Yahoo, Inc.*, 629 Fed. Appx. 369, 371 (3d Cir. 2015).

19. *Id.*

20. *2015 TCPA Order*, 30 FCC Rcd 7961, 7974, ¶ 16.

21. *Dominguez*, 629 Fed. Appx. at 373 (“Because this is an issue of heightened importance in light of the 2015 FCC Ruling, and the District Court did not previously have the benefit of the FCC’s ruling in addressing the issue, remand is appropriate to allow that Court to address more fully in the first instance whether Yahoo’s equipment meets the statutory definition.”).

22. *Dominguez v. Yahoo, Inc.*, 2017 U.S. Dist. LEXIS 11346, at \*9 (E.D. Pa. Jan. 27, 2017).

23. *Id.* at \*8.

motion for summary judgment again on the grounds that Yahoo's service still did not qualify as an ATDS under the FCC's current interpretation of "capacity."<sup>24</sup> The Court also excluded the reports on the grounds that they were inadmissible under *Daubert v. Merrell Dow Pharms., Inc.*<sup>25</sup> Dominguez appealed his case once again, and just as before, a critical decision was issued while it was pending before the Third Circuit.

In *ACA International v. FCC*, the D.C. Circuit held that the FCC's declaratory ruling and interpretation of the "capacity" of ATDS was far too expansive.<sup>26</sup> The Court particularly took issue with the argument that any smartphone could conceivably become an ATDS by downloading a random-number-generating application.<sup>27</sup> In light of the public policy concerns, the D.C. Circuit invalidated the 2015 TCPA Order.<sup>28</sup>

### III. ANALYSIS

The Third Circuit applied the D.C. Circuit's holding to this appeal.<sup>29</sup> It therefore rejected any arguments put forth by the Plaintiff alleging that Yahoo's email-notification service could be considered an ATDS based on its potential capacity to function as such a device.<sup>30</sup> Therefore, the issue for the Court was whether the Plaintiff provided evidence to prove that Yahoo's service constituted an ATDS based on its current configurations.<sup>31</sup>

The Third Circuit affirmed the District Court's decision to exclude the expert reports from evidence because they only focused on the latent capacity of Yahoo's email notification service to function as an ATDS.<sup>32</sup> The Plaintiff was unable to provide any evidence to prove the current capacity of the service to function in this manner, so he failed to create a genuine issue of material fact to overcome the grant of summary judgment.<sup>33</sup>

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24. *Id.* at \*3, \*8.

25. *Id.* at \*8 (citing 509 U.S. 579 (1993)).

26. *ACA Int'l v. FCC*, 885 F.3d 687, 699 (D.C. Cir. 2018) ("[T]he Commission's interpretation of the term 'capacity' in the statutory definition of an ATDS is 'utterly unreasonable in the breadth of its regulatory [in]clusion.'").

27. *Id.* at 701.

28. *Id.* at 703.

29. *See Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 119 (3d Cir. 2018) ("In light of the D.C. Circuit's holding, we interpret the statutory definition of an [ATDS] as we did prior to the issuance of [the] 2015 Declaratory Ruling.").

30. *Id.* ("Dominguez can no longer rely on his argument that the Email EMS Service had the latent or potential capacity to function as [an ATDS].").

31. *Id.* (deferring to D.C. Circuit's rationale opposing the 2015 TCPA Order's interpretation of the ATDS clause).

32. *Id.* at 120 ("The reports are founded upon the exact type of hypothesizing that is foreclosed by *ACA International*").

33. *Id.* at 121.

#### IV. CONCLUSION

In sum, the Third Circuit affirmed the District Court's grant of summary judgment in favor of Yahoo and rejected all arguments that their email notification service fit within the statutory definition of an ATDS.