Fisher Broyles

CLIENT ALERT
April 2, 2021

Supreme Intervention for the TCPA: The Supreme Court Resolves the Definition of an ATDS

On April 1, 2021, the Supreme Court resolved a question that has plagued businesses for over fifteen years and spawned a cottage industry of Telephone Consumer Protection Act ("TCPA") class action plaintiffs. *See Facebook, Inc. v. Duguid*, No. 19-511, 2021 U.S. LEXIS 1742 (Apr. 1, 2021). Far from an academic matter, this decision may give callers more latitude in their campaigns. While prudence is still advised, new clarity on the definition of an "automatic telephone dialing system" ("ATDS") presents an opportunity for businesses to re-evaluate their call and texting compliance programs, including the equipment that they use.

Among other things, the TCPA restricts calls made to a cell phone using an ATDS without the called party's prior express consent.[i] Violators are subject to statutory damages of $500 per call and up to $1,500 per call for knowing or willful violations.[ii] The penalties and corresponding settlements can be steep, particularly in a class action, sometimes reaching well into the hundreds of millions.[iii]

The plain language of the statute defines an 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." (emphasis added.)[iv] The key phrase, "using a random or sequential number generator," was always important to the definition. When the TCPA was passed in 1991, Congress was concerned with the use of dialers that would generate and dial numbers—at random—or generate sequential phone numbers that would tie up every phone number in an area, one at a time.[v] Since 1991, however, technology and marketing strategies have changed, and random fire dialers have become obsolete. The TCPA, it seems, achieved at least one of its intended purposes.

Then came the Federal Communication Commission (the "FCC"). In 2003, the FCC fatefully declared that the definition of an ATDS includes dialing equipment that can "dial thousands of numbers in a short period of time," even if the system is unable to generate random telephone numbers.[vi] The FCC repeated that declaration in 2008 and reinforced it through subsequent ATDS interpretations in 2012 and 2015.[vii]

Courts (and plaintiffs' attorneys) took notice and adopted the FCC's new and expanding ATDS definitions.[viii] The TCPA litigation floodgates were kicked wide open.

In 2018, the D.C. Circuit Court of Appeals overturned the FCC's ATDS definition, sending the question back to the FCC to reconsider.[ix] It never did, leaving the interpretive question for the Courts with conflicting results.

Nearly 30 years after the TCPA was enacted, the Supreme Court unanimously decided in *Facebook v. Duguid*, No. 19-511, 2021 U.S. LEXIS 1742 (Apr. 1, 2021), that the TCPA means what it says:

> "To qualify as an 'automatic telephone dialing system,' a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator."

Thus, "Congress' definition of an autodialer requires ***that in all cases***, whether storing or producing numbers to be called, ***the equipment in question must use a random or sequential number generator***." (emphasis added.)[x] The Supreme Court held this definition excludes Facebook's login notification system, which sent targeted, individualized texts to numbers linked to specific accounts.

<u>What Happens Next? Implication for Callers</u>:

The impact of this decision is substantial. *Facebook* is likely to have a dramatic effect on current and future TCPA cases premised on the alleged use of an ATDS, including cases that were stayed pending this opinion.

Businesses should understand, however, that this is not the time to throw caution to the wind. Those interested in a new approach to their call or marketing campaigns should speak with counsel to determine how this holding impacts their plans.

For one, there may be litigation over whether equipment uses or has the capacity to use a random or sequential number generator. It is reasonable to expect that plaintiffs' firms will test the waters. And while most technology in use today does not utilize a random or sequential number generator, callers should not assume their dialing or texting equipment does not have this functionality.

In addition, the Supreme Court's ruling does not affect calls using an artificial or prerecorded voice, calls subject to the TCPA's separate telemarketing regulations, or calls regulated by other federal and state laws. Compliance with these regulations will remain just as important, perhaps more so as the plaintiffs' bar pivots to other claims.

Businesses should also be aware of their existing contractual obligations and carrier policies, which may separately impact their use of automated call or texting platforms. Prior to *Facebook,* carriers were taking a more active role in screening and flagging suspected unwanted calls. Post-*Facebook*, carriers may be under increasing pressure to flag high volume callers. Similarly, many private contracts require specific steps to facilitate TCPA compliance; this outcome may not override such contracts. It may be desirable for new contracts to expressly address this interpretation of the TCPA.

Those using third party telemarketing firms or call centers should discuss how, if at all, they intend to respond to the case.

Finally, businesses should keep in mind consumer expectations and behavior. While this decision may mean that some calls are not governed by the TCPA, obtaining express consent to communicate is always a best practice and likely to reduce unwanted attention. And, if Congress (or state legislatures) decide to revisit the TCPA post-*Facebook*, a business that continues to obtain prior express consent may be thankful that it did.

FisherBroyles' TCPA team is tracking these developments and its members are available to discuss with clients how best to proceed in each case.

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[i] 47 U.S.C. § 227(b)(1)(A)(iii).
[ii] 47 U.S.C. § 227(b)(3).
[iii] *See, e.g., Wakefield v. Visalus, Inc*., No. 3:15-cv-1857-SI, 2020 U.S. Dist. LEXIS 146959, at *2 (D. Or. Aug. 14, 2020) (affirming $925,220,000 statutory damages award in TCPA class action).
[iv] 47 U.S.C. § 227(a)(1).
[v] *See* H. R. Rep. No. 102-317, p. 24 (1991) (finding such random dialing threatened public safety by "seizing the telephone lines of public emergency services, dangerously preventing those lines from being utilized to receive calls from those needing emergency services."; *Facebook, Inc. v. Duguid*, No. 19-511, 2021 U.S. LEXIS 1742, at *7 (Apr. 1, 2021) ("Indeed, due to the sequential manner in which they could generate numbers, autodialers could simultaneously tie up all the lines of any business with sequentially numbered phone lines.").
[vi] *In re Rules & Regulations Implementing the TCPA* ,18 FCC Rcd 14014, 14091-92 (F.C.C. June 26, 2003).
[vii] *In re Rules Implementing the TCPA* , 23 FCC Rcd 559, 566 (F.C.C. 2008) affirming "that a predictive dialer constitutes an automatic telephone dialing system and is subject to the TCPA's restrictions on the use of autodialer" even when it does not randomly or sequentially generate telephone numbers); *In re Rules & Regulations Implementing the TCPA*, 27 FCC Rcd 15391, 15392, n. 5 (F.C.C. November 29, 2012) (reiterating the FCC's definition of an ATDS to cover "any equipment that has the specified capacity to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated[.]"); *In re Rules & Regulations Implementing the TCPA*, 30 FCC Rcd 7961, 7971-12 (F.C.C. July 10, 2015) ("We reaffirm our previous statements that dialing equipment generally has the capacity to store or produce, and dial random or sequential numbers (and thus meets the TCPA's definition of 'autodialer') even if it is not presently used for that purpose, including when the caller is calling a set list of consumers.").
[viii] *E.g., Meyer v. Portfolio Recovery Assocs., Ltd. Liab. Co*., 696 F.3d 943, 950 (9th Cir. 2012) (deferring to the FCC's 2003 ATDS ruling).
[ix] *ACA Int'l v. FCC*, 435 U.S. App. D.C. 1, 14, 885 F.3d 687, 700 (2018) (rejecting the FCC's "unreasonably, and impermissibly, expansive" ATDS ruling and setting aside the FCC's "treatment of those matters").
[x] *Facebook*, 2021 U.S. LEXIS 1742 at *6, 13.