APRIL 13, 2021

Supreme Court Clarifies and Narrows the Definition of an Autodialer under the TCPA

Over the past 20 years or so, if your marketing team has deployed or wanted to deploy text messaging to communicate with consumers, and you – as legal counsel – pushed back, you are probably familiar with the Telephone Consumer Protection Act ("TCPA"), its rigid opt-in requirements for commercial text messaging, and the thousands of cases and millions of dollars in fines and settlements paid out for TCPA violations. One significant problem with the TCPA has been the lack of clarity in the statutory language regulating the use of an "automated telephone dialing system" when sending text messages. Even the most diligent marketing and technology teams could get tripped up by the TCPA's lack of definitional clarity, leading many to forego text messaging campaigns at all due to the potential legal risks, even though texting is currently among the most common communication platforms.

Thankfully, on April 1, 2021, the U.S. Supreme Court weighed in on what constitutes an "automated telephone dialing system" (also called an "autodialer" or "ATDS") in *Facebook, Inc. v. Duguid*.[1] By way of background, the TCPA generally prohibits sending text messages without some form of consent if the texts are sent via an autodialer.[2] The TCPA defines an autodialer 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."[3] The emphasized words are where the lack of clarity comes in, as back when the TCPA was drafted – in the early 1990's – only very specialized, high-tech machines had the "capacity" to store phone numbers using a random or sequential number generator and to dial those numbers. Alas, we know the upshot – almost all smart phones currently have the same potential "capacity" to do these things. This state of affairs has led to a great number of lawsuits by plaintiffs' class action counsel, given that statutory damages under the TCPA of $500 – $1,500 per text quickly adds up when a company might send a few thousand text messages.[4]

Over the years, various courts and even the Federal Communications Commission ("FCC") came to different and varying conclusions as to what type of equipment met the definition of an ATDS, and thus whether certain text messaging campaigns did or did not violate the TCPA. The FCC initially suggested in 2003 that equipment could meet the definition of an ATDS if the machine could dial outgoing phone numbers using a database of numbers, if dialing could be done without any human intervention, or potentially, if the machine could dial phone numbers in random or sequential order.[5] Then, in 2015, the FCC ruled that equipment met the definition of an ATDS if the machinery had the potential capacity to

automatically dial stored numbers, even if the machinery would have had to be modified to add such functionality.[6] Not surprisingly, inconsistencies followed – some courts held that an ATDS was any system that had the capability of automatically dialing stored numbers without regard to the use of a random or sequential number generator.[7] Other courts held that the mere storage of the phone numbers was not sufficient, and the definition of an ATDS required the capability of using a random or sequential number generator to store or produce the outbound numbers to be dialed.[8] Lawsuits delved deeply, including through extensive expert witness testimony, into whether certain telecommunications equipment met the ATDS definition, as well as whether the process of sending out a text message was initiated entirely by machine or through human intervention. Of course, the recipient of a text message does not know or care whether a received text was sent with an ATDS or by an individual from the sender on their personal smart phone. Nevertheless, the technological technicalities of the law trumped the reality of the relationship between sender and recipient.

Plaintiffs class action lawyers rejoiced at this situation, filing lawsuits seeking up to millions of dollars in damages, because some people received a few unwanted text messages. Given the potential for exponential damage awards based on a strict reading of the statute, many claims were made, many settlements were agreed to, and many dollars landed in the pockets of plaintiffs and their lawyers. Even worse, though, is that companies were deterred from engaging in any marketing campaigns that included the most common form of communication (texting). Many companies largely ignored text messaging as an advertising medium, and a reasonable, rational, legally-regulated marketplace for text message marketing – one without the overhanging threat of TCPA-mandated fines and penalties – never really developed.

It took Facebook staring down the barrel of a TCPA claim and standing its ground, to prompt the U.S. Supreme Court to clarify the definition of an ATDS. In its decision, *Facebook, Inc. v. Duguid*, the plaintiff received an automated, apparently unwanted, account-related text message.[9] The U.S. District Court for the Northern District of California dismissed the claim, holding that the complaint failed to allege that the equipment used to send the text message met the definition of an ATDS.[10] At best, held the district court, the allegations could be read to "suggest that Facebook does not dial numbers randomly but rather directly targets selected numbers based on the input of users and when certain logins were attempted," which failed to meet the statutory definition.[11] Cue the Ninth Circuit.[12] Reversing, it held that any machine that has "the capacity to 'store numbers to be called' and 'to dial such numbers automatically'" meets the definition of an ATDS. [13] Obviously no shrinking violet, Facebook persevered and took the case to the Supreme Court.[14]

Lest you think that the Supreme Court is entirely and hopelessly divided about everything , this case brought the Justices together. In a unanimous decision, the Court reversed, holding that the statutory

intent and context of the original TCPA aimed to "target a unique type of telemarketing equipment that risks dialing emergency lines randomly or tying up all the sequentially numbered lines at a single entity."[15] The Court stated that if it were to accept the argument that equipment that merely "had the capacity" to store and dial telephone numbers constituted an ATDS, that definition would encompass all modern cell phones, which was certainly not the intent of Congress at the time of drafting.[16] The Court also rejected the plaintiff's argument that cell phones are not within the definition of an ATDS because they rely on human intervention, explaining that all equipment requires some form of human intervention to send outgoing text messages, and declining "to interpret the TCPA as requiring such a difficult line-drawing exercise."[17] Ultimately, the Court concluded that the definition of an ATDS "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. This definition excludes equipment like Facebook's login notification system, which does not use such technology."[18]

As a result of the Court's decision, it will now be more difficult for plaintiffs to prove that an ATDS was used in sending outbound text messages, given that modern text message systems very rarely have the capability of using a random or sequential number generator to store or produce phone numbers. Rather, current text message technologies are designed to store phone numbers and send texts only to specific phone numbers.

Though the number of cases should certainly decrease due to the Court clarifying the definition of an ATDS, this is not the complete death-knell for TCPA litigation. The TCPA has other capacities in which it may be violated, such as by sending texts to individuals that have not given express opt-in consent. Thus, while this case certainly clears up a legal gray area that supported a large volume of class action litigation, it is not entirely over. Critically, although the opportunity for text message advertising campaigns is now a potential option for advertising and marketing teams, such campaigns must still be carried out very carefully, after having obtained demonstrable opt-in consent.

If you have any questions about this area, or would like to discuss how to minimize legal risks while conducting an advertising campaign via text message or any other means, please feel free to reach out to us.

---

[1] No. 19-511, slip op. (U.S. Apr. 1, 2021).

[2] 47 U.S.C. §227(b)(1)(A).

[3] *Id*. at §227(a)(1) (emphasis added).

[4] 47 U.S.C. §227(b)(3).

[5] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14091 (2003).

[6] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7691, 7974 (2015).

[7] *See e.g., Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1053 (9th Cir. 2018).

[8] *See e.g., Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301, 1312 (11th Cir. 2020).

[9] No. 19-511, slip op. at 3.

[10] *Id*. at 4.

[11] *Duguid v. Facebook, Inc*., 2017 WL 635117 at *5 (N.D. Cal. 2017).

[12] *Duguid v. Facebook, Inc.*, 926 F.3d 1146 (9th Cir. 2019).

[13] *Id*. at 1157.

[14] No. 19-511, slip op. at 4.

[15] No. 19-511, slip op. at 8.

[16] *Id.*

[17] *Id*. at 9 n.6.

[18] *Id.* at 7.