

Insights

SUPREME COURT ISSUES GAME CHANGING DEFINITION OF ATDS UNDER TCPA

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SUMMARY

On April 1, 2021, in *Facebook v. Duguid*, 592 U.S. __ (2021), the Supreme Court issued a unanimous and long-awaited ruling clarifying the definition of an “automatic telephone dialing system” (“ATDS”) under the Telephone Consumer Protection Act of 1991 (“TCPA”), 47 U. S. C. § 227(a)(1): an ATDS is a system that uses a random or sequential number generator to dial or store telephone numbers for call. The key piece of this holding is that the “random or sequential” phrase applies to both storing the telephone numbers and dialing the telephone numbers. Otherwise, the Supreme Court reasoned, *any* phone capable of storing numbers (*e.g.*, “virtually all modern cell phones”) would be subject to the TCPA’s onerous prior written consent requirements. Instead, unless the device has the capacity “to store . . . telephone numbers to be called, using a random or sequential number generator” or to “produce telephone numbers to be called, using a random or sequential number generator,” that device is not an ATDS and not subject to the strict prior written consent requirements of the TCPA.

The practical reality is that most telemarketing and other consumer communications are made to telephone numbers known to belong to a specific and intended call recipient, not to randomly or sequentially stored telephone numbers and not to randomly or sequentially generated telephone numbers. The Supreme Court’s decision has effectively removed these types of calls from the scope of TCPA compliance.

The *Facebook v. Duguid* ruling is likely to stem the current tide of TCPA litigation that has run rampant in recent years following numerous Federal Communication Commission (“FCC”) expansive interpretations of what qualifies as an ATDS. Because the use of an ATDS is a threshold issue, most cases typically turn on whether the device used to send the text message or make the call is an ATDS—opening up the sender to liability if the company failed to secure express consent from the recipient. The Supreme Court’s ruling finally offers a consistent, nationwide interpretation of the ATDS definition putting to rest divergent views among the lower courts that resulted in inconsistent risks to businesses operating nationally.

But, don't start the party just yet. The TCPA still prohibits the use of pre-recorded and artificial voice calls without prior express consent and the Telemarketing Sales Rule's "Do Not Call" restrictions are still in effect. The Court also declined to consider whether text messages are covered by the TCPA.

Going forward, TCPA compliance will not lose its importance. If your company uses pre-recorded or artificial voice calls to contact consumers on their cellular telephones, the world does not change all that much. Obtaining the express consent of the call recipients remains of the utmost importance. The same is true if your organization does, in fact, use an ATDS (yes, some companies do this). And as always, navigating the complexities of the statutes and regulations specific to marketing calls will still require careful attention.

Even if your organization does not utilize an ATDS subject to the strictest rules, the TCPA's other restrictions and other State and Federal regulations still apply to your organization's telemarketing efforts. For example, Telemarketing Sales Rule and its national Do Not Call registry still exists and your organization needs a compliance program to keep its telemarketing efforts on the right side of those rules. Stay tuned for an update from our team as soon as the FCC announces a go-live date for its reassigned numbers database, use of which will be a mandatory requirement for federal Do Not Call compliance.

Luckily, Bryan Cave Leighton Paisner has experts across multiple jurisdictions who can help you navigate the existing rules and scan the horizon for the "next big thing" in TCPA and consumer protection litigation. Contact [Brian Underwood](#), or anyone on our TCPA team to discuss how to position your telemarketing strategies for compliance.

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MEET THE TEAM



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