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Insights

DON'T MESS WITH TEXAS! HOW WILL TEXAS'S AMENDMENT TO ITS STATE TELEMARKETING LAW IMPACT LITIGATION?

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On June 20, 2025, Governor Greg Abbott of Texas signed Texas SB140 into law, significantly amending Texas's telemarketing statute, which is part of the Texas Business and Commerce Code ("TBCC").[1] The amendments will take effect on **September 1, 2025.** This development has major implications for businesses that have text-based marketing or loyalty programs or engage in outbound telemarketing. Most businesses know about the enormous litigation risks posed by the Telephone Consumer Protection Act ("TCPA"), but they should take heed of the Texas statute, as well.

Background

In 2021, the U.S. Supreme Court offered a bit of much needed clarity in *Facebook, Inc. v. Duguid*,[2] narrowing the definition of an "automatic telephone dialing system" ("ATDS"), one of the regulated technologies under the TCPA. Under the statute, an ATDS is equipment which has the capacity:

1. to store or produce telephone numbers to be called, using a random or sequential number generator; and

2. to dial such numbers.[3]

Prior to *Facebook*, courts were split as to whether this statutory definition includes any dialing equipment which can produce telephone numbers to be called using a random or sequential number generator ("ROSNG"), **or** a device that stores numbers to be called – arguably, a definition that would encompass most modern smartphones.

The Supreme Court clarified and narrowed this definition, holding that a device that stores or produces telephone numbers to be called, but does not use a ROSNG to do so, is not an ATDS.[4] An ATDS must do both.[5]

The Supreme Court dropped a bombshell in Footnote 7 of the opinion, however, musing that "an autodialer might use. . . a random number generator to determine the order in which to pick phone

numbers from a preproduced list. It would then store those numbers to be dialed at a later time."[6] Although Footnote 7 is *dicta*, some courts have held in the wake of *Facebook* that phone numbers do not actually have to be randomly or sequentially generated to trigger the TCPA, so long as the device uses a "random number generator" to select the order in which to dial numbers from an existing list. This distinction is important for companies with loyalty programs and other opt-in text messaging programs who call or text only names from a pre-prepared list of members.

Some courts (including four appellate courts) have treated Footnote 7 as the insufficiently-considered *dicta* that it is and have held that an ATDS must randomly or sequentially generate numbers to be called, excluding software which identifies numbers to be called from a preproduced list.[7] But some district courts have gone the opposite direction, holding that Footnote 7 means that a system that uses a ROSNG to determine the order in which to dial numbers from a pre-determined list would qualify as an ATDS.[8] At this time, the district court cases are outliers, and no appellate court has so held.

But Footnote 7 seems to have taken a firm hold in Texas….

Changing Winds Over The Lone Star State

Like many states, Texas has its own telemarketing statute, or "mini-TCPA." Governor Abbott's signature on SB140 means that it will be much easier for consumers to file a lawsuit under Texas's mini-TCPA for calls made with an Automatic Dial Announcing Device ("ADAD") without the requisite consent. The Texas law defines an ADAD as:

Equipment used for telephone solicitation or collection that can:

- store telephone numbers to be called or produce numbers to be called through use of a random or sequential number generator; and
- convey, alone or in conjunction with other equipment, a prerecorded or synthesized voice message to the number called without the use of a live operator.[9]

The big difference is that the Texas statute does not require the equipment to **both** store telephone numbers to be called **and** to use a random or sequential number generator. It is an **either-or** and essentially mirrors the above-discussed minority interpretation of the *dicta* in *Facebook's* Footnote 7. In Texas, a system that uses a ROSNG to determine the order in which to dial numbers from a pre-determined list would qualify as an ADAD. In other words, a device that is **not** an ATDS under the TCPA may still be an ADAD in Texas.

Cue The Class Actions

What does this mean for telemarketing litigation? Well, the TBCC already had a private right of action, with statutory damages of $500-$1,500 for each violation, but required a plaintiff to first file a complaint with the Texas Public Utility Commission, the Texas Attorney General, or any state

agency.[10] The amended law will have a private right of action under the Texas Deceptive Trade Practices Act ("DTPA"), with none of these procedural requirements, making litigation far easier to initiate.[11] Additionally, under the TBCC, the attorney general may recover a civil penalty of $5,000 per violation for making telephone solicitations from a location in Texas, or to a consumer in Texas, without the proper registration certificate.[12]

Furthermore, under the DTPA, consumers can seek treble damages and attorneys' fees.[13] The amendments to the TBCC also clarify that multiple legal recoveries for the same violation will not limit future recovery, meaning a consumer can "stack" damages for multiple violations, and can recover under both the TPCA and the TBCC.[14] Additional requirements include an expanded definition of a telemarketing call to include not just calls, but also text messages, images, graphics messages, or other electronics transmissions to a consumer's telephone.[15]

What Should Businesses Do?

Businesses that use telemarketing have a little time before September 1, 2025 to get their telemarketing compliance program in order. To prepare, businesses should:

- Carefully analyze the technology used to determine whether it would be considered an ADAD under the Texas law;
- Consider using non-regulated technology to make telemarketing calls;
- If using an ADAD, ensure that the business has obtained the requisite consent;[16]
- Obtain the necessary telemarketing registration certifications;
- Include text messages, graphics messages, or other electronic transmissions to a consumer's telephone in all telemarketing compliance programs.

A robust telemarketing compliance program was always good business sense, thanks to the TCPA. Now, it is even more important to strive for compliance, and businesses should consult with counsel that is experienced with the TCPA and state "mini-TCPAs" like Texas's in order to advise on how they can comply with thes

[1] Texas SB140, Enrolled Version, *available at* http://capitol.texas.gov/tlodocs/89R/billtext/pdf/SB00140F.pdf (last visited July 7, 2025) ("SB140").

[2] 141 S. Ct. 1163 (2021).

[3] 47 U.S.C. § 227(a)(1).

[4] 141 S. Ct. at 1167.

[5] *Id.*

[6] *Id.* at 1172, n.7.

[7] *See, e.g., Soliman v. Subway Franchisee Advertising Fund Trust, LTD.*, 101 F.4th 176, 181 (2d Cir. 2024); *Borden v. Efinancial,* LLC (9th Cir. Nov. 16, 2022); *Panzarella v. Navient Sols., Inc.*, 37 F. 4th 867, 881-82 (3d Cir. 2022); *Beal v. Outfield Brew* House, 2022 (8th Cir. March 24, 2022); *see also Hufnus v. DoNotPay*, N.D. Cal. June 24, 2021; *Barry v. Ally Fin.*, (E.D. Mich. July 13, 2021); *Tehrani v. Joie De Vivre Hospitality, LLC*, (N.D. Cal. Aug. 31,20231).

[8] *See Scherrer v. FPT*, 2023 WL 4660089, at *3 (D. Colo. July 20, 2023) (denying motion to dismiss because "an autodialer that stores a list of telephone numbers using a random or sequential number generator to determine the dialing order is an ATDS under the TCPA"); *Libby v. Nat'l Republican Senatorial Comm.*, 551 F. Supp. 3d 724, 729 (W.D. Tex. 2021) (denying motion to dismiss where system used a random or sequential number generator to select telephone numbers from a stored list).

[9] V.T.C.A., Bus. & C. § 301.001(1).

[10] V.C.T.A., Bus. & C. §§ 305.053. 304.257.

[11] SB140, 2:18-19, 26-27.

[12] V.C.T.A., Bus. & C., § 302.101.

[13] SB140. 2:15-27.

[14] SB140, 1:24-2:2; 2:10-12; 3:1-4.

[15] SB140, 1:11-16.

[16] While the Texas law doesn't define "consent," a good rule of thumb is to obtain "prior express written consent" ("PEWC") as defined by the TCPA. Under the TCPA, "prior express written consent" means "an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered." 47 CFR § 64.1200(f)(9). A valid consent must also include "a clear and conspicuous disclosure informing the person signing that: (A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and (B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services." *Id.*

RELATED CAPABILITIES

- Data Privacy & Security
- Data Privacy, Telecommunications & Collections
- Telephone Consumer Protection Act (TCPA)

MEET THE TEAM

Daniel T. Rockey

San Francisco

daniel.rockey@bclplaw.com
+1 415 268 1986

Martha Kohlstrand

Boulder

martha.kohlstrand@bclplaw.com
+1 303 417 8516

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