

U.S. Supreme Court to Address Circuit Split on Definition of ATDS Under The TCPA

Article By:

Lisa Yun Pruitt

Shannon Z. Petersen

On July 9, 2020, the U.S. Supreme Court granted certiorari in *Facebook, Inc. v. Duguid*, to resolve a split in authority on the meaning of Automatic Telephone Dialing System (“ATDS”) under the Telephone Consumer Protection Act (“TCPA”). In TCPA class actions, millions of dollars of potential liability often turn on this one issue, and different courts have rendered different results. A Supreme Court decision should establish a uniform definition that will almost certainly alter TCPA litigation nationwide.

The TCPA prohibits calls or texts to cell phones using an ATDS without sufficient prior express consent. ATDS is defined by the TCPA as having the capacity “to store or produce telephone numbers to be called, using a random or sequential number generator.” The interpretation of this definition has been hotly disputed for many years, resulting in a widening Circuit split.

The majority of Circuit Courts have defined ATDS narrowly, including the Third, Seventh, Eleventh and arguably the Sixth, holding that stored numbers be generated using a random or sequential number generator. The only two other circuits to have addressed the issue – the Second and Ninth Circuits – have defined ATDS broadly to include automatic dialing from a pre-existing customer list.

In *Facebook, Inc. v. Duguid*, the plaintiff alleged that Facebook violated the TCPA by sending text messages using an ATDS. 926 F.3d 1146 (9th Cir. 2019). The plaintiff alleged that Facebook maintained a database of phone numbers and programmed its equipment to automatically generate text messages to those stored numbers. The district court concluded that Facebook’s platform was not an ATDS because the system, as alleged, involved direct targeting, which is inconsistent with the random or sequential number generation required by the statutory text of the TCPA.

The Ninth Circuit reversed. It reiterated its decision in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018) that “an ATDS need not be able to use a random or sequential generator to store numbers[.]” The court explained that “it suffices to merely have the capacity to ‘store numbers to be called’ and ‘to dial such numbers automatically.’”

On July 9, 2020, the Supreme Court granted certiorari with respect to the issue of whether the

definition of ATDS encompasses any device that can “store” and “automatically dial” telephone numbers, even if the device does not use a “random or sequential number generator.”

What does this mean? The Supreme Court’s decision, likely in the first half of 2021, should resolve the split in authority and provide a uniform definition of ATDS. Many pending TCPA class actions will likely be stayed pending this decision. If the Supreme Court adopts the majority view, liability in TCPA cases will be significantly limited. While the Federal Communications Commission (“FCC”) has also been expected to re-define ATDS, for political and other reasons, it may wait for the U.S. Supreme Court to decide the issue first.

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