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FACEBOOK IS OUT!: The 6 Most Critical Take Aways–and One Most Important Question–Following the Supreme Court's HUGE TCPA ATDS Ruling Today

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Well folks, it never fails. I try to sneak out on a vacation and a major TCPA ruling comes down. It happened with *ACA Int'l*. It happened with the Ominibus. And it happened with *Facebook.*

Maybe I should stop taking so many vacations?

My inbox–which was already full from being out for 3 days–is absolutely overflowing with requests for my thoughts. So here they are–the top 6 things you need to know RIGHT NOW.

1. *Facebook* is a Huge Win For Callers and a Complete Vindication of Everything TCPA Defense Lawyers Have been Saying For Years

The Supreme Court decided 9-0–***9-0***—that the TCPA means what it says.

Only devices that have the capacity to store or dial actually using a random or sequential number generator are covered by the statute. Period.

Now that should hardly be a surprising result since that is precisely what the statute says. Nonetheless–as the history books now read–the FCC vastly expanded the reach of the TCPA in 2003 and again in 2012 and 2015 by creatively interpreting the statute's narrow language.

This opened the door to similar creative interpretations being adopted by some courts and ultimately by three Circuit Courts of Appeals.

This expansion has been much ballyhooed by TCPA defense lawyers and commenters– mostly me–as entirely divorced from the reality of the statute language and Congressional intent in drafting the statute.

Well today the Supreme Court of the United State issued its verdict and resoundingly agreed. Only devices that can store or dial numbers using a random or sequential number generator qualify as an ATDS.:

"*In sum, 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. This definition excludes equipment like Facebook's login notification system, which does not use such technology*."

And that's great news.

But read on, because this may not be as clear cut as it seems.

2. Yes, This Means You Can (Probably) Now Use Automated Technology to Call Cell Phones Without Consent– But Here's Why You Shouldn't Go Bonkers

Here's the punchline you were all waiting for.

Yes, *Facebook* means that you can probably use most predictive dialers to call cell phones without consent. Yes, even for marketing purposes. Yes, even cold call solicitations to numbers that are not on the DNC list. Yes, this changes everything.

But just slow down.

Remember:

1. Providing a positive consumer experience and honoring consumer contact preferences is good for business and your reputation;

2. If industry goes nuts Congress–and worse yet–the states, will write new laws to address industry practices and it will get really bad from a regulatory standpoint;

3. There are still critical call limits in place in certain contexts (such as debt collection);

4. There are other laws besides the TCPA that are currently on the books that might apply to you;

5. There is still some risk that the TCPA's ATDS definition will be broadly interpreted by some courts (see "capacity" section below);

6. The carriers are empowered to block calls that they believe their network users won't want. If you crank up your dialer you may end up having your calls blocked–even those that were consented.

3. Human Intervention is Out as a Test of ATDS Usage

As I have written time and again the "human intervention" test is simply too vague to be of much use to callers. (I often characterize it as existing "solely in the eye of the beholder." **)**

The Supreme Court agrees and EXPRESSLY refused to adopt any "human intervention" test when assessing the TCPA's ATDS definition.

As the Supreme Court puts it in fn 6: "[A]ll devices require some human intervention, whether it takes the form of programming a cell phone to respond automatically to texts received while in "do not disturb" mode or commanding a computer program to produce and dial phone numbers at random. We decline to interpret the TCPA as requiring such a difficult line-drawing exercise around how much automation is too much."

Boom. The entire "human intervention" framework is out the window.

Notably the phrase "human intervention" does not appear in the TCPA and only became part of the TCPA lexicon following the FCC's massive expansion of the ATDS definition in its 2015 Ominibus ruling. In that ruling the Commission interpreted the phrase "capacity" in the TCPA to include *future* state functionalities of a system in assessing whether it meets the TCPA's ATDS definition in the present.

In response to the FCC's time travelling ATDS approach, courts pushed back and fabricated a rule that "human intervention" in the present could thwart ATDS functionalities in the future, which never made much sense. But.. TCPAWorld.

In any event, *Facebook* appears to put the "human intervention" piece to bed entirely. Now the only question is whether a system has the "capacity" to perform the statutory function.

4. How Appellate Courts Address "Capacity" in the Wake of *Facebook* Will Be Critical

Yes, *Facebook* is a fantastic ruling and a great win for TCPA defendants and callers.

But is is not quite perfect.

A perfect ruling would have been one in which the court also clarified that the system must actually make USE of the random or sequential number generator functionality in making challenged calls to trigger the TCPA.

The Supreme Court didn't quite go there. Instead it got a little sloppy with its language, unfortunately. Specifically, although the Opinion tees up the issue looking at "capacity" it switches in framing its holding to focusing on "usage."

Again, take a look a page 7, for instance: "In sum, 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. This definition excludes equipment like Facebook's login notification system, which does *not use* such technology."(Italics added)

Read in one way this is FANTASTIC because the Supreme Court is holding that an ATDS must make actual present use of a R&S generator to trigger the TCPA.

But there is no analysis in the opinion as to what the word "capacity" means and how it fits in with the functionalities it identifies. And that could be a serious problem.

As far back as 2009, for instance, the Ninth Circuit Court of Appeals has held that it is the *capacity* of the system to perform the statutory functionalities–and not the *usage* of those functionalities–that triggers the TCPA. See *Satterfield v. Simon & Schuster, Inc*., 569 F. 3d 946 (9th Cir. 2009). This

decision has been followed repeatedly by district courts across the country. (It was this dangling thread that the FCC tugged at to unravel TCPA defense back in 2015 to begin with.)

By failing to squarely address “capacity” the Supreme Court leaves that same thread a’dangling. And while it is almost unthinkable that TCPA ATDS jurisprudence would have advanced this far only to slip back into the morass of district courts assessing what the “capacity” of a system is, that outcome appears to be on the table.

It will be critical, therefore, for courts to read *Facebook* as requiring the actual use of R&S technology. The language is there–even if the analysis isn’t.

5. The TCPA is Still Dangerous– Restrictions on Pre-Recorded Calls and DNC Claims Are Still There

It is important for readers not to get too carried away by the good news today.

As noted, there is still a dangling thread here to be cautious of. And it is the fate of all knitting to meet its demise by imprecision.

But more broadly the TCPA covers more than just ATDS calls. Please please please do **NOT MAKE THE MISTAKE** of thinking the TCPA is dead.

While many will read *Facebook* as the “death” of the TCPA or TCPA litigation this is more of a shift than an end. The Supreme Court was very very crystal clear that the TCPA’s provisions covering pre-recorded and artificial voice calls live on. The TCPA’s limitations on calls to numbers on the national DNC registry also live on.

Do NOT let anyone tell you that TCPA compliance no longer matters.

6. Text Messages Are Still Calls Under the TCPA–For Now

Many of us were hoping that the Supreme Court might undo the strange reality that text messages are somehow “calls” under the TCPA despite the fact that: i) text messages are information services and not telecommunications under FCC rulings; and ii) text message technology didn’t even exist back in 1991.

While Justice Thomas poked and prodded a bit on this issue at oral argument it turned out to be a misdirect. At Fn 2, the decision provides that as “[n]either party disputes that the TCPA’s prohibition also extends tosending unsolicited text messages….We therefore assume that it does without considering or resolving that issue.”

So the Supreme Court refuses to address the issue, which means it might still be up for grabs in some jurisdictions.

And Now the Critical Question– Does your system have the capacity to store or produce numbers using a random or sequential number generator?

The answer to that single question may determine whether you need consent to contact cell phones under the TCPA, or not. If you don’t know the answer to this question then you should act

as if *Facebook* was never determined until you GET the answer. Do not guess at this one. Do the analysis and do it right.

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