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Ripple Effects of Supreme Court's TCPA Decision Still Developing for Companies Using Auto-Dialers

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If you work in the Telephone Consumer Protection Act (TCPA) space, you are certainly aware of the landmark unanimous decision by the United States Supreme Court in *Facebook v Duguid* ***[1]***, in which the Court narrowed the definition of an automatic telephone dialing system (ATDS) to equipment that has the capacity to either store or produce numbers using a random or sequential number generator.

On its face, this decision seemed benign (the definition of an ATDS is unchanged). But it reversed a large swath of circuit court decisions that had ruled that merely dialing from a list of numbers was sufficient to qualify equipment as an ATDS for purposes of TCPA liability. The only clarity from recent developments is you need to properly obtain consent, ensure your policies, procedures and training are up to date and check with your dialer manufacture on its capabilities to see what, if anything you may need to change. The ripple effects of the *Duguid* decision bring cautious optimism.

First, the Supreme Court remanded *Allan v. PHEAA* ***[2]***, to the Sixth Circuit for review in light of the *Duguid* decision[3]. In *Allan*, the Sixth Circuit joined the Second and Ninth Circuits in holding that equipment that merely stores numbers (without a random or sequential number generator) qualified as an ATDS under the statute.

On June 10, 2021, the District Court for the District of South Carolina held that the Aspect predictive dialer did not qualify as an ATDS because the evidence proved that the system could neither randomly nor sequentially store or produce numbers to be dialed[4].

On June 21, 2021, the Northern District of Illinois dismissed a complaint for failure to allege that the equipment had the capacity to randomly or sequentially store or produce numbers to be called. Relying on the *Dugiud* decision, the Court in *Watts v. Emergency Twenty Four* ***[5]*** found that the Seventh Circuit decision *Gadelhak v. A.T.& T Servs*,**[6]** penned by now Supreme Court Justice Amy Coney Barrett, was specifically upheld by the *Duguid* decision, leading to stricter pleading standards in the Seventh Circuit.

These are positive developments in quelling the tide of class-action lawsuits against legitimate businesses with sincere efforts to provide customer service or collect on delinquent accounts.

However, states are now counteracting these developments with their own legislation, including predictive dialers that select numbers to be called from a database in the definition of an auto-dialer under state law (e.g. Florida’s new legislation CS/SB 1120, which defines an ATDS to include systems that permit the selection or dialing of telephone numbers). The Florida legislation potentially makes certain dialing systems violative of state law, but they are still TCPA compliant.

While most predictive dialers comply with the TCPA, beware of state laws that can create liability for using TCPA-compliant equipment under *Duguid.* Please note that the law regarding pre-recorded messages remains unchanged by *Duguid.*

Yet, even after *Duguid,* obtaining proper consent before calling customers or potential customers, providing TCPA training to employees and vendors, and having a written TCPA policy manual are still the best practices to avoid TCPA liability.

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[1] 592 U.S. (Apr. 1, 2021)

[2] 968 F. 3d 567 (6th Cir. Jul. 29, 2020)

[3] 2021 U.S. Lexis 1921 (Apr. 19, 2021)

[4] *Timms v. USAA Fed. Sav. Bank,* 2021 U.S. Dist. Lexis 108083 (D. S. Car. Jun. 10, 2021)

[5] 2021 U.S. Dist. LEXIS 115053 (N.D. III. June 21, 2021)

[6] 950 F. 3d 458 (7th Cir. 2020)

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