

TCPA – Dead or Alive?

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We are now nearly one year PF—post-Facebook, the seminal decision that effectively shut down the central avenue used by Plaintiffs’ lawyers to assert liability under the Telephone Consumer Protection Act. So where is the TCPA now?

By way of brief recap, on April 1, 2021, the Supreme Court issued its decision in *Facebook v. Duguid*, which evaluated the TCPA’s key statutory definition of an Automatic Telephone Dialing System, known as an ATDS. *See Facebook v. Duguid*, 141 S. Ct. 1163, 1167 (2021). The TCPA’s definition is deceptively simple:

The term “automatic telephone dialing system” means equipment which has the capacity-

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

47 U.S.C. § 227(a)(1). Plaintiffs’ lawyers had long advocated for an interpretation of this definition that encompassed equipment that merely dialed from a stored list, without a “random or sequential number generator” (and, with the help of the Federal Communications Commission, were largely successful in doing so). In essence, this required reading the word “store” in isolation, despite grammar and sentence structure to the contrary. This interpretation expanded the reach of the TCPA to cover modern dialing and text messaging equipment.

After years of litigation, myriad appeals and regulatory challenges, the dispute eventually ended up in front of the Supreme Court to resolve a growing circuit split. The Supreme Court sided with a strict textual (and grammatical) interpretation of this definition:

To qualify as an “automatic telephone dialing system,” a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator.

Facebook, 141 S. Ct. at 1167.

It was apparent at the time that this decision would have a fundamental impact on the landscape of TCPA cases, and the following months have borne that out. ATDS cases—once the primary type of TCPA case—have dropped off significantly. But has the TCPA effectively been rendered anachronistic? Not quite.

TCPA cases continue to thrive in four primary areas: (i) faxes, (ii) prerecorded and artificial voice calls, (iii) marketing calls/texts to numbers on the national do not call list and (iv) marketing calls/texts to numbers that have previously opted out. While the impact of *Facebook*

has been no doubt substantial, it must be recalled that the TCPA consists of many requirements and regulations that were simply not impacted by *Facebook* and the ATDS issue.

The TCPA separately regulates marketing faxes and prerecorded/artificial voice calls and separately requires compliance with the national do not call list and internal do not call list specifications. As autodialer cases decline, cases concerning these issues move to fill the void.

Even as to the autodialer cases that *Facebook* limited, it must also be remembered that some states have their own set of laws covering text messages and autodialing equipment. Florida and Washington both have state laws specifically regulating text messages. For example, Florida's law-known as the Florida Telemarketing Sales Act, amended in July of 2021 to include a private right of action-has seen a significant uptick in litigation, with new cases filed every week. It can be expected that more states will follow in the mold of Florida.

At the end of the day, though the TCPA has been significantly limited by *Facebook*, the TCPA is still very much alive. And we expect that Plaintiffs' lawyers will continue to look to state laws to litigate autodialer issues that *Facebook* effectively foreclosed under the TCPA.

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