Articles + Publications | April 1, 2021

Locke Lord QuickStudy: Supreme Court Adopts Narrow Definition of TCPA Automatic Telephone Dialing System ?

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Starting in 2003 when the FCC adopted an expansive interpretation of the definition of an "automatic telephone dialing system" (ATDS) that included most modern telephone equipment, the plaintiffs' bar has extracted hundreds of millions of dollars from businesses through the Telephone Consumer Protection Act and the threat of uncapped statutory damages. The TCPA prohibits certain types of telephone calls (including calls to cell phones) using an ATDS. In 2018, the D.C. Circuit vacated the FCC's expansive definition of an ATDS in *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). After *ACA International,* courts around the country have adopted conflicting definitions of an ATDS. The Third, Seventh, and Eleventh Circuits applied a plain-English construction to the text, while the Second, Sixth, and Ninth Circuits adopted an expansive definition based on perceived Congressional intent. This split meant that TCPA liability depended where the recipient of the call lived.

Today, in *Facebook v. Duguid*, __ U.S. __ (Apr. 1, 2021), the Supreme Court resolved this split and sided with the narrow definition of an ATDS adopted by the Third, Seventh, and Eleventh Circuits. Writing for a unanimous Court, Justice Sotomayor's opinion held that a straightforward reading of the statute meant that dialing equipment must have the capacity to either: (1) store numbers using a random or sequential number generator; or (2) produce numbers using a random or sequential number generator to be an ATDS. Anything else falls outside of the definition. The Supreme Court's ruling should greatly reduce the exposure companies face when calling customers and prospects.

Background

Congress passed the TCPA in 1991 to curtail "the proliferation of intrusive, nuisance calls" from businesses and telemarketers to consumers. The statute prohibits "any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any [ATDS] or an artificial or prerecorded voice" to cellular telephones. 47 U.S.C. § 227(b)(1)(A)(iii). An ATDS is defined as "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." *Id.* at § 227(a)(1) (emphasis added). However, the random and sequential number generators that were targeted by the TCPA soon disappeared from the telemarketing landscape. Companies began using new technology that dialed lists of numbers stored in a database of consumer or customer telephone numbers. A question then arose over whether this new technology that "stored" numbers must have the capacity to use a random or sequential number generator to be an ATDS or whether simply storing the numbers in a database is

enough.

In 2003, 2008 and 2015, the FCC attempted to answer this question and declared that an ATDS was "any equipment that has the specified capacity to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists." Following a challenge to the 2015 FCC ruling, the D.C. Circuit struck down the FCC's interpretation for exceeding its authority. *ACA Int'l*, 885 F.3d at 687. The D.C. Circuit disagreed with the FCC's interpretation, finding it untenable in that "every smartphone [became] an ATDS subject to the Act's restrictions, such that every smartphone user violates federal law whenever she makes a call or sends a text message without advance consent."

The circuit split

Immediately after *ACA Int'l.*, the FCC sought comments on how to interpret the definition of an ATDS. However, the FCC still has not issued a new rule. In this interpretive void, various circuit courts of appeal stepped in.

The Third Circuit was the first to weigh in. In *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018), the plaintiff alleged that the defendant sent over 27,000 text messages to his cell phone in violation of the TCPA. The court affirmed summary judgment in Yahoo's favor, holding that, after a careful analysis of the text, the phrase "using a random or sequential number generator" modifies both "store" and "produce", meaning that any technology must have the capacity to either ***store*** numbers using a random or sequential number generator or ***produce*** numbers using a random or sequential number generator. The Seventh and Eleventh Circuits later adopted the holding of *Dominguez*. *Gadelhak v. AT&T Services, Inc*., 950 F.3d 458 (7th Cir. 2020) (Barrett, J.)?; *Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301, 1306 (11th Cir. 2020).

The Ninth Circuit, however, reached the opposite conclusion in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018), finding that the statutory text was ambiguous. The court believed Congress meant to include "equipment that made automatic calls from lists of recipients" in the definition of an ATDS and thus concluded that the technology that can simply store and dial numbers from a previously populated list qualified as an ATDS. While the Ninth Circuit noted the D.C. Circuit's comment in *ACA International* that this would effectively turn every smartphone into an ATDS, it did not explain why it disagreed with this conclusion. The Second and Sixth Circuits later followed *Marks*'s lead, widening the split. *Allan v. Pennsylvania Higher Educ. Assistance Agency*, 968 F.3d 567 (6th Cir. 2020); *Duran v. La Boom Disco, Inc.*, 955 F.3d 279 (2d Cir. 2020).

Facebook v. Duguid

In 2014, Facebook sent several text message notifications to Noah Duguid alerting him about attempted logins to an account associated with his number. Duguid, however, never had a Facebook account and never provided his number to Facebook. Duguid brought a class action against Facebook alleging its database of stored phone numbers from which it would send automated text messages was an ATDS. Facebook moved to dismiss on the basis that Duguid alleged that it targeted texts to telephone numbers for specific accounts and that these texts were neither random nor sequential. The district court agreed and dismissed Duguid's complaint with prejudice, but the Ninth Circuit reversed, holding that Duguid's complaint stated a claim under *Marks*. The Supreme Court granted certiorari to resolve the circuit split.

On April 1, 2021, the Court issued a unanimous opinion reversing the Ninth Circuit. The opinion, authored by Justice Sotomayor, began (and pretty much ended) with analyzing the text, which "use[d] a familiar structure: a list of verbs followed by a modifying clause." The Court found that the modifier of "using a random or sequential number generator" applied equally to both "store" and "produce" as "the most natural reading of the sentence." The statutory context also provided support for this interpretation as the statute provides targeted prohibitions to "unique type[s] of telemarketing equipment" and to expand the definition "would take a chainsaw to these nuanced problems when Congress meant to use a scalpel." The Court agreed with the D.C. Circuit observation that Duguid's interpretation would turn virtually every modern cell phone into an ATDS and impose TCPA liability on ordinary consumers for "commonplace usage."

The Court rejected all of Duguid's arguments as to statutory interpretation canons. The Court disagreed that statutory interpretation depended on what terms made the most sense to be interpreted together because the "traditional tools of interpretation" did not lead to impossible or implausible outcomes. Indeed, there is already existing technology that uses random or sequential generators to store numbers to be dialed later. Likewise, the Court's interpretation did not conflict with the "rule of the last antecedent" because the Court does not apply that rule where "the modifying clause appears after an integrated list." In any event, the statutory text's last antecedent is not "produce," but "telephone numbers to be called" and there is no reason to stretch the modifier back as far as "produce," but stop at "store." Finally, the distributive canon was not applicable as that rule requires multiple antecedents and multiple consequents, but here there are only two antecedent verbs and one consequent modifier which relates to both antecedents.

The Court also disagreed with Duguid's legislative purpose argument as "Congress expressly found that the use of random or sequential number generator technology caused unique problems for business, emergency, and cellular lines." Thus, it made sense to keep the definition of an ATDS narrow to target those specific concerns.

The Court also, in a footnote, retired one of the favorite arguments of TCPA plaintiffs: that dialing equipment (specifically a predictive dialer) is an ATDS because it does not rely on "human intervention." As the Court explained: "all 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." The Court noted that the TCPA does not require courts to determine "how much automation is too much."

Finally, the Court rejected Duguid's contention that accepting Facebook's textual interpretation would lead to a "torrent of robocalls" because the statute has not kept pace with modern technology. The Court's decision did not affect other prohibitions under the statute and, in any event, the fact that the ATDS definition was not "malleable" to Duguid's liking was a matter for Congress, not the judicial branch.

Going forward

While this is certainly a huge victory for telemarketers and other companies that employ technology to place phone calls to customers' cell phones, companies still face risks from the TCPA's other provisions. Claims over pre-recorded messages and "do not call" list violations remain viable, and we expect that the plaintiffs' bar will get creative in figuring out how to plead that a defendant's dialing equipment includes a random or sequential number generator. Companies should continue to scrub telephone numbers against state and federal Do Not Call

Registries and honor do not call requests. In addition, footnote seven of the opinion theoretically leaves the door open for plaintiffs to still allege TCPA claims under *Marks*. The Court notes here that equipment could still qualify as an ATDS if it uses a random number generator from a stored database and then stores those randomly-selected numbers in a different database to be called at a later time. Some plaintiffs may see this as an opportunity to limit *Duguid*'s holding to the specific facts of the case while leaving the door open for claims that predictive dialers select numbers randomly or sequentially from a database.

Still, plaintiffs will unquestionably have to plead and prove that a defendant's dialing equipment has the capacity to utilize a random or sequential number generator. The TCPA only requires that the dialer have the "capacity" to generate random or sequential numbers even if the system does not use the generator. Companies should confirm with their dialer vendors that the system cannot generate random or sequential numbers. We also recommend that companies continue to obtain prior express written consent for telemarketing calls. Consent will protect against Do Not Call violations and will protect callers if Congress amends the TCPA to address the *Facebook* decision.

In the meantime, today's decision is sure to grab the attention of TCPA litigators and grammarians alike.

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