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TCPA: U.S. Government Advocates for Strict Reading of the Statute, ATDS Should Include Random or Sequential Generation Requirement

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The Acting Solicitor General submitted an amicus brief in *Facebook v. Duguid* on September 4, urging the Supreme Court to find that telephony must randomly or sequentially generate telephone numbers, then dial those numbers in order to qualify as an automatic telephone dialing system (ATDS) under the Telephone Consumer Protection Act (TCPA).

In July, the Supreme Court granted certiorari in *Facebook v. Duguid* to decide, once and for all, whether an ATDS requires random or sequential number generation. In its late 2018 *Marks* decision, the Ninth Circuit found that storage of telephone numbers, without random or sequential number generation, was enough to satisfy the first prong of the TCPA's definition of an ATDS. Earlier this year, the Second Circuit joined the Ninth Circuit, while the Third, Seventh, and Eleventh Circuits have concluded that a system must have the capacity to generate random or sequential numbers to qualify as an ATDS.

In *Duguid*, Facebook challenged the Ninth Circuit's definition, contending that it was too broad. In defending the lawsuit, Facebook argued that its equipment was not an ATDS because it stores numbers only to be called "reflexively" in response to "outside stimuli," such as a suspicious log-in. Facebook's equipment, it argued, does not "use a random or sequential number generator," and as a result, does not constitute an ATDS. According to Facebook, if the definition of ATDS is not read to exclude equipment which only stores numbers for "responsive" calling, all smartphones will be considered autodialers. The Ninth Circuit disagreed, doubled-down on *Marks*, and ruled that the plaintiff's claims could go forward.

While Facebook's petition for certiorari was pending, numerous Courts of Appeals waded into the fray. The Seventh and Eleventh Circuits concluded that telephony must include a random or sequential number generator to qualify as an ATDS, while the Second Circuit sided with the Ninth, finding that telephony need only dial from a stored list to satisfy the first prong of the ATDS definition.

The government's amicus brief firmly sides with the Seventh and Eleventh Circuits, citing the language of the statute, the legislative history, and the statute's diversion from its state law counterparts. According to the Acting Solicitor General, the autodialer restriction in the TCPA rejected the language used by 25 state laws in effect at the time and instead reaches specific telephony that uses random or sequential number generators. The amicus brief also rejects any policy arguments in favor of an expansive interpretation of the TCPA. In so doing, the government pointed to the same issues as the D.C. Circuit in the seminal *ACA International v. FCC* decision; namely, that an expansive interpretation of an ATDS would sweep smartphones into the statute's crosshairs.

Many expected the FCC to act swiftly on the heels of *ACA International*. While the federal agency has remained silent over the past two-and-a-half years, consumer-facing companies now have a friendly interpretation of the TCPA to point to from the federal government – albeit not from the agency itself.

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