

TCPA Compliance in the Wake of Facebook v Duguid

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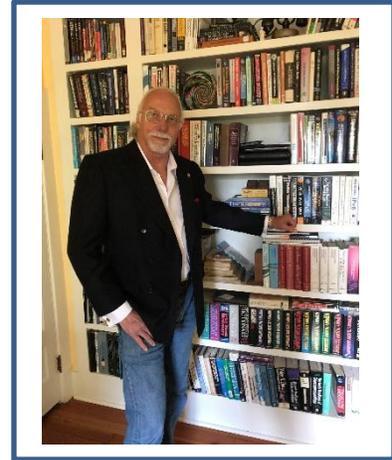
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The Supreme Court of the United States (SCOTUS) on April 1, 2021 rendered its long-awaited decision in the matter of Facebook v Duguid, which undoubtedly was the single most anticipated in the realm of the Telephone Consumer Protection Act (TCPA). Just in case you need to get up to speed, I provided a good deal of background and context on the Telephone Consumer Protection Act (TCPA) in a previous article, [TCPA: Facebook v Duguid](#). Subsequently, I raised the specter of continuing litigation in [Facebook v Duguid: It Ain't over Yet](#). Responsible call center operators (i.e., *good actors*) now must deal with life after this decision.¹

TCPA in Summary

The TCPA, as interpreted by the FCC over time, prohibited all voice and text (SMS) calls to consumers' cellular telephones using an *automatic telephone dialing system* (ATDS) unless the owner or primary user granted *prior express consent* in written form.

The TCPA defined the term *automatic telephone dialing system* (ATDS) to mean “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” at § 227(a)(1).

Not surprisingly, that definition was just confusing enough to trigger an avalanche of individual and class action litigation. The significance of the comma in the provision “to *store or produce* telephone numbers to be called, using a *random or sequential number generator*” became the source of heated debate. Specifically, did the phrase “using a random or sequential number generator” apply to both “store” and “produce”, or only “produce”? As cases were filed and heard across the land, it became clear that the federal courts were split. Some courts have sided with plaintiffs' attorneys who have taken the position that the term *capacity* should be interpreted very broadly and argued that all dialer software resides on computer platforms, all of which have the capacity to

¹ Bad actors couldn't care less. Let's hope they have to deal with it in the *afterlife*, so to speak.

generate random or sequential numbers. Other courts have interpreted the statute much more narrowly.

Facebook v Duguid in Summary

The Supreme Court sided with the District Court for the Northern District of California and overturned the Ninth Circuit Court of Appeals, ruling that “We hold that a necessary feature of an autodialer under §227(a)(1)(A) is the capacity to use a random or sequential number generator to *either* store or produce phone numbers to be called.” As Facebook, in this case, *neither* stored numbers nor produced numbers using a random or sequential number generator, it was *off the hook*, so to speak.

The SCOTUS opinion went beyond an interpretation of the language of the statute to apply a little common sense, as well. “It would make little sense...to classify as autodialers all equipment with the capacity to store and dial telephone numbers, including virtually all modern cell phones.”

Well, What About...

While I am not an attorney and, therefore, do not express legal opinions, it is my understanding that a court, Supreme or otherwise, can rule only on the specific issues of the case brought before it. So it is that the Facebook v Duguid failed to remove all of the uncertainties in the legal interpretation of the TCPA. As examples:

- Footnote 7 provides some ammunition for Plaintiffs, stating “...an autodialer might use a random number generator to determine the order in which to *pick* phone numbers from a preproduced list. It would then store those numbers to be dialed at a later time.”
- The ruling does not address the difference between *random vs pseudorandom* number generation.
- The ruling does not precisely define the term *capacity*. Does *capacity* mean *present capacity* and, further, does that translate to inherent capability (i.e., out of the box), capability as configured and deployed, or capability as leveraged by a small program or short script written to the operating system (OS).

These are not just products of my idle musings on the failures of the ruling. I have seen each and every one of them argued by “experts” in support of plaintiffs’ complaints.²

Compliance in the Wake

In the context of the Facebook v Duguid decision, considering all the issues it addressed and didn’t, clarified and confused, honest and conscientious actors have to be freshly concerned about TCPA compliance. That means checking all the boxes, doubling down on all the right things, and identifying and plugging all the holes in your

² Some, if not most, courts so far have rejected Footnote 7 arguments.

call center operations. Following is a partial list of steps you should take to minimize the likelihood of an adverse judgment should your company be forced to defend against a TCPA lawsuit:

- Scrub telephone numbers against the National Do Not Call (NDNC) database, the relevant State DNCs, and your Internal DNC (IDNC). Perform those scrubs in near real time (i.e., as you are dialing) or as close to real time as possible.
- Scrub telephone numbers against both a wireless number identification database and a ported number database to make sure that you have the proper level of consent and apply the proper level of restraint before dialing any number. Scrub in near real time or as close to real time as possible.
- Scrub telephone numbers to identify area codes associated with the State of Florida. Scrub address information to identify individuals residing in Florida. The recently amended Florida Do Not Call Act (FL ST § 501.059)³ requires express written consent for most *telephonic sales calls* or text messages to Florida residents placed using an *automated system*, which the statute defines as a “system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called.”⁴
- Scrub telephone numbers against a serial litigator database to avoid calling numbers assigned to characters who make a living filing and settling TCPA claims.
- Obtain prior express consent to call (voice or text) telephone numbers, particularly cell numbers, as appropriate. This can be tricky, as different channels (voice calls, text messages, faxes) for different purposes may require different levels and methods of consent.
- Develop and maintain internal call center policies and procedures consistent with contemporary federal, state and local laws and regulations. Develop process and procedural training material for call center agents and system administrators. Test for understanding on at least an annual basis.
- Obtain strong assurances from the manufacturers/developers of all dialing systems and subsystems, DataBase Management Systems (DBMSs), and Customer Relationship Management (CRM) systems that those systems and subsystems do not fit the definition of “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”.
- Secure and maintain system documentation contemporaneous with the specific version and release of the relevant systems. Document systems configurations and relevant reconfigurations over time.
- Maintain call detail records for all inbound and outbound calls. Such call detail should include, but not be limited to, telephone number dialed, state associated with the area code of the number dialed, number type (cell vs landline), customer/prospect name or ID, date and time call placed, date and time call terminated or call duration, calling mode (e.g., Predictive, Preview, Precision,

³ July 1, 2021

⁴ Florida has been and is likely to remain a hotbed for TCPA litigation.

Blast, Manual), agent/CCP ID, call result/disposition (e.g., Busy (Station Busy), SIT Tone or TriTone (e.g., Network Busy, Number Disconnected), No Answer, Answer, Right Party Contact, Fax Tone, Promise to Pay) . If using a cloud service provider (Call Center as a Service (CCaaS)), do not rely on the service provider to maintain those records. Rather, download and maintain those records on your premises or in your private cloud. Retain all records for at least seven (7) years.

- Maintain detailed records of agent interactions with customers/prospects (e.g., promises to pay, confirmation/revocation of consent, requests to remove numbers from calling list, alternate numbers to call).

Retain the services of a competent, knowledgeable, seasoned attorney, experienced in TCPA defense. Large, communications-intensive companies generally have in-house counsel responsible for following the TCPA, as interpreted by the FCC and case law in all jurisdictions, and advising you with respect to compliance issues. They also follow relevant state laws and regulations. They generally supplement in-house counsel with knowledgeable outside counsel skilled in litigation. After all, there is always the potential for a lawsuit right around the corner, right?

Retain the services of a competent, experienced, independent technical expert to work with your internal dialer operations team to evaluate the nature of the data and telephony systems (aka dialers) you employ. This gets tricky in the context of the TCPA, largely because the issues of *capacity*. Don't wait until you are in litigation (read *the subject of a lawsuit*). Take the time and spend the money to get a prophylactic analysis of your dialer system and subsystems, as well as the associated, interconnected systems and subsystems. Any of these, individually, and all of these and more in combination, can put you at extreme risk. Take it a step further and evaluate the adequacy of internal policies, procedures and training; and adequacy of reporting mechanisms.

Ray Horak is a seasoned author, writer, columnist, speaker, educator, telecom consultant, and industry analyst who provides litigation support services as a consulting and testifying expert across a wide range of telecom matters, including the TCPA. He also frequently conducts corporate compliance reviews to assess the risk levels associated with customer contact and related systems, policies and procedures in the context of the TCPA, with the goal of minimizing, if not eliminating, the risk of adverse judgments.

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