

Supreme Court to Weigh-in on the Definition of an Autodialer Under TCPA

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On July 9, 2020, the Supreme Court granted Facebook's petition for certiorari in a case with potentially broad implications for both class action litigation and business communications with their current and potential customers. The Supreme Court's disposition of Facebook's petition may settle the complex question of what qualifies as an automatic telephone dialing system ("ATDS") under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* ("TCPA").

The TCPA prohibits telemarketing calls to be placed using an ATDS without the requisite level of prior consent. Thus, the definition of what technology qualifies as an ATDS is often a fundamental, threshold question upon which TCPA litigation turns. Prior to 2015, the FCC had offered various, sometimes vague, interpretations of the term. In 2015, the FCC offered an expansive definition, which was set aside in March 2018 in the [ACA International](#) decision. While the issue has been before the FCC on remand for over two years now, courts nevertheless engaged in their own analysis of the statute, resulting in a broadening Circuit split on how the law is interpreted and applied and divergent outcomes based on the court in which the case is filed. Now the Supreme Court is poised (potentially) to resolve that dispute.

DEFINITION OF AN ATDS

Since the March 2018 decision of the Court of Appeals for the D.C. Circuit in *ACA International* set aside the FCC's overbroad and expansive definition of an ATDS, two distinct interpretations of an ATDS have emerged. In *Marks v. Crunch San Diego*, the Ninth Circuit held that any equipment that dials telephone numbers from a stored list qualifies as an ATDS under the TCPA. That expansive approach threatens to encompass ordinary smartphones on the market within the TCPA's ambit. This approach is also employed by the Second Circuit. In contrast, the Third, Seventh, and Eleventh Circuits have opted for a narrower, more textually honest and logical interpretation, that requires a showing that equipment has the present capacity to generate numbers using randomly or sequentially and dial them. (Arguably, the D.C. Circuit's decision also called for an interpretation closer to the Third, Seventh and Eleventh Circuit interpretations). District Courts in the remaining Circuits (as well as some where the Circuit Courts have spoken) have generally (but inconsistently) adhered to one of these two approaches. Some of our prior discussions of these issues can be found [here](#) and [here](#).

FACEBOOK SEEKS AN END TO TCPA CONFUSION

In *Facebook, Inc. v. Noah Duguid, et al*, Case No. 19-511 (2020), plaintiff Noah Duguid alleges that defendant Facebook had contacted him via text messages without appropriate levels of consent using an ATDS, as that term is defined under the TCPA. Mr. Duguid is not a Facebook customer and

alleges that he received repeated login notification text messages from Facebook. Plaintiff alleges that he never provided the company with his cellphone number, much less prior express written consent to be contacted by text. Plaintiff's original complaint was filed in the Northern District of California in March 2015 and dismissed without prejudice for failure to properly allege that an ATDS was used to send the texts at issue. In his Amended Complaint, Duguid added factual allegations that Facebook used an ATDS by maintaining a database of numbers on its computer and transmitting text message alerts to selected numbers from its database using an automated protocol.

Facebook again moved to dismiss Duguid's allegations arguing that the TCPA was unconstitutional and that Duguid failed to plead the use of an ATDS. On February 16, 2017, the District Court granted Facebook's motion to dismiss, finding the ATDS allegations were insufficient. Because of that finding, the court never reached the constitutional question. The court reasoned that Duguid's ATDS allegations "strongly suggested direct targeting rather than random or sequential dialing," which did not indicate the use of an ATDS. Importantly, the District Court rendered its opinion before the Ninth Circuit's interpretation of the ATDS definition in *Marks v. Crunch San Diego* in September 2018.

On June 13, 2019, the Ninth Circuit reversed the lower court's dismissal. Applying the *Marks* standard, the Ninth Circuit reasoned that Duguid had sufficiently alleged that Facebook used an ATDS by alleging the equipment "had the capacity to store numbers to be called and to dial such numbers automatically." The Ninth Circuit separately addressed Facebook's constitutional challenge to the TCPA and agreed that, although the TCPA included content- and speaker-based restrictions on speech, the overall statute could be salvaged by severing what it saw as the most offensive aspect—the government debt exception.

ISSUES BEFORE THE COURT

Facebook appealed and in its petition to the Supreme Court presented both the constitutional challenge and definitional question for review.

On July 6, 2020, the Supreme Court upheld the constitutionality of the TCPA in *William P. Barr et al. v. American Association of Political Consultants et al.*, Case No. 19-631 (2020), thus mooting the constitutional challenge in Facebook's petition. Our analysis of that decision can be found [here](#).

On July 9, 2020, three days after it released its decision in *Barr*, the Supreme Court granted certiorari on the following question: Whether the definition of ATDS in the TCPA encompasses any device that can "store" and "automatically dial" telephone numbers, even if the device does not "us[e] a random or sequential generator"?

CONCLUSION

The Supreme Court's resolution of this circuit split has the potential to forever change business communications by making it more or less difficult for businesses to reach their customers. As noted, a threshold question in TCPA litigation is whether equipment used to originate a call or text is an ATDS. The D.C. Circuit, in remanding the FCC's 2015 expansive definition, noted that definition's "eye-popping sweep." Just how far the 29-year-old TCPA's definition should reach into modern dialing technology has been a central question in litigation since the D.C. Circuit remand. How the Supreme Court addresses this could affect the methods businesses use to provide notifications and reminders to customers as well as how they obtain new customer and collect debts.

In addition to resolving the question of an ATDS, the Supreme Court's acceptance of Facebook's

petition has other implications. In the short term, companies and practitioners are likely to see stays across the robust and active TCPA docket as lower courts await direction on this core (often threshold) legal question from the Supreme Court. While the decision in *ACA International* returned the ATDS definition to the FCC for consideration, the Supreme Court's grant also makes it less likely that the FCC will take any additional affirmative steps on the definition of an ATDS until the Facebook case is decided.

The Supreme Court's next term opens on October 5, 2020, and oral argument will be scheduled for a date sometime thereafter. A decision can be expected to be published sometime between the argument and when the terms recesses in late June/July 2021.