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CLIENT ALERT

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The Post-Facebook TCPA Landscape: How the Supreme Court's Opinion on the Definition of ATDS Has Changed Legal Risk for Companies That Text or Call Consumers

The Telephone Consumer Protection Act has for over a decade been a source of significant legal risk for any business that communicates with consumers by phone or text. The TCPA prohibits making calls without consent to cell phones using an "Automatic Telephone Dialing System" ("ATDS"), and contains a private right of action that provides for statutory damages of $500 up to $1,500 per offending call or text. Importantly, broad interpretations by courts and the FCC of what constitutes an ATDS—at some points so broad as to encompass everyday smartphones—sparked a conflagration of class actions against businesses across numerous industry sectors including financial services, retail, energy, and healthcare.

Starting in 2018, however, this wave of TCPA class actions started to crest after a circuit split evolved over the interpretation of the statutory definition of an ATDS. Did modern-day systems that automatically called or texted numbers from a database qualify as an ATDS? Or was the definition limited to the old fashioned random/sequential number dialers plaguing American households with telemarketing calls at the time the TCPA was passed in 1991?

In mid-2020, the Supreme Court granted certiorari in the case of *Facebook v. Duguid* to resolve this circuit split. On April 1, 2021, the Supreme Court issued its opinion in *Facebook*, holding that "[t]o 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, Inc. v. Duguid*, 141 S.Ct. 1163, 1167 (2021). Based upon this narrow interpretation of the ATDS definition, the Court concluded that the definition "excluded equipment like Facebook's login notification system," which sends automated login notification texts to its users.

The Court's opinion in *Facebook* has meaningfully lowered the risk of using automated technology to call or text consumer cell phones for the simple reason that the technology likely no longer meets the ATDS definition as interpreted by the Supreme Court. However, while the Court's opinion was very positive in this respect, there are still many other aspects of the TCPA that remain a potent source of legal risk. In

evaluating the impact of *Facebook*, it is helpful to start by orienting oneself with the three key things the TCPA prohibits:

(1) Informational and telemarketing calls or texts made to cell phones with an ATDS;
(2) Informational and telemarketing calls made to cell phones or landlines with an artificial or prerecorded voice;
(3) Telephone solicitations made to telephone numbers registered on the National Do Not Call Registry

The legal risks associated with each category of prohibition in the post-*Facebook* TCPA landscape are addressed below.

Automated Calls and Texts

Prior to *Facebook*, the extension of the ATDS definition to encompass informational communications made with predictive dialing equipment, mass-texting platforms, and similar technology spawned some of the biggest TCPA class actions, leading to hundreds of millions of dollars being paid out in class-wide settlements by American businesses. Activities such as debt collection calls, account alert text messages, prescription reminders, and utility notifications became fraught with legal peril as plaintiff's attorneys leveraged excessively broad interpretations of the ATDS definition to hammer businesses that dared to communicate with their customers using efficient automated technologies.

These types of informational calls and texts are the biggest benefactors of the risk reduction resulting from *Facebook*. This is because, as interpreted by the Supreme Court, the ATDS definition likely no longer extends to the technology used to send these messages given the absence of the requisite random or sequential number generation functionality. Practically speaking, this means that consent is likely no longer required to make purely information calls or texts to cell phones (but, as addressed below, this does not mean businesses should abandon basic opt-in and opt-out protocols).

In addition, prior to *Facebook*, "telemarketing" calls or texts (i.e., calls or texts made for the purpose of promoting the purchase of a good or service) carried very high risks. This is because the TCPA imposes a heightened "prior express written consent" requirement upon any telemarketing call or text made to a cell phone using an ATDS. "Prior express written consent" is a legally defined term consisting of multiple elements requiring a signed agreement, with various disclosures subject to a conspicuousness requirement. These requirements added on yet more layers of risk to any business seeking to call or text consumers for promotional or marketing purposes. As a result of *Facebook*, those heightened consent requirements likely no longer apply. Critically, however, marketing and promotional calls still remain subject to regulation under the TCPA's separate rules concerning the National Do Not Call Registry, which are addressed further below.

It is important to recognize that *Facebook* lowered, but did not completely eliminate, the risks associated with making calls or texts in this category. This is mainly because some plaintiff's attorneys, in their last throes, will attempt to persuade lower courts that modern-day dialing and texting technology still somehow meets the ATDS definition, even under the Supreme Court's narrow interpretation. Those efforts have yet to fully percolate in the lower courts. For example, at least one lower court has ruled that allegations of impersonal text messages were enough to plausibly plead use of an ATDS as interpreted by the Supreme Court, meaning the issue will need to be addressed with evidence on summary judgment. *Montanez v. Future Vision Brain Bank, LLC*, 2021 WL 1291182 (D. Co. Apr. 7, 2021).

Pre-Recorded or Artificial Voice Calls

The Supreme Court's opinion in *Facebook* did not concern the TCPA's prohibition on pre-recorded and artificial voice calls, so the status quo remains for these types of calls, which continue to present a higher risk profile. The TCPA prohibits calls using a pre-recorded or artificial voice message to both landlines and cell phones without the called party's consent. Just like with the ATDS restrictions, if the call is made for "telemarketing" purposes, then the heightened "prior express written consent" requirement will apply.

National Do Not Call Registry

Also unaffected by *Facebook* is the TCPA's prohibition on "telephone solicitations" to telephone numbers registered on the National Do Not Call Registry ("DNC"). Of note, these regulations are triggered by the content of the message, not the type of technology used to make a call or text. Similar to the definition of "telemarketing," "telephone solicitation" is any call made for the purpose of encouraging the purchase of a good or service. There are, however, two key carve-outs to the term. Telephone solicitations do not include calls or texts to a consumer with which the caller has an "established business relationship" ("EBR"), or who has provided their "prior express invitation or permission," to be called. An EBR is defined as either an inquiry by the consumer regarding the business's products or services made within three months preceding the call, or a transaction with the consumer within the 18 months preceding the call. The term "prior express invitation or permission" is defined as a signed writing in which the consumer agrees to receive calls at a specified phone number. Importantly, both are terminated when a consumer makes an opt-out request.

The DNC rules also impose other requirements that businesses should be aware of, including honoring opt-out requests, maintaining internal do-not-call lists, and a do-not-call policy.

Importantly, as compared to the far more onerous "prior express written consent" requirements applicable to "telemarketing" calls made with an ATDS, the DNC rules

afford businesses with much more flexibility in fashioning compliant telephone and text message campaigns. Thus, although marketing and promotional calls still remain subject to regulation under the TCPA, this flexibility provides businesses with more avenues to mitigate the legal risk arising out of such campaigns.

Takeaways

The Supreme Court's opinion in *Facebook* should cause a shift in the way that businesses evaluate and mitigate against TCPA risk arising from telephone call or text message campaigns. To sum it up:

- Automated informational calls enjoy the most significant risk reduction
- Promotional/marketing messages are still subject to regulation under the DNC rules, but businesses are afforded more flexibility in fashioning compliant campaigns
- The status quo remains on pre-recorded or artificial voice calls

Importantly, the Supreme Court's opinion in *Facebook* should not be viewed as license to flood consumers with calls or text messages. There remain a number of reasons outside of the TCPA to continue maintaining basic opt-in and opt-out procedures. Those reasons include customer experience, reputational risk, and still-applicable industry guidelines such as those promulgated by the CTIA. Given these considerations, businesses are wise to connect with outside counsel experienced in the many nuances of the TCPA to vet their risk, and tune up their practices as needed.

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