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ADVERTISING, MARKETING & PROMOTIONS

>> ALERT

"GRAND FINALE?" — SUPREME COURT TO ADDRESS THE DEFINITION OF "AUTOMATIC DIALER" UNDER THE TCPA

Since 1991, the Telephone Consumer Protection Act (TCPA) has set out to end unwanted contact from telemarketers, generally prohibiting (among other things) the use of an "Automated Telephone Dialing System" (ATDS) to call wireless phone numbers without the appropriate level of prior consent.

As explained in our previous alerts here and here, the broadly-worded TCPA has been applied to an expansive array of automatically initiated calls, including not just telemarketing calls or prerecorded messages, but market research calls and text messages as well.

ATDS BACKGROUND

While the TCPA defines an ATDS as equipment that "has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers," this definition has been the subject of extensive litigation in recent years, and the source of much angst for any business contemplating any modern marketing or market research program that might be dialing wireless phones.

Some courts, including the United States Court of Appeals for the Ninth Circuit, have found that it is enough for a phone to be able to dial stored numbers automatically, as most smartphones can do, to qualify as an ATDS under the TCPA. Now, in a case involving a social media giant, the United States Supreme Court will decide the correct interpretation under the law, with oral argument set for December 8, 2020.

THE BOTTOM LINE

The Supreme Court's upcoming decision will likely resolve a longstanding circuit split on what constitutes an automatic dialer under the TCPA.

If the Court adopts Facebook's narrower view, its decision could significantly reduce the number of TCPA class action suits filed going forward. But, if the Court reinforces the minority view, the potential for claims, even against cell phone owners who automatically dial one or more of their contacts, could increase.

Until the Supreme Court's decision — and likely even thereafter — marketers, research firms and agencies must continue to consult counsel to ensure compliance with the TCPA's requirements.

LOW RISK, HIGH REWARD?

Noah Duguid filed a class action lawsuit against Facebook in 2015, asserting that the ubiquitous social media company was sending him unwanted text messages concerning suspicious activity on his account, despite the fact that he was not a Facebook user. Facebook claimed that the texts were sent by mistake, and that the calls likely resulted from the reassignment of an actual user's former number to Duguid — a common situation today, but not really contemplated at the time of the TCPA's enactment. Regardless, the company argued that it had not used a random or sequential number generator to send the messages and therefore could not be held liable.

The trial court agreed with Facebook and dismissed the case, but the Ninth Circuit reinstated it. The Ninth Circuit found that Facebook's dialing system met the criteria for an ATDS because it had the "capacity to dial stored numbers automatically," and

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that the texts fell within the scope of "unwanted, unsolicited and automatic" phone messages at which the TCPA was directed. Facebook sought review from the Supreme Court, and on July 9, 2020, the Court agreed to hear the case.

Facebook argues that the Ninth Circuit's approach is contrary to the majority view. Indeed, other U.S. Courts of Appeal have held that a device is not an ATDS unless it generates and dials random or sequential phone numbers. For example, Facebook points to the 2018 decision of the Third Circuit in *Dominguez v. Yahoo*, which held that a system must be able to generate random or sequential numbers to be considered an ATDS under the TCPA, a view echoed by the Sixth, Seventh and Eleventh Circuits.

In arguing for reversal and dismissal of the case, Facebook asserts that its automated system, which only stores and automatically dials numbers, operates similarly to a standard smartphone, and that the broad interpretation made by the Ninth Circuit would expose millions of laypersons to TCPA claims and the attendant penalties of between $500 to $1,500 per call. This is an argument that many TCPA defendants have made, with limited success. Nonetheless, in recent weeks numerous other high profile retailers, lenders, trade associations and public interest firms — including the Home Depot, Quicken Loans and salesforce.com — have filed briefs supporting Facebook's arguments. In fact, the United States itself has intervened in the case, filing its own briefs supporting Facebook's arguments.

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