



ARE YOU KEEPING UP WITH THE CONSTANTLY CHANGING TCPA LANDSCAPE?

July 2023



1



Scott J. Helfand
HUSCH BLACKWELL

Partner – Chicago
312.341.9876

Scott.Helfand@huschblackwell.com
www.huschblackwell.com



John W. McGuinness

manatt

Partner – Washington, D.C.
310.312.4270

jmcguinness@manatt.com
www.manatt.com



2

Overview

1. The Background of the Telephone Consumer Protection Act (TCPA)
2. The TCPA Runs Amok
3. The Supreme Court Lends a Hand
4. All TCPA Problems Solved? No!
5. Ways to Minimize Exposure
6. Summing Up Where We Stand Under the TCPA
7. State mini-TCPAs



3

The TCPA's Original Purpose



4

1991 – Congress passes the TCPA

- “Computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall....”

-Sen. Fritz Hollings, Congressional Record – Senate Proceedings and Debates of the 102nd Congress, First Session, July 11, 1991

- “The Telephone Consumer Protection Act of 1991 (TCPA) proscribes abusive telemarketing practices....”

-*Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1164 (2021).

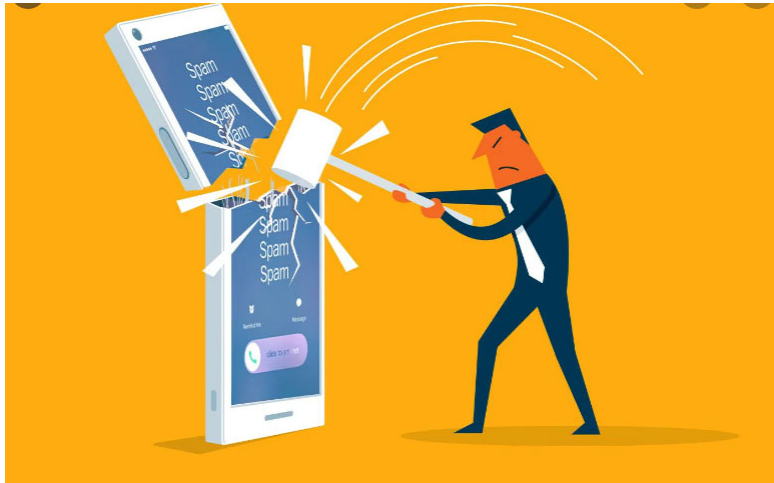


5

- Generally speaking, TCPA requires a business to obtain consent of the party to be called before placing calls (including SMS text messages) using an automatic telephone dialing system (ATDS) or artificial or pre-recorded voice.
- Level of consent required depends on the type of call
 - ✓ Prior express consent for “servicing” calls
 - ✓ Prior express **written** consent for telemarketing or advertising calls
- A plaintiff may recover \$500-\$1,500 for each violation of the TCPA – *i.e.*, for each *call* that violates the TCPA – without any showing of actual damages. 47 U.S.C. § 227(b)(3).



6



The TCPA Runs Amok

“The TCPA has strayed far from its original purpose,” and “has become the poster child for lawsuit abuse.” *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961 (2015) (Pai, dissenting).

- The TCPA itself: The term ATDS means 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. 47 U.S.C.A. § 227(a)(1)
- The FCC said the term includes “predictive dialers” -- dialing equipment that can make use of algorithms to “assist[] telemarketers in predicting when a sales agent will be available to take calls.”
- The FCC declared that, while some predictive dialers cannot be programmed to generate random or sequential phone numbers, they still satisfy the statutory definition of an ATDS.
- In other words, the FCC said that – regardless of whether equipment uses random or sequential number generation – that equipment constitutes an ATDS if it makes calls automatically, e.g., from a list in a database.



9

- The FCC declared that, while some predictive dialers cannot be programmed to generate random or sequential phone numbers, they still satisfy the statutory definition of an ATDS.
- In other words, the FCC said that – regardless of whether equipment uses random or sequential number generation – that equipment constitutes an ATDS if it makes calls automatically, e.g., from a list in a database.



10

Why all the problems?

- Reminder: statutory damages of \$500-\$1,500 per call
- Reminder: No actual damages requirement
- Four-year statute of limitations
- Class action exposure
 - 1,000 calls = \$500,000 to \$1.5 million
 - 10,000 calls = \$5-\$15 million
 - 100,000 calls = \$50-\$150 million
 - 1,000,000 calls = \$500 million-\$1.5 billion
 - 10,000,000 calls = \$5-\$15 billion



11



12

2018 – 2021 – the courts step in (again)

- In *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687, 700 (D.C. Cir. 2018), the D.C. Circuit struck down the FCC's interpretation of an ATDS. The D.C. Circuit found the FCC's interpretation "arbitrary and capricious," because the FCC had failed to engage in "reasoned decision making." In reaching this conclusion, the D.C. Circuit focused on, among other things, the FCC's reliance on "capacity." The D.C. Circuit found that the FCC had failed to provide sufficient guidance on this point. Specifically, the FCC's reasoning could "compel concluding that smartphones have the 'capacity' to function as autodialers because apps carrying the requisite features can be downloaded." Moreover, although the FCC said that the capacity requirement entails more than "theoretical" capacity, the single example the FCC provided of a device that would not have the requisite capacity was "a traditional rotary-dial phone (which by now is approaching obsolescence)." *But* the D.C. Circuit did not adopt a specific definition of an ATDS.



13

- **Circuit Split Develops:**
 - Third, Seventh, and Eleventh Circuits: to constitute an ATDS, equipment must have the capacity to employ random or sequential number generation.
 - Second, Sixth, and Ninth Circuits: regardless of whether the equipment has the capacity to use random or sequential number generation, equipment that dials numbers automatically from a list can constitute an ATDS



14

- The Opening line: The Telephone Consumer Protection Act of 1991 (TCPA) proscribes ***abusive telemarketing practices*** by, among other things, imposing restrictions on making calls with an “ ‘automatic telephone dialing system.’” (emphasis added).

The Holding:

As defined by the TCPA, an “automatic telephone dialing system” is a piece of equipment with the capacity both “to store or produce telephone numbers to be called, using a random or sequential number generator,” and to dial those numbers. 47 U.S.C. §227(a)(1). The question before the Court is whether that definition encompasses equipment that can “store” and dial telephone numbers, even if the device does not “us[e] a random or sequential number generator.” It does not. To qualify as an “automatic telephone dialing system,” a device must have the capacity either:

(i) to store a telephone number using a random or sequential generator or

(ii) to produce a telephone number using a random or sequential number generator.



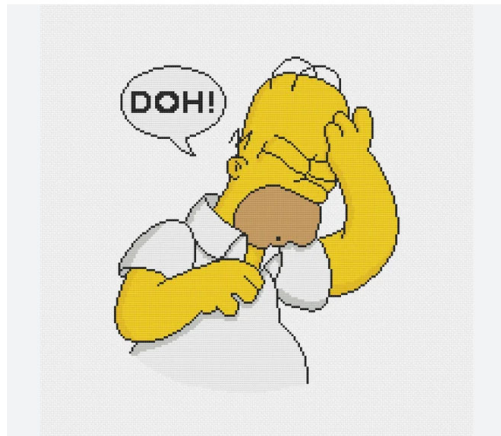
15

Sanity wins!



16

The TCPA Battles Continue



Capacity

- **Statutory Text**

- The term “automatic telephone dialing system” means 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. 47 U.S.C. § 227(a)(1) (emphasis added).

- **Duguid**

- As defined by the TCPA, an “automatic telephone dialing system” is a piece of equipment **with the capacity** both “to store or produce telephone numbers to be called, using a random or sequential number generator,” and to dial those numbers. 141 S. Ct. at 1167 (emphasis added).
- In sum, Congress’ definition of an autodialer requires that in all cases, whether storing or producing numbers to be called, the equipment in question **must use** a random or sequential number generator. This definition excludes equipment like Facebook’s login notification system, which does not use such technology. *Id.* at 1170 (emphasis added).
- 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. *Id.* at 1173 (emphasis added).

- **Pre-Duguid Decisions re Capacity**

- **Post-Duguid Decisions re Capacity**

Other TCPA Prohibitions

- “No person or entity may . . . (2) Initiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using....an artificial or prerecorded voice,” to, among other things, “any telephone number assigned to a...cellular telephone service...or any service for which the called party is charged for the call,” other than “a call made with the prior express written consent of the called party...”
47 C.F.R. § 64.1200(a)(2).
- “No person or entity may...(3) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the called party, unless the call;
 - (i) Is made for emergency purposes;
 - (ii) Is not made for a commercial purpose;
 - (iii) Is made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing;47 C.F.R. § 64.1200(a).



19

Exceptions

- Bona Fide Error Defense - no violation if you can demonstrate:
 - ✓ Written procedures to comply with do-not-call rules;
 - ✓ Training personnel
 - ✓ Maintain a list of do-not-call numbers
 - ✓ Checks the do-not-call list at least every 31 days and documents it



20

Don't Forget...

- Reminder: statutory damages of \$500-\$1,500 per call
- Reminder: No actual damages requirement
- Four-year statute of limitations
- Class action exposure
 - 1,000 calls = \$500,000 to \$1.5 million
 - 10,000 calls = \$5-\$15 million
 - 100,000 calls = \$50-\$150 million
 - 1,000,000 calls = \$500 million-\$1.5 billion
 - 10,000,000 calls = \$5-\$15 billion



21

Ways to minimize TCPA exposure

- **Consent**
 - Prior express consent vs. prior express written consent
 - Written versus oral consent in general
 - Pre-checked boxes – don't use these
 - Affiliates
- **Call content**
 - "Dual purpose" calls
- **Technology**
 - Pre-recorded versus "live operator" calls
 - *But Note:* Solicitation calls to numbers on the National DNC Registry can trigger liability regardless of the technology used



22

Ways to minimize TCPA exposure

- **Scrubbing**

- Reassigned number database
 - Numbers ported from landlines to cell phones
 - Wrong number litigation
- National Do Not Call Registry

- **Vendors**

- TCPA liability extends to the party placing the call *and* the party on whose behalf the call is placed
- Agency principals – who is directing the calls and providing the equipment?
- Contractual requirements for compliance



23

Summing Up Where We Stand Under the TCPA

Refresher:

- You can make calls/texts for “servicing-related” purposes by simply obtaining a cell-phone number from a customer (i.e. prior express consent).
 - Often businesses like to obtain such consent in a written form – that’s nice belt and suspenders, but its not required
- But the telemarketing/solicitation calls/texts can still get you into trouble – need prior express **written** consent
 - Careful – servicing-related calls or text messages can easily transition from servicing to telemarketing (e.g., “dual purpose” calls).
- Prior express written consent:
 - ✓ In writing
 - ✓ Signature of the person called
 - ✓ Authorize advertisements or telemarketing messages using an ATDS or an artificial or prerecorded voice
 - ✓ Disclosure: (i) by executing the agreement, individual provides authorization; and (ii) the person is not required to sign the agreement as a condition of purchasing any property, goods, or services.



24

Outstanding Risks

- Statutory Damages
- Litigation costs
- UDAP/UDAAP
- Customer relations and reputational risk
- State Mini-TCPA's



25

State mini-TCPAs

- Following *Facebook*, states fill the void
 - Florida – Florida Telephone Solicitation Act
 - Two Year Overview
 - Recent Amendments
 - Focus on different aspects of statute
 - Oklahoma – Oklahoma Telephone Solicitation Act
 - Many Exemptions
 - Cases overview
 - Washington
- Other States



26

State mini-TCPAs (cont.)

- Business need a state law compliance strategy
- Options
 - Lowest common denominator
 - State-by-state
 - Avoid/address high risk states + TCPA
 - Combination/tailored
 - Consider:
 - Business model
 - Risk tolerance
 - Implementation



27

Questions?



28

Thank You



Scott J. Helfand
HUSCH BLACKWELL

Partner – Chicago
312.341.9876
Scott.Helfand@huschblackwell.com
www.huschblackwell.com



John W. McGuinness



Partner – Washington, D.C.
310.312.4270
jmcguinness@manatt.com
www.manatt.com

