KRIEG DEVAULT

Insights

Supreme Court Confirms that to Violate the TCPA your Automatic Telephone System Must Use a Random or Sequential Generator

April 7, 2021

By: Scott S. Morrisson, Brett J. Ashton, and Blake P. Holler

The TCPA Issue

There has been a significant amount of litigation over the past few years regarding the Telephone Consumer Protection Act ("TCPA") on the issue of whether banks or credit unions are violating the TCPA when they call their customers using certain automatic telephone systems. Customers frequently claim that a financial institution violated the TCPA, 47 U.S.C. § 277, by contacting them after the customer had revoked consent to be contacted about an overdrawn account, unpaid debt, or for some other reasons, using an automatic telephone system. Customers claim that the unauthorized contact occurs by means of an automated telephone dialing system ("ATDS") within the meaning of the TCPA. The issue of exactly what is, and what isn't an ATDS within the meaning of the TCPA has been the subject of significant dispute.

How the Issue Has Been Handled in Indiana and Illinois

The Seventh Circuit Court of Appeals, the federal appellate court that governs federal appeals in Indiana and Illinois, had ruled early last year in *Gadelhak v. AT&T Services, Inc*., 950 F.3d 458 (7th Cir. 2020) that in order to be an ATDS in violation of the TCPA, the dialing system must have the capacity to store or produce telephone numbers using a random or sequential numbered generator. Following *Gadalhak's* guidance, lawsuits against lending institutions had been dismissed by the courts after proof was given that the dialing system at issue did not have the capacity to store or produce telephone numbers using a random or sequential numbered generator. Indeed, the authors of this article have successfully represented lending institutions obtaining this very result, dismissal from Indiana federal courts, and at the 7th Circuit, on this basis.

Yet, not all federal circuit appellate courts agreed with the 7th Circuit's stance in *Gadelhak*. The 2nd, 6th, and 9th Circuits all essentially held that storage of telephone numbers, even without random or sequential numbered generation, was enough to satisfy the TCPA's definition of an ATDS. Meanwhile, the 3rd and 11th Circuits agreed with the 7th Circuit and had all concluded that a system must have the capacity to generate random or sequential numbers to qualify as an ATDS.

The United States Supreme Court Decided The Issue Last Week

That set the stage for the United States Supreme Court to determine the issue. Last week on April 1, 2021, in an unanimous decision, the U.S. Supreme Court decided *Duguid v. Facebook*, holding that an ATDS as defined by the TCPA *does* require a telephone system to have the capacity to store telephone numbers using a random or sequential generator, or to produce a telephone number using a random or sequential generator.

In other words, ATDS prohibition does not cover those who have telephone systems that do not use a random or sequential number generator.

The U.S. Supreme Court rejected the more expansive definition of an ATDS suggested by Duguid, and instead sided with Facebook and the 3rd, 7th, and 11th Circuits. Although the Court's conclusion is somewhat of a mix of what these Circuits had held, so that these decisions should not be blindly followed, the Court essentially agrees with their holdings. In what is sure to be an oft quoted statement, the U.S. Supreme Court held that a more expanded definition of an ATDS "would take a chain saw to these nuanced problems when Congress meant to use (in drafting the TCPA), a scalpel."

What This Means for You

For financial institutions attempting to contact customers, for instance, regarding overdrawn accounts or unpaid debts, the Court's opinion in *Facebook* is a major victory. The Court's decision significantly reduces the expansive reach of the TCPA and will protect financial institutions from litigation. The TCPA's ATDS statutory provision has been heavily litigated in the past several years, but the *Facebook* decision now provides a definitive interpretation on the definition of an ATDS. Businesses should review how their telephone systems operate accordingly.

For questions, please contact **Scott S. Morrisson**, **Brett J. Ashton**, or **Blake P. Holler** for more information about this topic.