

THE TCPA:

WHERE WE WERE THEN, WHERE WE ARE
NOW, AND WHERE WE HOPE TO BE SOON

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ROADMAP

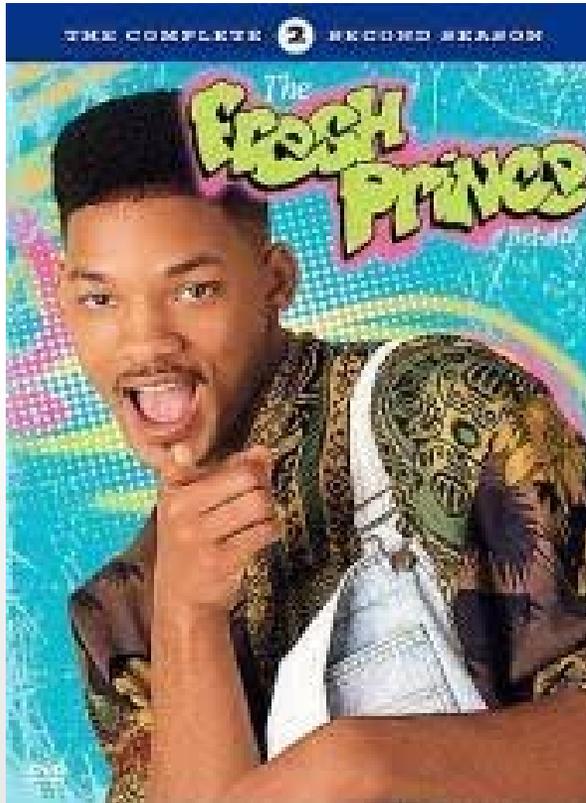


- Telephone Consumer Protection Act; 47 U.S.C. sec. 227
 - How Did We Get Here?
 - The Basics
 - The FCC
 - The CIRCUIT SPLIT
 - The Supreme Court's Ruling in *Facebook v. Duguid*
 - Practical Tips

IT'S 1988

Typical cost: \$100 or less for a portable handset, at least \$20 to \$30 a month for access to a calling network, plus 45 cents to 75 cents a minute for most calls (25 to 50 percent more for calls you make or receive while using your cell phone beyond your service provider's home territory).





IT'S 1991

- Infamously, the development of “robocall” technology allowed companies to make calls using artificial or prerecorded voices, obviating the need for live human callers altogether.
- Advances in automated technology made it feasible for companies to execute largescale telemarketing campaigns at a fraction of the prior cost, dramatically increasing customer contacts.
- Congress found autodialer technology to be uniquely harmful. It threatened public safety by “seizing the telephone lines of public emergency services, dangerously preventing those lines from being utilized to receive calls from those needing emergency services.” H. R. Rep. No. 102–317, p. 24 (1991).
- Indeed, due to the sequential manner in which they could generate numbers, autodialers could simultaneously tie up all the lines of any business with sequentially numbered phone lines. Nor were individual consumers spared: Autodialers could reach cell phones, pagers, and unlisted numbers, inconveniencing consumers and imposing unwanted fees.

TCPA

- The Telephone Consumer Protection Act; 47 U.S.C. sec 227
 - Congress passed the TCPA to address “the proliferation of intrusive, nuisance calls” to consumers and businesses from telemarketers. §2, ¶¶1, 6, 105 Stat. 2394, note following 47 U. S. C. §227.
 - Using an “automatic telephone dialing system” or artificial/recorded voice to place any “call” to a cellular telephone.
 - \$500 or \$1,500 PER CALL
 - Strict Liability
 - Class Action

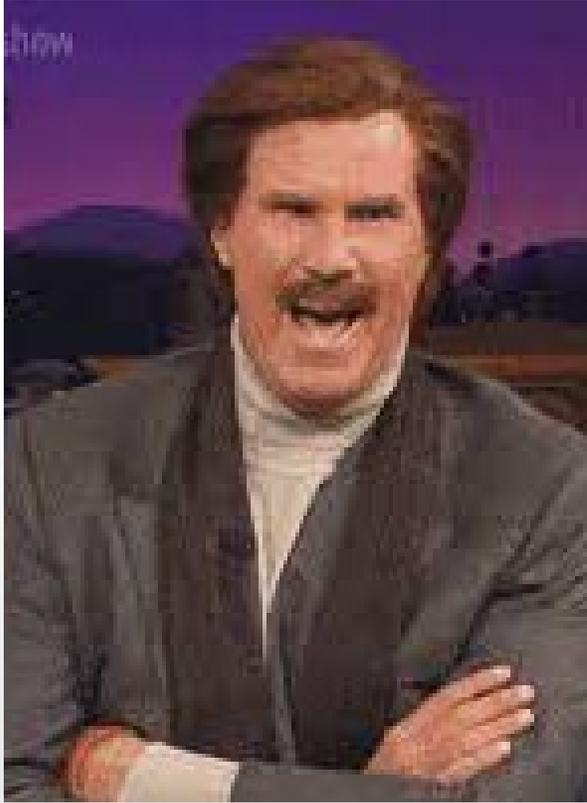
LANDLINES

- DEBT COLLECTION IS DIFFERENT, OR SO SAYS THE FCC
 - EXEMPT: Commercial calls that do not include an advertisement or constitute telemarketing.
 - On December 30, 2020, the Federal Communications Commission (FCC or Commission) released a Report and Order updating a number of Telephone Consumer Protection Act (TCPA) exemptions.
 - For all exempted calls to a residence, the Report and Order adopts new limitations on the number of calls that can be made pursuant to the exemptions. It limits the number of exempted calls to three artificial or prerecorded voice calls within any consecutive thirty-day period.
 - For all exempted calls to a residence, the Report and Order also amends the TCPA rules to require callers to allow recipients of calls that fall under the exemptions to opt out.
 - Importantly, with respect to these new opt-out requirements, the Commission explains that it “does not apply to those artificial or prerecorded voice message calls that are made for an ‘emergency purpose’ or with the prior express consent of the called party because such calls are not made pursuant to an exemption adopted under section 227(b)(2)(B).

WHAT IS AN AUTODIALER THOUGH?

- Section 227(a)(1) defines an autodialer as: “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.”

SOUNDS EASY ENOUGH



- Except the circuits all disagreed.

FCC

- FCC's 2015 Omnibus Ruling determined that all software-enabled dialing devices were subject to the TCPA because such dialers had the inherent "flexibility" to perform the *statutory* requirements of random or sequential number generation (i.e. a couple of lines of code could always be dropped into any dialer program to allow it to call randomly/sequentially.) It arrived there by focusing on the word "capacity" in the statutory definition and also by assuming that random or sequential number generation were the required functionalities of an ATDS as specified in the TCPA's definition.
- Notably, however, earlier ATDS formulations from the Commission in 2003 and 2008 had not required random or sequential number generation, just the ability to call thousands of numbers at a time without human intervention.

NOW, MY IPHONE
IS AN AUTOMATIC
TELEPHONE
DIALING SYSTEM



THE DEBT COLLECTION INDUSTRY SUED

- In *ACA Int'l* the D.C. Circuit Court of Appeals set aside the broad definition of ATDS established in the Omnibus determining that it impermissibly converted smartphones into ATDSs and all Americans into TCPA violators in waiting.
- It also (maybe?) set aside all of the FCC's ATDS rulings determining that they are inconsistent with each other and flawed in that they do not identify the functionalities an ATDS must perform to trigger statutory coverage.

LET THE COURTS DECIDE

- The Second and Ninth Circuit have both broadly interpreted the definition of an ATDS, while the Third, Seventh and Eleventh have taken a much narrower reading. For example, earlier this year the Eleventh and Seventh Circuit Courts reached similar conclusions, back-to-back, narrowly holding that the TCPA's definition of Automatic Telephone Dialing System (ATDS) only includes equipment that is capable of storing or producing numbers using a "random or sequential" number generator, excluding most "smartphone age" dialers.

THE U.S. SUPREME COURT WEIGHS IN

- *Facebook v. Duguid*
 - Facebook, Inc., maintains a social media platform with an optional security feature that sends users “login notification” text messages when an attempt is made to access their Facebook account from an unknown device or browser. If necessary, the user can then log into Facebook and take action to secure the account. To opt in to this service, the user must provide and verify a cell phone number to which Facebook can send messages.
 - In 2014, respondent Noah Duguid received several login notification text messages from Facebook, alerting him that someone had attempted to access the Facebook account associated with his phone number from an unknown browser.
 - But Duguid has never had a Facebook account and never gave Facebook his phone number.
 - Unable to stop the notifications, Duguid brought a putative class action against Facebook. He alleged that Facebook violated the TCPA by maintaining a database that stored phone numbers and programming its equipment to send automated text messages to those numbers each time the associated account was accessed by an unrecognized device or web browser.

THE NINTH CIRCUIT EVERYTHING IS AN AUTOMATIC TELEPHONE DIALING SYSTEM!

- Facebook moved to dismiss the suit, arguing primarily that Duguid failed to allege that Facebook used an autodialer because he did not claim Facebook sent text messages to numbers that were randomly or sequentially generated.
- Rather, Facebook argued, Duguid alleged that Facebook sent targeted, individualized texts to numbers linked to specific accounts.
- The U. S. District Court for the Northern District of California agreed and dismissed Duguid's amended complaint with prejudice. 2017 WL 635117, *4–*5 (Feb. 16, 2017).
- The United States Court of Appeals for the Ninth Circuit reversed. As relevant here, the Ninth Circuit held that Duguid had stated a claim under the TCPA by alleging that Facebook's notification system automatically dialed stored numbers.
- An autodialer, the Court of Appeals held, need not be able to use a random or sequential generator to store numbers; it need only have the capacity to “store numbers to be called” and “to dial such numbers automatically.” 926 F.3d 1146, 1151 (2019) (quoting *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1053 (CA9 2018)).

SCOTUS GRANTS CERT

- It makes the most “sense,” Duguid insists, to apply the phrase “using a random or sequential number generator” to modify only “produce,” which, unlike the verb “store,” is closely connected to the noun “generator.”
- Facebook argues the clause “using a random or sequential number generator” modifies both verbs that precede it (“store” and “produce”).
- Series-qualifier canon: Congress defined an autodialer in terms of what it must do (“store or produce telephone numbers to be called”) and how it must do it (“using a random or sequential number generator”). The definition uses a familiar structure: a list of verbs followed by a modifying clause. Under conventional rules of grammar, “[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series,” a modifier at the end of the list “normally applies to the entire series.”

PRACTICAL EXAMPLE OF SERIES MODIFIER

- Imagine if a teacher announced that “students must not complete or check any homework to be turned in for a grade, using online homework-help websites.” It would be strange to read that rule as prohibiting students from completing homework altogether, with or without online support.

FACEBOOK V. DUGUID- SCOTUS- APRIL 1, 2021

- The U.S. Supreme Court ruled in Facebook v. Duguid that individuals can only claim protection under the Telephone Consumer Protection Act from unwanted calls made using a mass dialing system or "autodialer" if the system uses a random or sequential number generator to either store or produce the numbers called.
- “Expanding the definition of an autodialer to encompass any equipment that merely stores and dials telephone numbers would take a chainsaw to these nuanced problems when Congress meant to use a scalpel. Duguid’s interpretation of an autodialer would capture virtually all modern cell phones, which have the capacity to ‘store . . . telephone numbers to be called’ and ‘dial such numbers.’ §227(a)(1).”

BUT WHAT ABOUT AI OR PRE-RECORDED MESSAGES?

- The statute separately prohibits calls using “an artificial or prerecorded voice” to various types of phone lines, including home phones and cell phones, unless an exception applies. See 47 U. S. C. §§227(b)(1)(A) and (B). Our decision does not affect that prohibition.

WHAT ABOUT A TEXT OR EMAILS OR SOCIAL MEDIA MESSAGING?

- Social Media
 - Nope.
- Email
 - Nope.
- Texts.... Probably and most likely Yes!
 - Facebook
 - FCC
 - The Courts

STATE LAWS

- 815 ILCS 305/1 - Illinois
- (a) "Autodialer" or "Autodialer System" means any telephone dialing or accessing device, machine, computer or system capable of storing telephone numbers which is programmed to sequentially or randomly access the stored telephone numbers in order to automatically connect a telephone with a recorded message, the term does not include any device associated with a burglar alarm system, voice message system or fire alarm system.

A FEW PRACTICAL TIPS

- Vet your system in advance!
 - Random or Sequential
- Get Consent
 - Loan Docs
 - Website
 - Recordings
- Have an opt-out system.
- Have Representations in Your Retention Agreements
- Policies and procedures!

COMMENTS AND QUESTIONS?



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