

ALERT

October 2020

Supreme Court To Resolve Circuit Split On TCPA Autodialer Definition

By: Terese L. Arenth

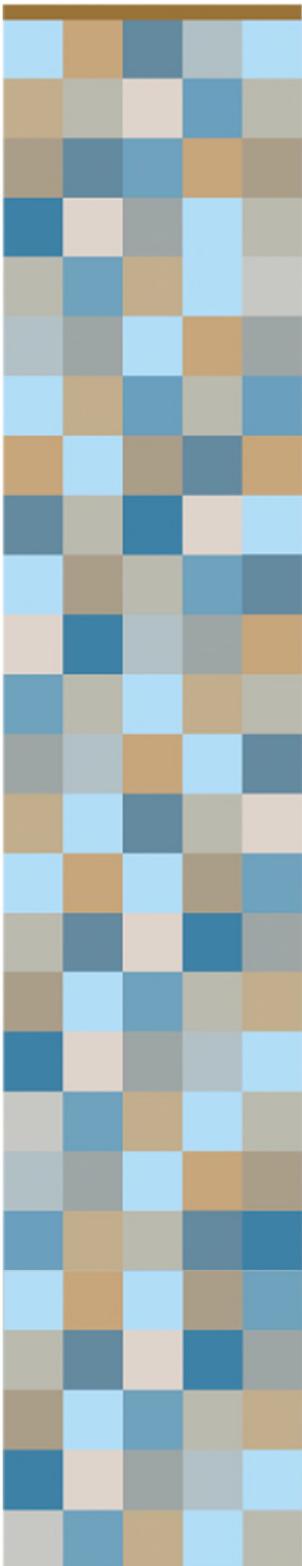
On December 8, 2020, the United States Supreme Court will hold oral arguments to finally resolve a deepening split of authority in the Circuit Courts of Appeal regarding the definition of an "autodialer" under the Telephone Consumer Protection Act (TCPA), which definition has spawned extensive litigation and cost many businesses substantial dollars.

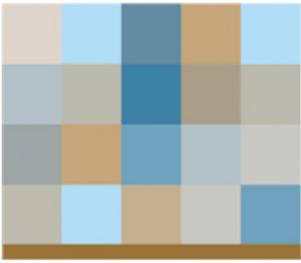
Since 1991, the TCPA has been intended to protect consumers from unwanted telemarketing calls and generally prohibits (among other things) the use of an "automated telephone dialing system" (ATDS or autodialer) to call wireless telephone numbers without the appropriate prior consent. This includes text messaging.

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 has resulted in a split of authority. This split of authority is significant, as more businesses move towards marketing campaigns that might include calling a cell phone or text messaging and violation of the TCPA can result in hefty penalties between \$500 to \$1,500 per call or text, making it ripe for class action suits.

The United States Court of Appeals for the Ninth Circuit has held that it is enough for a phone to be able to dial stored numbers automatically to qualify as an ATDS under the TCPA, which broad definition would encompass the capabilities of most smartphones. The Second Circuit and Sixth Circuit have agreed with the Ninth Circuit's broad definition. On the other hand, the Third, Seventh, Eleventh and DC Circuits have held that a device is not an ATDS unless it generates and dials random or sequential phone numbers.

In 2015, Noah Duguid filed a class action lawsuit against Facebook, asserting that Facebook 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 (which is not uncommon but was not contemplated at the time of the TCPA's enactment). Regardless, Facebook argued that it had not used a random or sequential number generator to send the messages and therefore could not be held liable.





ALERT



Moritt Hock & Hamroff LLP is a broad based commercial law firm with more than 75 lawyers and a staff of patent agents and paralegals. The firm's practice areas include: business succession planning; commercial foreclosure; commercial lending & finance; construction; copyrights, trademarks & licensing; corporate & securities; creditors' rights & bankruptcy; cybersecurity; privacy & technology; dispute resolution; employment; healthcare; landlord & tenant; litigation; marketing, advertising & promotions; mergers, acquisitions & private equity; not-for-profit; patents; real estate; secured lending, equipment & transportation finance; tax; and trusts & estates.

Terese Arenth is a Partner with the firm and serves as Chair of its Promotional Marketing and Advertising Practice Group, as well as Co-Chair of its Cybersecurity, Privacy and Technology Practice Group, both of which are within the firm's Intellectual Property Department. Ms. Arenth concentrates her practice in promotional marketing, advertising and Internet/new media, as well as privacy and technology related matters. She also has significant involvement in the firm's intellectual property practice area and vast experience in commercial and corporate litigation.

Although the trial court agreed with Facebook and dismissed the case, it was reinstated by the Ninth Circuit. 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 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, which has held that a device is not an ATDS unless it generates and dials random or sequential phone numbers. For example, the 2018 decision of the Third Circuit in *Dominguez v. Yahoo* held that a system must be able to generate random or sequential numbers to be considered an ATDS under the TCPA, a view which has been followed by the 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 Ninth Circuit's broad interpretation could expose millions of people to TCPA claims and its stiff penalties. Many high profile companies, trade associations and public interest firms have filed amicus briefs supporting Facebook's arguments, including Lyft, Quicken Loans, Home Depot, Salesforce.com, Aetna, Midland Credit Management, Credit Union National Association, Portfolio Recovery Associates, the Retail Litigation Center, the Life Insurance Direct Marketing Association, the Washington Legal Foundation, the Professional Association for Customer Engagement, the U.S. Chamber of Commerce and even the United States Government itself.

Whichever way the Supreme Court rules, it will be a landmark decision with major impact on the TCPA litigation playing field. Adoption of Facebook's narrow definition of an ATDS could significantly reduce the number of TCPA class action suits going forward. If, however, the Court adopts the Ninth Circuit's broad interpretation, the potential for claims could dramatically increase, even potentially against smartphone owners who automatically dial one or more of their contacts.

If you have any questions regarding this Alert, please feel free to reach out to [Terese Arenth](mailto:Terese.Arenth@moritthock.com) at (516) 880-7235 or terenth@moritthock.com.



This Alert is published solely for the interests of friends and clients of Moritt Hock & Hamroff LLP for informational purposes only and should in no way be relied upon or construed as legal advice.

©2020 Moritt Hock & Hamroff LLP

