

Supreme Court to Settle Circuit Split on TCPA Autodialer Prohibitions

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In our April issue, we covered the beginnings of a circuit split over the extent to which the Telephone Consumer Protection Act (TCPA) prohibits advertisers and other advertising campaigns from using automated dialing systems. See [“Did Your Text Message or Phone Call Campaign Use an Illegal ‘Autodialer’?”](#) *Expect Focus – Life, Annuity, and Retirement Solutions* (April 2020). The TCPA defines autodialers as equipment that “store[s] or produce[s] telephone numbers to be called, using a random or sequential number generator.” The “broad approach,” initially adopted by the Ninth Circuit, considers equipment that can dial any stored number automatically to satisfy the TCPA definition. The “narrow approach,” adopted by the Third, Seventh, and Eleventh Circuits, refuses to extend the TCPA definition to automated dialers beyond randomly or sequentially generated numbers.

Since April, the Second and Sixth Circuits joined the Ninth Circuit and adopted the “broad approach,” splitting the circuits evenly at 3–3. In *Duran v. La Boom Disco Inc.*, the Second Circuit explained that the phrase “using a random or sequential number generator” modified only the term “produce” and did not apply to the term “store” in the key phrase of the TCPA. Thus, according to the “broad approach,” any automated call is a prohibited autodialer if it calls numbers that (1) were generated by humans or computers and stored; or (2) randomly or sequentially produced by a computer.

The Sixth Circuit in *Allan v. Pennsylvania Higher Education Assistance Agency* followed the Ninth Circuit’s approach, concluding that the autodialer phrase is ambiguous and looking to the rest of the statute for guidance. It found that the TCPA, as a whole, was meant to cover “equipment that made automatic calls from lists of recipients,” regardless of whether the numbers were randomly or sequentially generated. The court explained that “[i]f stored-number systems are not covered, companies could avoid the autodialer ban altogether by transferring numbers from the number generator to a separate storage device and then dialing from that separate storage device.”

In early July, the U.S. Supreme Court granted certiorari in *Duguid v. Facebook Inc.*, a putative class action against Facebook over its alleged practice of sending text messages to non-users even when the person elects to stop receiving notifications. *Duguid* will provide an opportunity for the Supreme Court to consider whether the TCPA's definition of automated dialing systems encompasses any device that can "store" and "automatically dial" telephone numbers, even if the device does not "us[e] a random or sequential number generator," and may resolve the circuit split.

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