Consumer Finance Monitor (Season 4, Episode 14): The U.S. Supreme Court's decision in Facebook v. Duguid: A Discussion of its Implications

Speakers: Dan McKenna, Mark Furletti, Stefanie Jackman, Jenny Perkins, and Joel Tasca

Dan McKenna:

Hello everyone. My name is Dan McKenna, and I am the practice group leader of Ballard Spahr's Consumer Financial Services Litigation Group. Big day today in the TCPA space, as the Supreme Court issued its decision in Duguid versus Facebook, finally putting to rest the definition of ATDS. We expect a lot of deep diving posts and webinars on this topic, but our goal today is simpler than that. We want to give you, the listener, a brief description of the case and our quick assessment of what it means for TCPA litigation and regulation moving forward. So let's get right into it.

Dan McKenna:

TCPA litigation has long been one of the top three highest volume consumer cases in the country. Stated simply, the statue's been abused by plaintiff's council to manufacture litigation against compliant businesses. One of the most litigated issues has been what technology is covered by the statute. Among other things, the TCPA expressly applies to automated telephone dialing systems or ATDS. Although that is defined in the statute, courts and council have long disagreed about what that definition means and what the terms includes. The TCPA defines ATDS as equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

Dan McKenna:

As simple as that definition might seem, courts have long debated whether an ATDS has to use random or sequential number generators, or just have the option or potential capacity to use them. And they've also long debated whether the use of a random or sequential number generator applies only to dialing numbers. Or does that term also apply to storing numbers? The impact is decisions holding that technology like predictive dialers, which typically dial within intent from lists of set phone numbers of customers or target audiences, and do not use random or sequential number generators have been held to be an ATDS because they can store numbers, even if they're not stored using a random or sequential number generator. And the courts are split on this.

Dan McKenna:

In comes the Supreme Court today, and in a rare unanimous decision, the Supreme Court issued a decision today in Facebook versus Duguid that held that the key phrase, using a random or sequential number generator modifies both to store and to produce, as a result, ATDS is now defined to include only technology that has the capacity to store numbers using a random or sequential number generator, or produce numbers using a random or sequential number generator. Although the court repeatedly mentioned capacity, it likewise highlighted current use. There were a number of instances where the court said uses and not capacity to uses. Practically then, as Justice Sotomayor, who wrote for the court, explained predictive dialers, or to use her words, quote, "equipment that merely stores and dials telephone numbers," end quote, no longer necessarily runs afoul of the TCPA's ATDS prohibitions. That is the current state of the law and it is big news, so let's quickly discuss what that means.

Dan McKenna:

Stefanie Jackman's a litigation partner in our Atlanta office who litigates a lot of these cases and offers compliance advice to businesses. She also heads up Ballard's collections team. Stefanie, what does this decision mean for businesses that make outbound calls?

Stefanie Jackman:

Thanks, Dan. I think it's really exciting, but I also want to warn people of the need to have a little bit of caution, meaning don't just throw your TCPA policy and compliance and controls out the window and go full. Instead, I think that one of the things that entities making outbound calls and using technology to assist them in doing that, or additionally, sending outbound texts, need to think of this case as a win and something that could be very useful in defending against existing and future cases. But we're not out of the woods. I think the woods look different, and as Jenny's going to talk about, there may still be some room for the plaintiffs' bar to get into some battle of the experts on capacity and what that means, because one of the things that I noted in reading this opinion is the Facebook system that was in play had no capacity to do anything in the way of generating or storing numbers by using a random or sequential number generator.

Stefanie Jackman:

Instead, consumers had to put their number directly in and authorize Facebook to send them a text notification in the event of a later access issue or potential privacy breach of some type. A couple other things though that have come into my mind, just thinking about what companies need to be mindful of, prerecorded messages are still 100% in play for potential liability. That provision of the TCPA, and the Supreme Court noted this in their opinion, prerecorded messages and the sending of them without consent is most definitely not dependent on the use of a system that constitutes an ATDS under the statute.

Stefanie Jackman:

A few other things I was thinking about is: What's this mean for Regulation F? You mentioned I do a lot of collections work. Regulation F, for those that are going to be subject to it, it applies to entities that are subject to the FTCPA, so collections agencies and debt buyers who utilize these technologies a lot in attempting to contact consumers and resolve their delinquent debts. Reg F has said that you can contact consumers in ways that are abusive or harassing. It wouldn't surprise me at all to see the use of an ATDS without some basic controls, or without consent, or whatever you're thinking about doing, make its way into framing those types of arguments and attack in November when the rule takes effect in the collections context.

Stefanie Jackman:

I also think that concept about consent and revocation that have largely developed in the world of the TCPA ATDS saga of the last almost seven years now will immediately find a home in litigating the extent to which any use of or contacting consumers by text, or on their cell phones, or even email, which is not subject to the TCPA, outside of the safe harbors provided for in Reg F, immediately all of this framework from TCPA is going to go over and inform that context. And I just lastly noted, and I think companies should be cautious of the Supreme Court doing a very strict textual analysis, and as you noted, in a unanimous fashion, gave us a pro industry decision. But I expect that there could be other times where we would like them maybe to not be so strict with the text. And I sense right now we have a court that is coalescing around that interpretive approach, so those are my thoughts.

Dan McKenna:

That's are interesting, Stefanie. Thank you. Mark Furletti is also with us, and he's the co-head of our Consumer Financial Services Group, and a renowned thought leader in the TCPA space, definitely someone who I go to a lot when it comes to compliance and regulatory advice here. So Mark, can you share with us what you think is the larger impact of this on telemarketing and lead generation?

Mark Furletti:

Sure, Dan. So I kind of have kept a chart in different forms of the types of consent that folks need to have to place auto dialed calls to cell numbers. Right? And so on the marketing side, I'm just going to go through kind of what that chart I think now looks like, and I'll do it for the marketing side. And I'll also talk about it briefly on the non-marketing side. Okay, so folks who work with me know that my chart normally either has PEC or PEWC in it. Right? PEC is prior express consent, PEWC is prior express written consent. So it's long been the case that if you want to do an auto dialed live agent call to a cell number

and you have a marketing purpose, you need PEWC. And it's been the case that it has a non-marketing purpose, you need PEC. Well, now you need neither of those. You do not need, technically need, any form of consent.

Mark Furletti:

Automated text messages to cell numbers, same story. For marketing, you needed PEWC. For non-marketing, you needed PEC. Now you need neither. For prerecorded voice message calls to cell numbers, no change, as Stefanie noted. On the marketing side, you still need PEWC. On the non-marketing side, you need PEC. And I'll note that the FCC recently promulgated rules that increased the type of consent that is needed for non-marketing prerecorded voice message calls to landlines requiring PEWC for those. So that chart gets a lot simpler, that consent chart, and the revocation stuff and the number change stuff and the wrong number stuff, all of that becomes much less critical. Now I think we'll talk later about, maybe more specifically, about how folks are not entirely out of the woods. But at least on this kind of key piece of consent and how burdensome that's been under the TCPA, things are looking much better.

Dan McKenna:

Thank you, Mark. I'm interested in hearing what you have to say on the other topics in a few minutes. But turning back to litigation for a minute, Stefanie mentioned some really interesting stuff about how the litigation will continue. And Jenny Perkins is with us also. She's a litigation partner in Philadelphia, who I'm very fortunate to work with often. She litigates TCPA cases across the country. Jenny, you and I talk about this a lot. We thought this might be coming. The plaintiffs whom we work with regularly litigates against regularly, thought this was coming. How have they been ramping up to address this?

Jenny Perkins:

Sure. Thanks, Dan. Well, certainly as Stefanie hinted, prerecords and artificial voice, they're still in play. Probably during the past six months, the plaintiff's council that we deal with often, have told us that they're not taking cases without prerecords. So they were doing a little bit more investigation before filing those cases. I think what we can expect to see is more cases that expressly allege prerecord, so that we cannot, so we don't have an opportunity to try to move to dismiss at the pleading stage. I think we're also going to see a new host of case law developed on prerecords. Oftentimes, case law on prerecords have just been ignored. The hot issue has always been: What constitutes an ATDS? But for instance, the fifth circuit a couple years ago, they actually ruled that in order for a prerecord to be actionable under the TCPA, it actually must have played. So I think we're going to see a lot of litigation in developing case law on the prerecord space.

Jenny Perkins:

You and I have seen this as well. The plaintiffs' bar is starting to increase the types of claims that they're bringing. So although their claims derive from what we've traditionally seen as TCPA claims, we're seeing a lot of state statutory claims. Maryland, Massachusetts, South Carolina, just as examples, they have their own state, many TCPAs. So I think we should anticipate seeing a lot of those cases. In addition to the state statutory claims, we've also seen a lot of common law torte claims that have accompanied our TCPA cases, such as invasion of privacy, trespass to chattels, which happens to be one of my favorite that we see. So that's where I think we're going to see the litigation.

Jenny Perkins:

Stefanie did mention that we still think that there's going to be a battle of the experts when it comes to: What exactly does capacity to auto dial mean? I think what we're going to experience is a lot of the same, at least for the first three to six months, that we saw post ACA, where you had experts like Jeff Hansen, who had opined that the operating system has the capacity to generate or, I'm sorry, to store or produce numbers. So therefore, it qualifies as an ATDS under the TCPA. I don't think all plaintiffs' lawyers are going to invest in this battle of the experts, but I think we are going to see some of it.

Dan McKenna:

Yeah. I think that's an interesting point, Jenny, and well worth being made, is that we do regularly see some of the more frequent plaintiffs' experts opining that the system that the telephony works off of has the capacity to randomly and sequentially generate numbers. And in fact, when they're deposed, will have you type in code that shows that Microsoft Office can do that, or Linux, or whatever else, can do it. This also aligns with the footnote seven in the decision, which has gotten, well, there's been a decent amount of scuttlebutt out there today about the Supreme Court addressing Duguid's point that random sequential number generators can be used to determine the order in which stored numbers can be dialed from a pre produced list.

Dan McKenna:

Candidly, I feel like that's a bit of a stretch for the real volume filers to go down that path, and it's a pretty significant investment for them to have to make those arguments. But we're definitely going to see, I think, Jenny, to your point, more and more uses of experts to try to establish capacity to randomly sequentially generate phone numbers, at least until the courts start shutting that down. So one thing you didn't mention, that I know we're also starting to see a lot of, is DNC related litigation. And we're fortunate to also have Joel Tasca on the phone. Joel's a litigation partner in our Las Vegas office, who also litigates these cases across the country, and has a particular focus on the West. Joel, can you tell us what you see on the horizon for DNC related claims?

Joel Tasca:

Sure. Thanks, Dan. Dan, even before today, we have been seeing more and more TCPA complaints that contain do not call list claims than we had in the past. I think a lot of plaintiff's lawyers saw the handwriting on the wall and they knew that the Supreme Court probably was not going to decide Duguid in our favor, and so they started looking to bring TCPA claims that didn't necessarily depend on use of an ATDS. And do not call list claims don't require use of an ATDS. These claims are provided for by different section of the TCPA, subsection C of section 227, as opposed to subsection B, which is the ATDS section. And so plaintiffs are free to bring those do not call list claims without concern about the Duguid ruling.

Joel Tasca:

So who needs to be concerned about do not call list claims? Thankfully, those claims, do not call list claims, don't apply to collection calls, which have so often been the subject of the ATDS claims that we've seen over the years, and instead, do not call list claims apply only to solicitation or telemarketing calls. So if you are in the business of ... If your business engages in solicitation or telemarketing calls, then you need to be concerned about do not call list claims. And just like the ATDS call claims, do not call list claims, they subject the defendant to liability on a per call basis, either $500 or $1500 per offending call, depending on whether the conduct is negligent or willful. And so they are a dangerous claim, especially when brought as a class action.

Joel Tasca:

As far as the elements of the claim go, I'm not going to go into great detail here because we actually recently did a separate podcast, which focused only on do not call list claims, and so we took a deeper dive into the elements in the podcast, if you're interested in checking that out. But it generally for a do not call list claim, the number called or texted, it has to be on the do not call list. And there are two types of do not call lists. There's the national do not call registry, and then there can be a company's own individual do not call list. The call or text has to be a solicitation or a call for a telemarketing purpose, and that is going to cover dual purpose calls. So if you are calling for a customer service reason, but along the way, or at the end of the call, you also pitch an additional product, that is going to be covered as a telemarketing or solicitation call and potentially subject to a do not call list claim.

Joel Tasca:

The call has to be subject to, or it has to made to a residential line. So if it's a cell phone that's used exclusively for businesses, then it's not a residential line. Cell phones are presumed to be residential lines, but that presumption can be rebutted. So residential does not equate to landline in this context. Cell phones certainly can be considered residential lines. The defenses

and exceptions to this kind of claim that are common are consent. And Mark was talking about consent. Consent for a do not call list claim has to be a signed written agreement between the consumer and the seller that contains certain elements. Another defense is an established business relationship. So if the party that is called has engaged in a transaction with the business within the last 18 months, the 18 months preceding the call, or if the called party inquired or applied to the business regarding products or services within the last three months before the call, then that can qualify as established business relationship, which would then preclude liability under the do not call list claim.

Joel Tasca:

And then there is also what I consider sort of a bonafide error defense, which is available. And basically, that requires the business to have very specific practices and procedures in place to prevent violations of the do not call list rules. The requirements are very specific. They've got to be written procedures. They have to include training of personnel on those procedures. There are certain record keeping requirements. So those are the basic elements and main defenses that we see.

Joel Tasca:

Last thing I'll note, and I mentioned this briefly earlier, is that do not call list claims can be brought as class actions. And I would say plaintiffs have had sort of mixed success in getting class certification in these claims. The best way to challenge class certification is a lot like our regular ATDS TCPA claims, where we attack the commonality and/or predominance requirements for class certification. And there are a number of liability issues on do not call list claims that can be challenged. We mentioned consent as one. The established business relationship is another one that can be challenged. Can you really prove established business relationship on a class wide basis? Or is that going to require individualized proof?

Joel Tasca:

The question of whether a cell phone is a residential line or not, that can be an individualized issue, and there are others. So do not call list claims, they can be brought as class actions, but we have an arsenal of defenses against them, defenses to class certification that we can mount against them. So those are my quick sort of thoughts on the do not call list claims, Dan.

Dan McKenna:

Thanks, Joel. So it sounds like the plaintiffs' bar has suffered a significant blow. And let's be honest, the right decision was made by the Supreme Court with respect to the scope of ATDS. But they're a crafty crew, and we expect to see continued litigation from them in a lot of different ways. Our goal today is to keep this quick and punchy. So I want to quickly ask if anyone has any other thoughts about the impact on class action litigation. I will quickly add that we are already seeing regular class action plaintiffs' lawyers come back and say, "Look, this is a prerecorded class action, so I'm going to continue to pursue those claims." And some are even, as they're so prone to do, claim this was a beneficial decision for them because it creates some helpful issues that are now no longer individualized with respect to the technology that's being used, which is of course phooey, but whatever, they can say what they want since they're the plaintiffs' bar.

Dan McKenna:

And I know that we are continuing to see plaintiff's class action litigation, but I do know that the risk of it being a class to leverage higher dollar single plaintiff settlements is gone. It's really, truly gone in my mind. And we should be using that for our benefit. So quickly, Jenny, and Stefanie, Joel, you've given us your thoughts. Jenny and Stefanie, if you have anything to add, I'll ask Stefanie first.

Stefanie Jackman:

I think you said it perfectly, Dan. I think at the end of the day, there is an awful lot that we can make work in our favor from this decision. Plaintiffs may give it their best shot, but I promise you they already have and they will continue to pack up shop and transition into FCRA and FTCPA litigation to supplement what has been taken away.

Dan McKenna:

Well, Lord knows, Stefanie, they're already doing that. And then Jenny, I'll give you the final word on class action litigation. I know you're seeing a lot of wrong number class action litigation. And this obviously impacts that, and I think in a really good way because it's not like any of our clients are intentionally calling wrong numbers when their desire is to reach a consumer, customer of theirs. So what's your take on the impact on that?

Jenny Perkins:

Thanks, Dan. So I think we're going to definitely see less forum shopping, which we've seen the past two years, everybody has tried to file or find a nexus to the Ninth Circuit, so that they could take advantage of marks, or the Second Circuit, or even the Sixth Circuit. So I think we're going to now see it more widespread in all the circuits, but I think we're going to see the prerecord classes. And just last week, I saw a new class action that had the automated class and also a state law, one of the state statutory class, so I think we will see that as well.

Dan McKenna:

That's interesting. And I can share that I've never felt so popular as I did this morning when I got piles of emails from plaintiffs' council looking for low dollar settlements on their TCPA cases. So I want to transition in conclusion to Mark, to ask a couple of final regulatory questions. And Mark, the first one's pretty broad. What does this mean from a regulatory perspective? And let me drill down on that a little bit. Certainly, businesses who don't randomly and sequentially generate numbers, they can't possibly now be free to just blast everyone on the list they can buy. Can they?

Mark Furletti:

Yeah, Dan, I agree. I mean, I think first off, as Joel said, the DNC and IDNC, so do not call list at both the federal and state levels obviously still apply for marketing calls, regardless of the technology used, always has. I think it will now be easier for someone to violate those rules because as Joel was saying, you either need to have an EBR, an established business relationship, to place a call to a person whose name is on the do not call list. Or you need what the regulations call prior express invitation or permission. PEIP is what I called it. You always had PEIP because you got PEWC. That is when you got consent for the auto dial marketing call, you in effect would have by definition, I think, PEIP.

Mark Furletti:

Now that you're not going to get PEWC, then you don't have PEIP. So you'd have to rely ... Sorry. There's a lot of acronyms here. But basically, you're going to have to rely on the EBR, and if you don't have the EBR, you won't have the PEWC to fall back on. You'll have to get some form of consent. So I think that's something to keep in mind. The internal do not call list stuff I think will become more important. And then of course, the time of day, call abandonment, don't disconnect before four rings, 15 seconds, disclosure requirements, all that stuff, plus stuff from the TSR, telemarketing sales rule, all still apply.

Mark Furletti:

So on the marketing side, there's still a lot there. And I think it's easier to violate now that you don't have the protection, the kind of procedures in place you would may have otherwise had. I think the other point that is important is that the carriers, and either directly through their codes of conduct, and then through the short code rules that they've promulgated at least protects, regardless of purpose, marketing, or non-marketing, they have gotten more restrictive and become more protective of consumers' rights than the TCPA has. So on the ground, when businesses start sending out texts, particularly on the text side, sending out lots of texts, I think that carriers are going to step in and check bad conduct.

Mark Furletti:

And what they're looking for, as I understand, is high opt out rates. So if you send out a whole bunch of texts, and more than 5% of them get a stop reply, that is a red flag for the carriers to say, "Hold on. We think you really didn't have consent in the first place." This is not a TCPA issue at all, but your text won't get delivered, or you'll get shut down if you don't comply with

these other rules. So yeah, it's not, I think while it's really helpful and Dan, folks don't need to speak to you and Jenny and Joel and Stefanie as much as they maybe would've had to previously for a little bit, possibly, I think that there's still plenty there to, both from a business side and in the carrier trickle stuff, and then from the telemarketing side to still trip people up.

Dan McKenna:

So that's fascinating, Mark. So I agree that there's a great opportunity for businesses to spend less on litigation here and have to be bothered by me and Jenny and Joel and Stefanie and others in that vein. But I'm hearing you say it's not time to pump the brakes on your compliance. Right? You've got to keep your compliance out there and compliance active, so that you don't find yourself unintentionally running afoul of this other stuff. And it's really great advice. The last question I've got, Mark, is also for you. This is an issue that I've had a few conversations with other people about today, including a number of clients on this, and this is a fairly rare decision in that it's a unanimous decision. And I'm curious as to your thoughts on how current Congress is going to react because it almost feels like an invitation from the Supreme Court for them to do so. I know that you don't have a crystal ball. But of anyone I know who can make a prediction like this, it's you, so I'm really curious as to your thoughts. Not holding you to it though, Mark.

Mark Furletti:

Well, I may be able to make a prediction, Dan. I doubt it's a good one. I don't know. I actually was thinking, Dan, about this. Kind of what's the future look like from multiple levels? So let me start with the consumer level. I think we will see more and better call blocking, call screening, absent technology. I know I have on my Gmail account, I have a primary mailbox, a promotion mailbox, and a social mailbox. I never look at the promotion mailbox almost ever. And so it won't surprise me if we see things on your cell phone that will, apps that will come out that will be very popular, or that the carriers will offer, that will allow me to sort calls and texts in this exact same way. And I think you could see white listing tools, where I get to put in, "I only want to hear from ... I only want my phone to do anything if it's from one of my friends, or family, or whomever."

Mark Furletti:

So I think it could lead to fewer calls being answered. I think a lot more calls being made, but fewer being answered. At the carrier level, I think they'll be under more pressure to clamp down on bad behavior. I think caller ID will become a much more important feature, as particularly if you see kind of this significant increase in the number of marketing texts that consumers are receiving. And they'll complain to the carriers, and they will respond. I think the FCC at that level will look for ways to improve the accuracy of caller ID info, which they've already done through STIR and SHAKEN. But I think proper identification of who's placing the call will become really critical for consumers to be able to make decisions about whether they want to be bothered to answer it or not. And so I assume there's some runway there for them to move.

Mark Furletti:

I think there could be, if there is a huge increase in calls, as I think there could be, then and we don't see these other technologies that are able to kind of curb it, then states I think will regulate more, and then yeah, if you told me that this afternoon, there is some Congressional staffer drafting a TCPA fixed bill, I would not be at all surprised. Right? I don't know that. I'm just saying it would not be shocking to me if some senator were to say to a staffer, "Go fix this." And I think such a bill could potentially have bipartisan support. This is not, I think, so clearly an issue that is clear to me and a just very one party focus. So anyway, that's my crystal ball, Dan.

Dan McKenna:

I think it's a great crystal ball. The FTC and the FCC continue to complain, or rather state that their highest level of complaint is around calls to consumer cell phones. I suspect that will not change as a result of this decision, and maybe as it ramps up, we'll start to see some of the alternative solutions to stopping some of those calls. I want to end by thanking you, Mark, for your thoughts and your insight, and Joel and Jenny and Stefanie as well, for your experience and thoughts and insight, and invite all of our listeners to reach out if they want to flesh any of these things out further. Thanks, everyone, for listening.