Turning the TCPA Tide

The Effects of *Duguid*

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Chapter

01

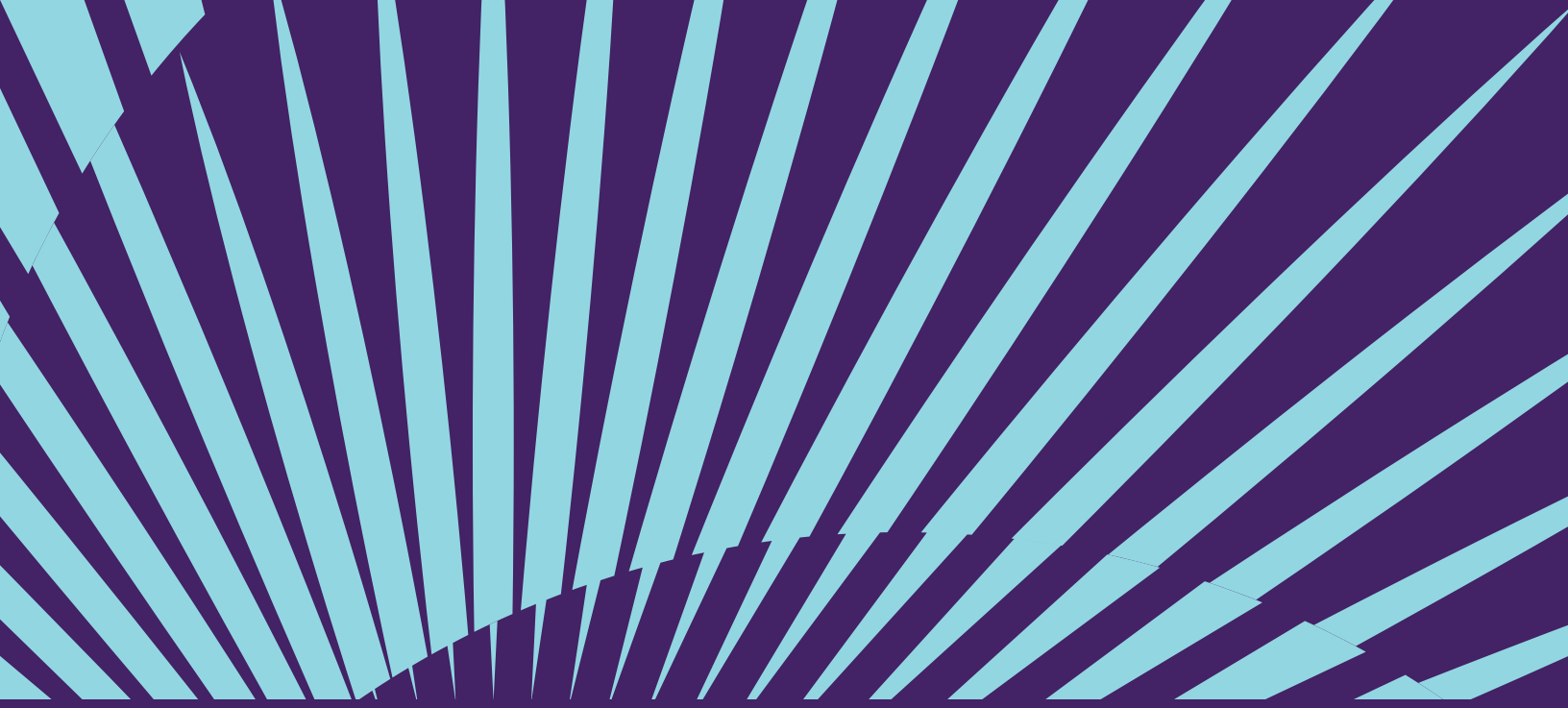
Executive Summary

Over the past decade, the Telephone Consumer Protection Act (TCPA) has created staggering liability exposure and legal risk for businesses that communicate with consumers. Thanks to a private right of action and statutory damages of up to $1,500 per call or text, the TCPA has become a cash cow for the plaintiffs' bar and one of the most heavily litigated consumer protection statutes. For cases taken through trial, verdicts have exceeded $200 million, and TCPA settlements regularly exceed seven figures.

One flashpoint in litigation over the TCPA has been the meaning of a particular term—"automatic telephone dialing system" (ATDS). Lower courts' rulings about what types of dialing equipment constitute an ATDS have played a major role in driving TCPA lawsuit abuse. Even though the statute requires that an ATDS have the "capacity" to "store or produce telephone numbers to be called, using a random or sequential number generator," some courts had found that a random or sequential number generator is not a necessary element of an ATDS. Based on these decisions, plaintiffs have pressed theories that any unwanted call, autodialed or not, can support statutory damages.

The U.S. Supreme Court's decision in *Facebook v. Duguid*[1] should have put any uncertainty to an end. In a crisp, unanimous decision, the Court held that an ATDS must have the capacity to either: (1) store a telephone number using a random or sequential number generator; or (2) produce a telephone number using a random or sequential number generator.

Six months later, *Duguid* has changed the TCPA landscape. Our findings confirm that *Duguid* has not led to an uptick in robocalls[2] and has meaningfully reduced the volume of new TCPA litigation, although not as much as some predicted. The plaintiffs' bar, meanwhile, is trying to twist the TCPA by misinterpreting the *Duguid* ruling in lower court litigation. *Duguid* helped legitimate callers on the merits, though most lawsuits have been allowed to proceed to discovery instead of being dismissed at the pleadings stage.



Chapter

02

TCPA Case Filings

To understand *Duguid*'s impact on the landscape of TCPA litigation, we primarily examined federal case filings filed six months before and six months after the *Duguid* decision, totaling 1,649 cases. State court cases, which are addressed in a separate section below, are not included. In addition, some federal cases filed within the relevant timeframe may not yet have appeared in the repository we utilized, Courthouse News, as of the date of our analysis.[3]

Based on this data set, comparing the number of federal case filings six months before the Supreme Court's decision to the numbers from six months after the Supreme Court's decision highlights that the rate of new TCPA cases has declined. Between October 1, 2020 and March 31, 2021, 975 TCPA-related federal cases were filed. *Duguid* was decided on April 1, 2021. In the six succeeding months, up to September 30, 2021, 674 TCPA-related cases were filed in federal court—a decrease of roughly 31 percent.

While there has been a meaningful drop in the number of new TCPA cases, the Supreme Court's decision has not led to as steep a decline in new TCPA actions as some predicted.[4] Plaintiffs have continued to initiate a large number of TCPA suits in federal court, and as a result, companies still face a significant volume of TCPA cases with the associated risks.

"Plaintiffs have continued to initiate a large number of TCPA suits in federal court, and as a result, companies still face a significant volume of TCPA cases with the associated risks."

TCPA Litigation Before & After April 1, 2021 *Duguid* Decision	
6-month period before *Duguid*	6-month period after *Duguid*
975 TCPA federal lawsuits filed	674 TCPA federal lawsuits filed

Lawsuit Location

Closer analysis of the data shows geographic shifts in the number of new TCPA suits being filed. Some states have experienced particularly sharp declines in new federal TCPA suits post-*Duguid*. California, for instance, had far and away the highest number of new TCPA filings pre-*Duguid*, with 305 suits filed between October 2020 and the end of March 2021.

These 305 suits constituted nearly one-third of all new TCPA federal filings nationwide during that six-month period. In the six months after *Duguid*, new filings dropped to 178, a decrease of 41 percent. Even with this decline in filings, federal courts in California remain the preferred choice for TCPA plaintiffs, representing about one-quarter of post-*Duguid* filings across the country. A neighboring state, Arizona, saw an even steeper decline: new TCPA filings in Arizona federal court decreased by 66.7 percent, from 24 filings pre-*Duguid* to only 8 filings post-*Duguid*.

One explanation for these two states' marked reductions in TCPA filings may be that both fall within the Ninth Circuit. Before the Supreme Court weighed in, the Ninth Circuit's interpretation of an ATDS was notoriously broad.[5] *Duguid* has narrowed the definition of an ATDS and rejected the Ninth Circuit's more lenient standard, effectively leveling the most substantive differences between circuit courts' prior ATDS jurisprudence. It is therefore no surprise that a formerly plaintiff-friendly circuit is seeing a significant reduction in new filings.

Other states, by contrast, saw an increase in federal TCPA filings following the *Duguid* decision. New York, for example, saw an increase of 20 percent, from 30 filings before the decision to 36 filings after the decision. In Wisconsin, suits increased from 12 to 16, or 33 percent. Maryland's filings increased 67 percent, but the actual number of cases is low—from 3 cases pre-*Duguid* to 5 cases post-*Duguid*. Thus, even while new federal TCPA filings may have dipped nationwide, the results across states can vary greatly.

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Despite these jurisdiction-specific differences, *Duguid* does not appear to have altered the focal point for TCPA litigation. Notably, in the six months before the *Duguid* decision, California, Florida, Texas, and Illinois together accounted for 60.9 percent of all new TCPA federal filings nationwide. Six months after the *Duguid* decision came down, these same four states still account for 59.4 percent of nationwide filings, a drop of less than 2 percent.

Despite these jurisdiction-specific differences, *Duguid* does not appear to have altered the focal point for TCPA litigation.

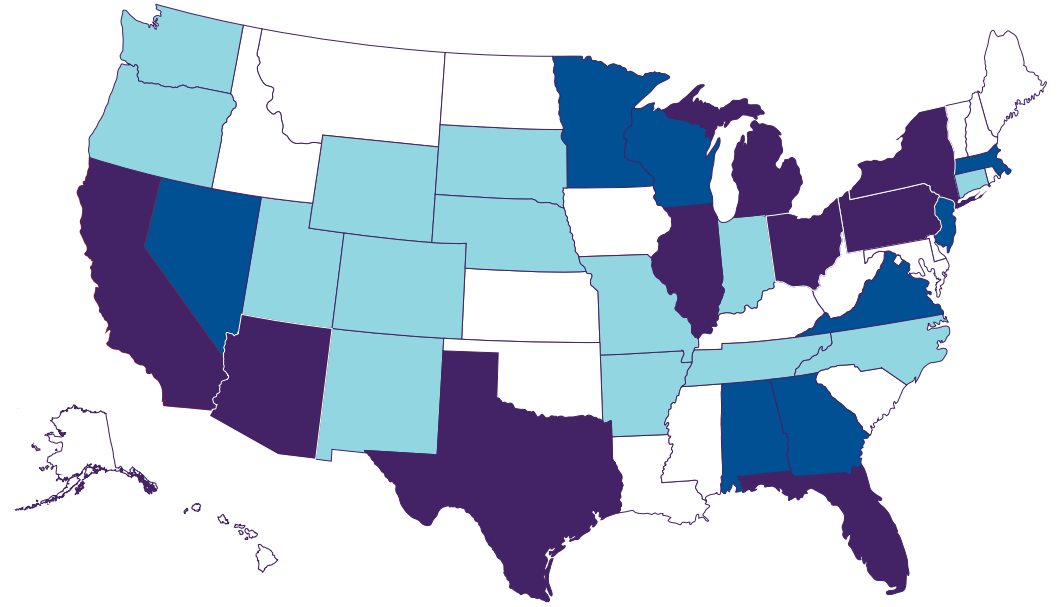
State	New filings in six months pre-*Duguid*	New filings in six months post-*Duguid*	Rate of Change (%)
CA	305	178	-41.6
FL	120	80	-33.3
TX	108	89	-17.6
IL	61	54	-11.5
OH	44	21	-52.3
NY	30	36	20
MI	27	14	-48.2
AZ	24	8	-66.7
PA	24	17	-29.2
MA	20	5	-75
NJ	17	11	-35.3
NV	16	4	-75
AL	13	7	-46.2
GA	12	7	-41.7
WI	12	16	33.3
MN	11	7	-36.4
VA	11	2	-81.8
CT	10	8	-20
NC	9	13	44.4
NM	9	2	-77.8
AR	7	3	-57.1
IN	7	3	-57.1
TN	7	6	-14.3
UT	7	2	-71.4
WA	7	20	185.7
CO	6	8	33.3
MO	6	12	100
NE	6	6	0
OR	6	4	-33.3
OK	5	4	-20
RI	5	3	-40
SC	4	3	-25
LA	3	0	-100
MD	3	5	66.7

State	New filings in six months pre-*Duguid*	New filings in six months post-*Duguid*	Rate of Change (%)
WV	3	2	-33.3
DC	2	3	50
DE	1	1	0
HI	1	0	-100
IA	1	2	100
ID	1	0	-100
KS	1	1	0
ME	1	0	-100
PR	1	1	0
VT	1	1	0
NH	0	1	-
MT	0	1	-
MS	0	1	-
KY	0	2	-

*States not listed here had no TCPA cases filed in the study period.

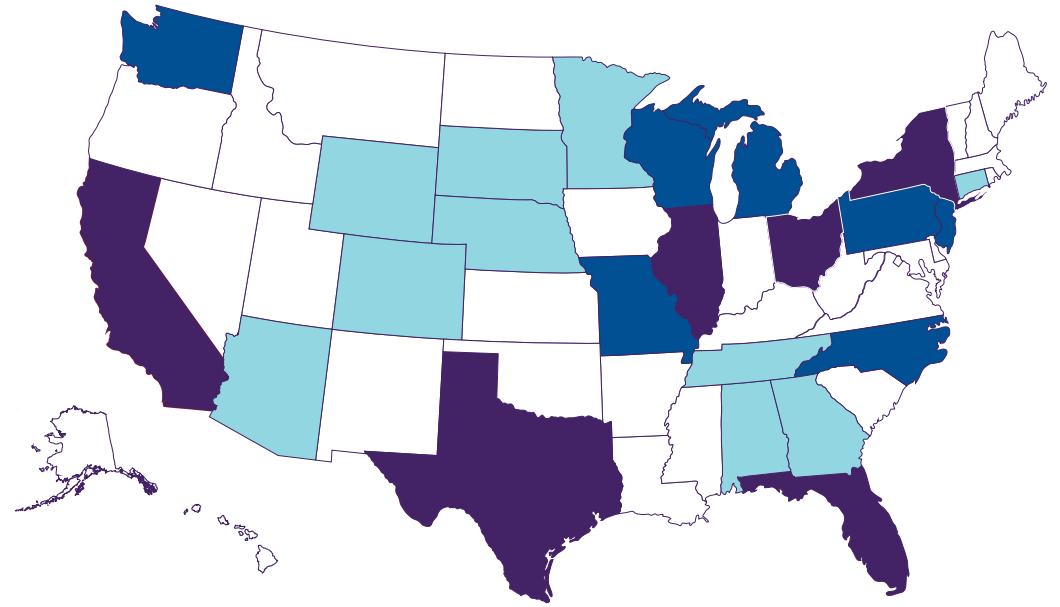
Comparing the top 10 plaintiffs' firms pursuing federal TCPA claims pre- and post-*Duguid* reveals that eight out of the 10 top filers remain the same (excluding pro se litigants).

Location of TCPA Filings Pre- and Post-*Duguid*



Number of Filings by State in Six Months pre-*Duguid*

21 + | 11 – 20 | 6 – 10 | 0 – 5



Number of Filings by State in Six Months post-*Duguid*

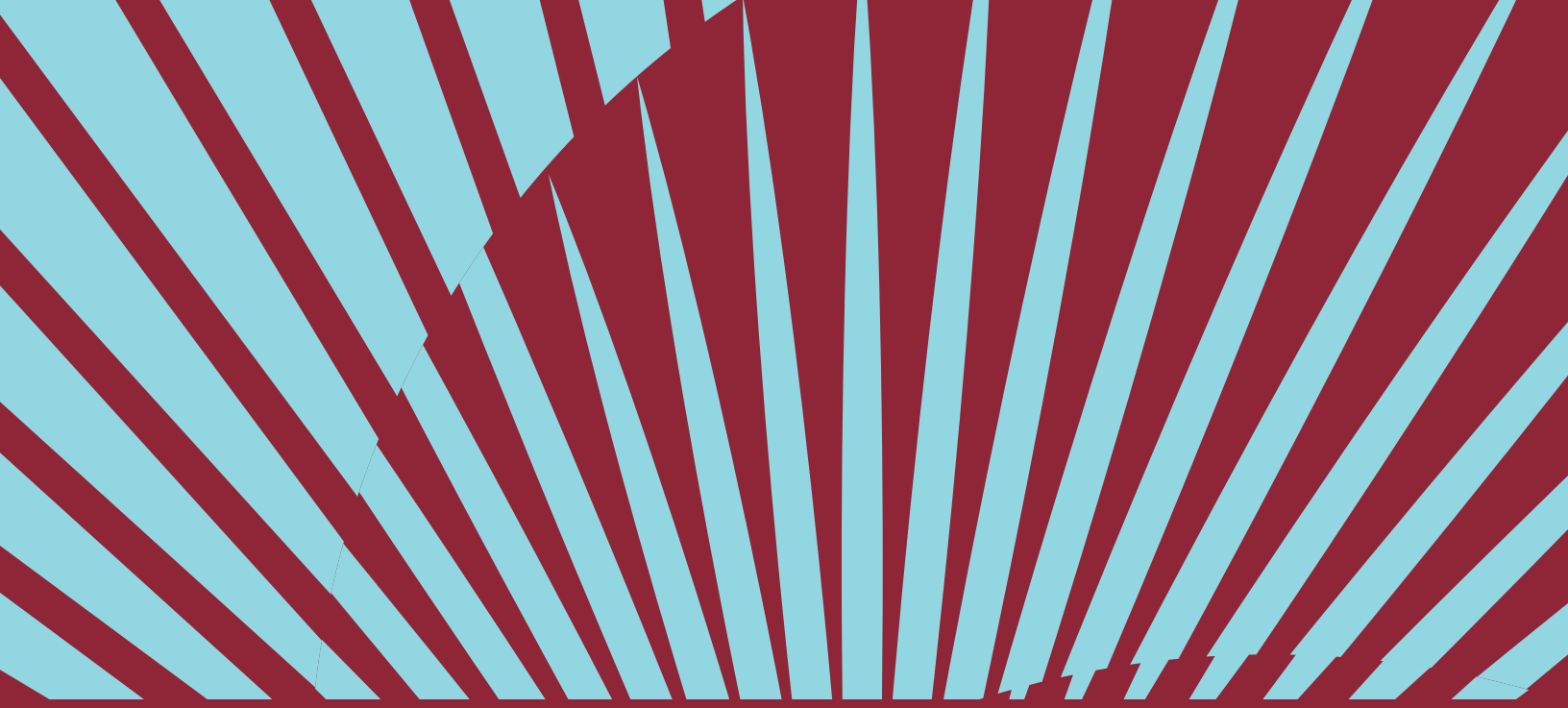
21 + | 11 – 20 | 6 – 10 | 0 – 5

Plaintiffs' Lawyers

Duguid also does not seem to have significantly changed the composition of plaintiffs' lawyers who bring the greatest share of TCPA claims. In the six months pre-*Duguid*, three plaintiffs' firms—Kimmel Silverman, the Law Office of Todd Friedman, and Sulaiman Law Group/Atlas Consumer Law—brought nearly a third of federal TCPA suits. In the six months after *Duguid*, those same firms brought nearly one-quarter of the nation's TCPA cases. More broadly, comparing the top 10 plaintiffs' firms pursuing federal TCPA claims pre- and post-*Duguid* reveals that eight out of the 10 top filers remain the same (excluding pro se litigants). These plaintiffs' lawyers and firms, then, appear largely undeterred despite *Duguid*'s holding.

Plaintiff Lawyer Firms pre-*Duguid*	# of Cases
Law Office of Todd Friedman	126
Pro se	103
Kimmel Silverman	98
Sulaiman Law/Atlas Consumer Law	68
Gale, Angelo, Johnson & Patrick P.C.	29
Shamis & Gentile	25
Price Law Group	24
Kaufman PA	22
Kazerouni Law Group	20
Law Offices of Stefan Coleman, PLLC	17
Paronich Law	17

Plaintiff Lawyer Firms post-*Duguid*	# of Cases
Pro se	100
Law Office of Todd Friedman	76
Sulaiman Law/Atlas Consumer Law	48
Kimmel Silverman	40
Kaufman PA	29
Law Offices of Stefan Coleman, PLLC	23
Gale, Angelo, Johnson & Patrick P.C.	22
Paronich Law	22
Price Law Group	13
Hiraldo PA	10
IJH Law	10



Chapter

03

Key Post-*Duguid* Legal Issues

Duguid resolved a longstanding circuit split on the meaning of ATDS. The Court unanimously held that, to qualify as an ATDS, a device must have the capacity to either: (1) store a telephone number using a random or sequential number generator, or (2) produce a telephone number using a random or sequential number generator. In other words, equipment does not become an ATDS just because it stores numbers and dials them automatically.

Undeterred, the plaintiffs' bar continues to try to cash in on the TCPA's private right of action and its windfall statutory damages. Not only have case volumes remained high, as described above, but plaintiffs' lawyers have weaponized new legal theories to countermand *Duguid*'s directive. While many of these new arguments may seem frivolous, plaintiffs have succeeded in prolonging TCPA litigation and driving cases to summary judgment, which in turn creates risk for good-faith callers whose systems do not use random or sequential number generators to store or produce numbers. These and other issues are discussed below.

Case Disposition

Based on the decisions to date, callers cannot assume that *Duguid* will guarantee a quick exit from litigation based on a motion to dismiss. Indeed, most ATDS claims have survived the pleadings stage in post-*Duguid* decisions. One court summarized the current majority view: "The newly clarified definition of an ATDS is more relevant to a summary judgment motion than at the pleading stage."[6] These decisions tend to involve allegations of "blast" communications—calls or texts that appear to have been sent to a large number of recipients, based on their content. Beyond these speculative allegations, the complaints generally provide no other facts suggesting that an ATDS was used. Cases that are not dismissed at the pleadings stage will generally proceed to document production, expert testimony, class certification, and summary judgment briefing.

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Until the courts of appeal have an opportunity to rule on the issue, we expect a continued split of authority among district courts, many of which may treat autodialer allegations as a fact-intensive inquiry that requires expert testimony, depositions, and other discovery. Prevailing on the autodialer prong, then, could end up being a long, drawn-out option for many callers.

The Contentious Footnote 7

Duguid requires that an ATDS have the capacity to produce or store numbers using a random or sequential number generator. While it is easy to see how a generator can produce telephone numbers, it is less intuitive to imagine how a generator stores them. To clarify this point, the Court dropped a footnote—footnote 7—which has become the battleground in much of the post-*Duguid* TCPA litigation and the subject of mischaracterization.

To put footnote 7 into context, the Court was attempting to explain that "storing" telephone numbers using a random number generator was a cognizable practice at the time the TCPA was enacted. The Court noted that "as early as 1988, the U.S. Patent and Trademark Office issued patents for devices that used a random number generator to store numbers to be called later (as opposed to using a number generator for immediate dialing)."[7]

This evidence illustrates why a piece of equipment that stores telephone numbers does not necessarily need to produce them.

Nevertheless, plaintiffs have seized on one sentence from footnote 7 and stripped it of its context to argue that ATDS includes equipment that dials from a stored list of numbers, which is contrary to the rest of the opinion. The gist of plaintiffs' argument is that certain devices may constitute autodialers if they "use a random generator to determine the order in which to pick phone numbers from a preproduced list."[8]

One critical issue around footnote 7 is what numbers must be randomly generated. The plaintiffs' bar has pushed the theory that any random number generation transforms equipment into an ATDS, even if the equipment does not randomly generate the telephone numbers to be called.[9] Plaintiffs have tried to blur the difference between a device that generates random telephone numbers and a device that generates non-telephone numbers, such as an internal index.

But courts across the board have generally declined to accept such a theory—and correctly so. In one example, the plaintiff alleged the use of an ATDS because the defendant processed phone numbers that consumers provided when signing up for services.[10] The equipment was not an ATDS, the court found, because it called only phone numbers that had been supplied by consumers, "and not phone numbers identified in a random or sequential fashion." The court also noted that the amicus cited in *Duguid's* footnote 7 "makes clear that the 'preproduced list' of phone numbers referenced in the footnote was itself created through a random or sequential number generator." In contrast, the list of numbers used by the defendant was "obtained in a non-random way (specifically, from consumers who provide them)."

Text of Footnote 7

Duguid argues that such a device would necessarily "produce" numbers using the same generator technology, meaning "store or" in § 227(a)(1)(A) is superfluous. "It is no superfluity," however, for Congress to include both functions in the autodialer definition so as to clarify the domain of prohibited devices. *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 544, n. 7, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994). For instance, an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list. It would then store those numbers to be dialed at a later time. *See* Brief for *Professional Association for Customer Engagement et al.* as Amici Curiae. In any event, even if the storing and producing functions often merge, Congress may have "employed a belt and suspenders approach" in writing the statute. *Atlantic Richfield Co. v. Christian*, 590 U. S. __, __, n. 5, 140 S.Ct. 1335, 1350, n. 5, 206 L.Ed.2d 516 (2020).

In another case, the court rejected the plaintiff's argument that footnote 7 supports the position that a system that uses a list of preexisting phone numbers must be classified as an ATDS.[11] The plaintiff argued that equipment constitutes an ATDS when it: (1) uses a prepopulated list of numbers; (2) generates an index number via a random or sequential number generator; and then (3) uses those generated numbers to determine the order of numbers to call. The court rejected that argument because an ATDS must randomly or sequentially generate the telephone numbers to be called.

As courts have noted, moreover, it is highly unlikely that the Court intended to undermine its entire decision in a footnote, having soundly sided with the Seventh and Eleventh Circuits' interpretations of ATDS (which focused on the manner in which lists were generated for dialing). Courts have also observed that Congress did not intend to regulate systems that produce random index numbers to prepopulated lists.[12] Instead the TCPA was intended to prevent telemarketers from tying up emergency lines or all sequential lines at a single entity, such as a hospital. For these reasons, courts have explained, footnote 7 does not create a "cognizable harm sought to be addressed by Congress" because using indexed numbers to dial telephone lines would not result in such risks.

Human Intervention

Duguid changed the relevance of human intervention in the ATDS analysis. In past cases, defendants have argued—and succeeded on—claims that their calls or texts are not "automatic" because human involvement was necessary to manually place communications to recipients. In particular, the peer-to-peer texting community has argued in recent years that their texts involve enough human intervention to fall outside the autodialer definition. Plaintiffs, meanwhile, used human intervention as a limiting principle—it is the reason, they say, why ordinary smartphone users cannot be found liable under the TCPA for commonplace calls and texts.

But *Duguid* rejected human intervention as a relevant factor in the ATDS analysis. As Justice Sotomayor's opinion explained, it is too difficult to draw an administrable line in determining which calls are made with human intervention and which ones are not.[13] Moreover, as Justice Gorsuch repeatedly noted during oral argument, human intervention is not an appropriate test because it appears nowhere in the text of the TCPA.[14] Even with *Duguid*'s generally strong requirement to show use of a random or sequential number generator, the opinion seems to deprive defendants of an important defense that previously enjoyed vitality.

Texting

Duguid was a case about texting. The plaintiff alleged he received unauthorized

For these reasons … footnote 7 does not create a “cognizable harm sought to be addressed by Congress” because using indexed numbers to dial telephone lines would not result in such risks.

security-related text messages about his Facebook account. But the Court's decision did not turn on the fact that texts, instead of calls, were sent.

The Court's silence was curious. On its face, the TCPA applies to "calls." It makes no mention of "text messaging"—a technology that did not exist when the statute was enacted in 1991. When Congress wants to regulate text messages, it expressly does so—the Truth in Caller ID Act, for example.[15] The Federal Communications Commission (FCC) and lower courts have nevertheless found that the TCPA's consent requirement applies to text messages and calls alike.

In *Duguid*, the Court did not disturb those determinations. During oral argument, Justice Thomas wondered out loud "why a text message is considered a call under the TCPA," though he later admitted that his question was not "central to the case." Yet in footnote 2 of the opinion, the Court assumed—without deciding—that texts are "calls" under the TCPA, in part because the litigants stipulated that the texts were subject to the TCPA for the purposes of that case. Whether the TCPA regulates texting, then, remains open for another day under the Court's jurisprudence.

Empowered by the Court's silence, the plaintiffs' bar continues to challenge text messaging in post-*Duguid* lawsuits. Some of these cases have turned on the specifics of the text at issue. In one case, the court found that text messages sent in response to an alarm could not have involved a random or sequential number generator.[16] Another found a "targeted message" sent using long code made it "less plausible" that the defendant used an ATDS.[17] Still, plaintiffs have prevailed in texting cases after *Duguid*. In one decision, the court credited the plaintiff's ATDS allegation based on the fact that he received a text from a short code that included a "STOP" instruction.[18] Despite *Duguid* being a case about texting, companies can expect that plaintiffs will continue to attempt to challenge text messages until the Court squarely addresses this issue.

Capacity

Duguid held that ATDS equipment must have the "capacity" to store or dial numbers using a random or sequential number generator. But the Court did not say when equipment has the "capacity" to behave in that manner. Based on the D.C. Circuit's *ACA International* decision from 2018, we know that "capacity" cannot mean equipment that can theoretically be modified to use a random or sequential number generator: "If every smartphone qualifies as an ATDS, the statute's restrictions on autodialer calls assume an eye-popping sweep."[19] There must be more.

But how much more remains an open question, even after *Duguid*. In addition to addressing the issues above, some courts following *Duguid* have distinguished the capacity to store or produce telephone numbers to be called from the use

of a random or sequential number generator to place telephone calls, generally holding that use is required as the basis for a claim.

One district court, for example, has held that mere capacity without use is not sufficient to find that a device is an autodialer since a ruling to that effect would effectively make any defendant liable simply for having such a system.[20] The court quoted *Duguid* as emphasizing that "Congress' definition of an autodialer requires that, in all cases, whether storing or producing numbers to be called, the equipment in question must use a random or sequential number generator."

Empowered by the Court's silence, the plaintiffs' bar continues to challenge text messaging in post-*Duguid* lawsuits.

Chapter

04

State Laws

Currently, many state telemarketing laws do not impose requirements that are as stringent as the TCPA. Most, moreover, do not include a private right of action for unconsented automated calls akin to the federal TCPA. But in the wake of the *Duguid* decision, certain state legislatures have sought to beef up their respective telemarketing laws.[21] And plaintiffs' lawyers have taken notice.

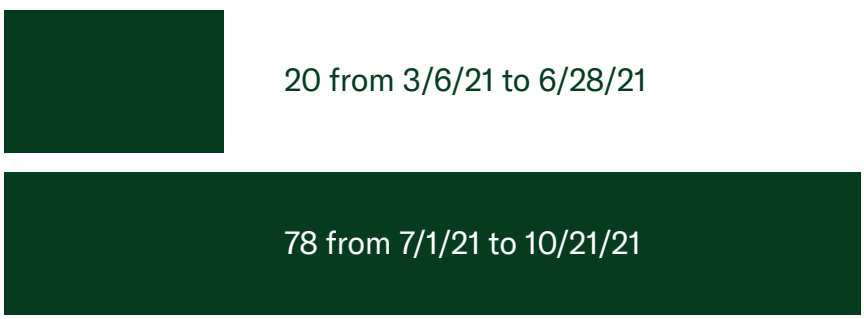
For example, Florida enacted a series of "mini-TCPA" amendments to its Telemarketing Act in the wake of the Supreme Court's decision.[22] These amendments, which became effective July 1, 2021, do the opposite of what *Duguid* did—they define autodialer more broadly, eschewing the narrower definition agreed upon by the Justices. Florida also included a private right of action, opening the door for plaintiffs to seek statutory damages up to as much as $1,500 per violation.

Given the availability of statutory damages, it is not surprising that there has been a recent uptick in litigation under Florida's state telemarketing law. During the 114 days before enactment of the amendments, 20 TCPA-related cases were filed in Florida state court.[23] During the 114 days following the change in law, 78 of these cases were filed, an increase of 390 percent.

This dramatic increase more than offset the drop in federal court filings in Florida, which decreased from 73 cases during the 114 days pre-enactment to 35 cases over the same time period post-enactment. Thus, the overall number of TCPA-related filings in Florida, whether in state or federal court, increased from 93 cases pre-enactment to 103 cases post-enactment.

If these statistics are any indication, Florida will continue to see a significant uptick in state court TCPA cases. This may presage a shift in litigation from federal to state court. More broadly, the overall increase suggests that Florida may become even more active as the plaintiffs' bar gravitates toward this jurisdiction.

Filings Under Florida's State Telemarketing Law



Chapter

05

Conclusion

Although we have observed a 31 percent reduction in federal TCPA lawsuits in the six months following *Duguid*, it remains unclear whether the meaningful decline in federal court litigation, coupled with the expected increase in state "mini-TCPA" claims, will prove to be a durable trend.

A generation of plaintiffs' lawyers, enriched by massive verdicts and settlements, will not so easily give up on the TCPA. The plaintiffs' bar continues to file cases in federal court based on creative but legally unsound theories that equipment can qualify as an ATDS if it has any modicum of random number generation—an argument, in effect, that *Duguid* did not mean what it said. While many of these claims have survived the pleadings stage after *Duguid*, they have fared less well on the merits.

Even with the clarity *Duguid* provides, key issues remain open at the Supreme Court. Can the TCPA actually regulate text messages in the absence of express statutory language to that effect? Will lower courts find the presence of human intervention contextually relevant, even though the Court in *Duguid* did not? And beyond these questions, lower courts will increasingly grapple with TCPA litigation unrelated to *Duguid*—Do-Not-Call claims, prerecorded and artificial voice calls, number spoofing, and more. These and other questions will likely inform the state of post-*Duguid* jurisprudence and the continuing viability of TCPA claims.

"A generation of plaintiffs' lawyers, enriched by massive verdicts and settlements, will not so easily give up on the TCPA."

Endnotes

[1] *Facebook, Inc. v. Duguid*, 141 S.Ct. 1163, 1173 (2021).

[2] *See, e.g.*, https://robocallindex.com/.

[3] Courthouse News was analyzed on October 20, 2021, to generate our dataset.

[4] *See, e.g.*, National Law Review, "The Viability of Future TCPA Litigation in Light of *Facebook Inc. v. Duguid*" (May 24, 2021), located at https://www.natlawreview.com/article/viability-future-tcpa-litigation-light-facebook-inc-v-duguid ("The impact of this decision cannot be overstated. It will, for example … likely result in the dismissal of many pending TCPA lawsuits [and] limit the opportunity for plaintiffs to forum-shop by filing a TCPA lawsuit in jurisdictions with a broad interpretation of the TCPA… .").

[5] *See Marks v. Crunch San Diego*, 904 F.3d 1041 (9th Cir. 2018) (holding that the definition of an ATDS includes devices with the capacity to dial stored numbers automatically, not just those with the capacity to call numbers produced by a random or sequential number generator).

[6] *Gross v. GG Homes, Inc.*, 3:21-cv-00271-DMS-BGS, 2021 WL 2863623 (S.D. Cal. Jul. 8, 2021).

[7] *Duguid*, 141 S.Ct. at 1172.

[8] *See Duguid*, 141 S.Ct. at 1171 n.6.

[9] *See, e.g., Carl v. First Nat'l Bank of Omaha*, No. 2:19-CV-00504-GZS, 2021 WL 2444162, at *9 & n.10 (D. Me. June 15, 2021) (finding on summary judgment that an issue of fact remained regarding whether the equipment "pick[s] phone numbers from a preproduced list" using a random or sequential number generator, per footnote 7).

[10] *Hufnus v. DoNotPay, Inc.*, No. 20-CV-08701-VC, 2021 WL 2585488 (N.D. Cal. June 24, 2021).

[11] *Tehrani v. Joie de Vivre Hosp., LLC*, No. 19-CV-08168-EMC, 2021 WL 3886043 (N.D. Cal. Aug. 31, 2021).

[12] *See, e.g., Tehrani*, 2021 WL 3886043 at *5 (N.D. Cal. Aug. 31, 2021) ("If these are the harms that the TCPA was intended to address, then little would be gained by finding a TCPA violation based on a preexisting customer database. For example, it is unlikely that a preexisting customer database would contain an emergency number; similarly, it is unlikely that a customer database would pose a danger to tying up business with sequentially numbered phone lines."); *Hufnus*, 2021 WL 2585488 at *1 (finding that plaintiff's "reading of footnote 7 conflicts with [*Duguid*'s] holding and rationale[;] [t]he Supreme Court explained in *Duguid* that the TCPA's definition of autodialer concerns devices that allow companies 'to dial random or sequential blocks of telephone numbers automatically,' not systems, such as DoNotPay's, that randomly or sequentially dial numbers from a list that was itself created in a non-random, non-sequential way"); *Borden v. efinancial, LLC*, No. C19-1430JLR, 2021 WL 3602479 at *5 (W.D. Wash. Aug. 13, 2021) (stating that "Mr. Borden's argument relies on a selective reading of one line within footnote 7 and ignores the greater context of that footnote and the opinion").

[13] *Duguid*, 141 S.Ct. at 1171 n.6.

[14] Transcript of Oral Argument at 72, *Duguid*, 141 S.Ct. 1163.

[15] 47 U.S.C. 227(e).

[16] *Watts v. Emergency Twenty Four*, No. 20-cv-1820, (N.D. Ill. June 21, 2021).

[17] *Jovanovic v. SRP Invs.*, CV-21-00393-PHX-JJT at 4 (D. Ariz. Sep. 14, 2021).

[18] *Poonja v. Kelly Services*, Case No. 20-cv-4388 (N.D. Ill. Sept. 29, 2021).

[19] *ACA Int'l, et al. v. FCC*, 885 F.3d 687, 697 (D.C. Cir. 2018).

[20] *Barry v. Ally Fin., Inc.*, No. 20-12378, 2021 WL 2936636 (E.D. Mich. July 13, 2021).

[21] In addition to Florida, New York has recently amended its telemarketing laws. On July 13, 2021, a bill was signed into law expanding the definition of telemarketing to include marketing by electronic messaging text. *See generally* N.Y. GEN. BUS. LAW § 399-z, amended by 2021 N.Y. Sess. Laws Ch. 239 (A. 6040). Even before *Duguid* was decided, some states had been moving towards mini-TCPAs that are more stringent than their federal law analog. In 2014, Connecticut amended its telemarketing law to potentially cover not just text messages but also push notifications and in-app messages, as well as to provide for reasonable attorneys' fees that could incentivize plaintiffs to bring suit. *See* Conn. Gen. Stat. § 42-288a (effective Oct. 1, 2014).

[22] *See generally* Florida Senate Bill 1120 (effective July 1, 2021).

[23] The Florida-specific data is subject to similar limitations as our nationwide dataset. Courthouse News was consulted on October 21, 2021 to generate the Florida dataset, and as of that date, it may not yet have included all of the new state cases filed within the relevant timeframe.

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