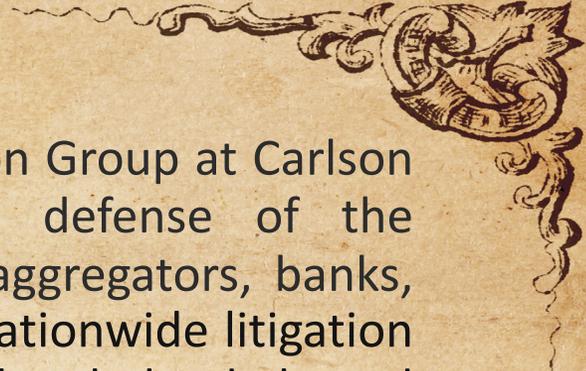


**TCPA: *THE NEW FRONTIER***  
**Litigation and Compliance in 2020:**  
**Where Are We Going – And What**  
**Will We Find**

**October 21, 2020**

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## IDENTIFIES

serial TCPA plaintiffs and litigators while running wireless and DNC scrubs on data



## REAL-TIME

native integration for Safe Harbor protection in leading CX platforms

# Federal Exemption under the TCPA – Supreme Court Strikes Down

*In Re Barr, Attorney General, Et Al. V. American Association Of Political Consultants, Inc., et al.* Certiorari To The United States Court Of Appeals For The Fourth Circuit No. 19–631

- Decided July 6, 2020 – US Supreme Court affirms in favor of U.S. Office of Attorney General holding - **2015 Federal government debt exemption in TCPA is unconstitutional.**
- TCPA statutes reverts back to its pre-2015 amendment status.
- What Court said about TCPA Could impact future rulings!!!!

# Creasy v. Charter Communications, Inc., 2020 WL 5761117 (E.D. La. Sept. 28, 2020)

- Charter filed motion to dismiss, arguing the 2015 government-debt exception rendered the **entire autodialer ban in** TCPA unconstitutional for calls prior to 7/06/2020 (i.e., date when SC severed it from statute in *Barr*, in 2020).
  - Plaintiff argued that Supreme Court confirmed that by severing the government debt exception, autodialer ban was always constitutional
  - **HELD:** For the five years that gov't. debt exception existed in the autodialer ban (227(b)(1)(A)(iii)), **the entirety of that provision was unconstitutional.** Court lacked jurisdiction to enforce violations of unconstitutional laws
  - **Comment:** Will decision stand?

# Restrictions: Use of Automated Telephone Equipment

## 47 U.S. Code § 227(B) RESTRICTIONS ON USE OF AUTOMATED TELEPHONE EQUIPMENT

- **(1) PROHIBITIONS:** It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States— **(A)** to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—
  - **(i)** to any emergency telephone line (including any “911” line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);
  - **(ii)** to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or
  - **(iii)** to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, **unless such call is made solely to collect a debt owed to or guaranteed by the United States; (STRUCK BY BARR DECISION)**

# Definition of ATDS

47 U.S. Code § 227. Restrictions on use of telephone equipment:

▶ **(a) Definitions as used in this section**

- **(1)** The term “automatic telephone dialing system” means 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

# TCPA – SCOTUS - *Duguid v. Facebook* - *It's Showtime for ATDS!!!!!!*

- July 9, 2020 – US Supreme Court granted Facebook's petition for certiorari. *Facebook v. Duguid* should resolve Federal Appellate Court split regarding definition of "ATDS" in TCPA.
- HEARING IN SC -Tuesday, December 8, 2020. Decision expected spring of 2021.
  - **ISSUE ON APPEAL - Whether the definition of ATDS in the TCPA 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."** -
- Split in interpretations among Federal Circuit Courts of Appeal:
  - **3<sup>rd</sup>, 7<sup>th</sup> and 11<sup>th</sup>** Circuit Courts hold - random or sequential number generation is required for ATDS finding. *Dominguez ex rel. Himself v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018), *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 469 (7<sup>th</sup> Cir. 2020) *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1306–07 (11th Cir. 2020).

# TCPA - SCOTUS

- **9<sup>th</sup> Circuit** - *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9<sup>th</sup> Cir. 2018) – held: automatic dialers that call from lists or databases are ATDS, even if no dialing of numbers randomly or generation of numbers sequentially.
- **6<sup>th</sup> and 2<sup>nd</sup>** Circuit Courts of Appeal concur with *Marks*. *Allan v. Pennsylvania Higher Educ. Assistance Agency*, 968 F.3d 567 (6<sup>th</sup> Cir. 2020); *Duran v. La Boom Disco, Inc.*, 955 F.3d 279, (2d Cir. 2020).
  - US Dept. of Justice Brief filed in *Duguid* – Heavily Favors R&S Number Generation interpretation – Brief Excellent - Supports Facebook position
  - *Duguid* Brief – Filed 10-16-20 – Well drafted – misses argument as to “comma” placement
  - HOW WILL HIGH COURT RULE? **Question of the day!!!!!!**

# Terry Fabricant (SF) v. Wavve Marketing Corp et al, October 2020- Defense Motion to Stay Granted

- Plaintiffs filed class action claiming Defendant used an ATDS to call Plaintiffs, which violated Plaintiffs' privacy
  - Defendant moved to stay proceedings due to pending *Facebook* case
  - Plaintiff claimed the stay would: (1) create a risk of evidence destruction; (2) witnesses' memories would fade; and (3) class members would be harder to reach - Court rejects arguments
  - Court Grants Stay – for Defendant, stating the key issue in *Duguid v. Facebook* is primary issue Fabricant claim-

# Prior Express *Written* Consent – 7 Points of Light for Marketing

- Identify each specific seller to whom consent is being provided (list? Redirect?) DEBATE
- Identify the consumer's phone number
- Indicate an affirmative agreement (i.e., I agree/I consent)
- Disclose that the consumer is authorizing the seller to engage in advertising or telemarketing (i.e., offers for products/services)
- Disclose that calls will be made using automated technology
- Disclose that consumer is not required to provide consent as a condition of purchasing goods or services
- Obtain written signature from the consumer (electronically E-SIGN or in writing)

See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 F.C.C. Rcd. 1830 (2012) ("2012 FCC Order"); 47 C.F.R. 64.1200(f)(8).

**Imp. - Must be "clear and conspicuous" to "reasonable consumer"**

# Lead Issues – Case Law

*Lundbom v. Schwan's Home Serv., Inc.*, No. 3:18-CV-02187-IM, 2020 WL 2736419 (D. Or. May 26, 2020) No. 20-35480 (appeal filed June 1, 2020)

- Text surrounding hyperlink to privacy policy established inquiry notice of those terms
- Webpage disclosures independent of hyperlinked policy established prior express written consent under TCPA
- Summary judgment granted for defense
- Case implications – could be used to argue a “Marketing Partners” hyperlink provides sufficient notice consumer consents to calls from listed third parties

# Lead Issues – Case Law

*McCurley v. Royal Seas Cruises, Inc.*, 331 F.R.D. 142, 176 (S.D. Cal. 2019) *class decertified in part*, 2020 WL 4582686 (S.D. Cal. Aug. 10, 2020) (class of transfers remained)

- Court held that lead generator’s declaration lacked “personal knowledge” that any class member actually filled out the “opt-in” form
- Declined to follow *Gordon v. Caribbean Cruise Line, Inc.*, No. 14 C 5848, 2019 WL 498937 (N.D. Ill. Feb. 8, 2019) which did consider similar lead generator declaration.
- Class certified

# Warm Transfers and Liability Issues

“Warm Transfer” - Call made by third party center and transferred to marketer (transfer may or may not be made upon receiving consent).

***Braver v. NorthStar Alarm Servs., LLC***, No. CIV-17-0383-F, 2019 WL 3208651, at \*13 (W.D. Okla. July 16, 2019)

- Summary judgment denied
- marketer likely liable for warm transfer under actual authority, apparent authority and ratification theories – Look at Contract Language – fact issues

***Johansen v. Liberty Mut. Grp., Inc.***, No. 15-CV-12920-ADB, 2017 WL 6045419, at \*2 (D. Mass. Dec. 6, 2017)

- Discovery dispute
- Court held discovery relevant to warm transfer liability under agency theory

# Warm Transfers and Liability Issues

*Abante Rooter & Plumbing, Inc. v. Arashi Mahalo, LLC*, No. 18-CV-07311-VC, 2019 WL 6907077 (N.D. Cal. Dec. 19, 2019)

## Summary judgment granted

- marketer not liable for warm transfer under actual authority, apparent authority and ratification theories
- Defendant did nothing to give plaintiff impression by purchasing leads that it authorized DTX to use an ATDS w/o consent or to call merchants on the Do-Not-Call Registry and violate TCPA
- No evidence that Arashi, when knew of DTX's violations of the TCPA, accepted benefits

# Serial TCPA Filers

## ***Autodialer Ban vs. DNC Rules***

- The National DNC Registry “applies to ‘residential subscribers’ and does not preclude calls to businesses.” *Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 FCC Red. 9779, 9785 (June 17, 2008)
- “residential” subscriber for the purposes of the DNC rules essentially means “personal use”- it does not mean “landline.”
- A wireless number may be a “residential” subscriber for the purposes of DNC Rules. 47 CFR 64.1200(e).
- A call to a business-only line is still subject to the TCPA’s autodialer rules for marketing calls where pre-recorded messages left without consent

# DNC Do Not Call List

- Remember – Telemarketing - Subscribe to National DNC List
- DNC liability under TCPA - 47 U.S.C § 227(c)(3)(F) – separate and apart from liability for making telem. call without PEWC.
- Definition of “telephone solicitation” for purposes of DNC excludes calls with PEWC
- “Safe Harbor” defense - defendant can avoid liability for calling an individual on the DNCR if it can (1) demonstrate that the violation is the result of error, and (2) establish that it had adequate procedures in place to avoid mistakenly calling individuals on the registry. 47 C.F.R. § 64.1200(c)(2)
- Policies and Procedures Critical

# Serial TCPA Filers

***Shelton v. Target Advance LLC*, 2019 WL 1641353 (E.D. Pa. Apr. 16, 2019)**

- Defendant engaged in B2B marketing.
- Plaintiff's cell number listed online as the number for a business
- Argument - Plaintiff lacked standing to sue under TCPA's DNC provisions - Business numbers not permitted to be registered on the National DNC
- Court Held - Plaintiff might lack standing for ATDS provisions if sole purpose of business was to drum up business - **KEY - Take Deposition – Subpoena records**
- Motion for summary judgment denied on ATDS due to factual issue

***Cunningham v. Montes*, 378 F. Supp. 3d 741, 746 (W.D. Wis. 2019)**

- Plaintiff denies purchase of three cell phones for the purpose of filing TCPA lawsuits – denies Honey-pot theory.
- Defendant had no contrary evidence – summary judgment denied on this issue – **NEED EVIDENCE – KEY to Winning!!!!**

# Spokeo and Standing to Bring Suit for Telemarketing Text

***Salcedo v. Hanna***, (11th Cir. Aug. 28, 2019) - Ma

- Former client received **one** text message from lawyer offering discount on services.
- 11<sup>th</sup> Circuit disagreed with *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017 and 8<sup>th</sup> Circuit *Golan* which held - two unsolicited text messages = injury in fact for TCPA standing to bring suit)
- Congressional intent in enacting TCPA - to prevent harassing phone calls
- Key was single message
- ***No injury in fact to confer*** Article III standing
- Case sent back to lower court with instructions to dismiss complaint

# DON'T FORGET THE TSR Rule

- “The TCPA rules contain provisions restricting telemarketing that are almost identical to the ones set forth in the TSR.” *Nat'l Fed'n of Blind v. F.T.C.*, 303 F. Supp. 2d 707, 718 (D. Md. 2004)
- 16 C.F.R. §§ 310 et seq.
- The FTC can impose **penalty of \$43,280** per violation 15 U.S.C. § 45(m)(1)(A); 28 U.S.C. § 2461, as amended, and as implemented by 16 C.F.R. § 1.98(d)

# TRACED Act Breakdown: 4 General Areas

- Highly comprehensive and substantive legislation that takes aim ( 1/3 of the statute)
- Report addressing the robocall scourge
- Call Authentication
- Potential Regulation
- Enhancing Enforcement

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# Practices to Mitigate TCPA Risk

- **Be proactive. Comply with *Crunch*** - Even if you are autodialing, texting (which is a “call” under TCPA), or leaving prerecorded messages on mobile phones of consumers who live outside of the 9<sup>th</sup> or 1<sup>st</sup> Circuits
- **Seek independent legal advice to **ensure your policies, procedures and processes** support compliance with all TCPA laws**
- **Obtain and record the consumer’s consent** before autodialing, texting, using outbound artificial voice, or leaving prerecorded messages on mobile phones
- **Receive and record the consumer’s revocation of consent** before autodialing, texting, using outbound artificial voice, or leaving prerecorded messages on mobile phones
- **For now - treat any device which stores a list of numbers and dials such numbers to be an ATDS**
- **Don’t assume device without random or sequential numbers # generator is not an ATDS**
- **Dial responsibly.** When in doubt, use a manual system to dial numbers.
- **Pre-recorded Message Traps - beware!!!** Independent of ATDS issue – Confusion abounds

# Practices to Mitigate TCPA Risks

- Review client's contracts, terms and conditions, warranties, indemnity
- Assignment of accounts
- Cell scrub
- Litigious consumer scrub – CRITICAL
- Last date of RPC – Imp. Re Reassigned number database
- Evaluation of marketing consent status – 7 points of light
- Likelihood of consumer's association with consent
- Origin of Leads

# Telemarketing Class Action Ruling

**Wakefield v. ViSalus Inc.,**

Case No. 3:15-cv-01857, (June 23, 2017) U.S. District Court Oregon

- ViSalus, Inc. could be on the hook for \$925 million for making more than 1.85 million unsolicited robocalls
- ViSalus had already conceded it used an ATDS for the calls at issue
- Testimony – four prerecorded calls made by ViSalus without consent. Jury concluded calls to Wakefield plus 1.85 mil. calls to class members violated TCPA.
- Statutory damages for TCPA violations are \$500 per call
- **NOTE:** Due Process Clause in the Fifth Amendment to the U.S. Constitution. In *Golan v. FreeEats.com, Inc.*, Ct lowered damages: \$490/98% per TCPA call discount. Prior ruling – in excess of 1 billion.

# Understanding the Reassigned Number Data Base: The Game Changer for ?

- FCC approved the reassigned number data base in **December 13, 2018:**
  - Centralized database of reassigned numbers as a tool to lower the number of calls placed to consumers and customers by mistake
  - Each year, over 35 million numbers in the U.S. are disconnected and become for reassignment to new subscribers
- Carrier reporting of number disconnection to be mandatory; Caller use of database to be voluntary
- FCC referred these to its North American Numbering Council (NANC) and stated an expectation that the agency would **solicit competitive bids as database administrator within the next year - 2019 FCC accepts proposals**
- **Safe Harbor from TCPA Liability ONLY IF THE DATABASE MAKES THE MISTAKE**
- Minimum “aging” period of 45 days after permanent disconnection before a telephone number will be eligible to be reassigned by a service provider to a new subscriber
- Only a number’s most recent date of permanent disconnection will be provided
- Database would provide only three possible responses: “yes,” “no,” or “no data”
- The FCC concluded that its new data reporting obligation will be imposed on all carriers and voice providers
- **In 2020 – FCC announces Reassigned number base will be operational in 2021.**

## TCPA – Revocation of Consent Prohibited where Bilateral Contract Confers Consent

- See also **Reyes 2d Cir./Medley 11<sup>th</sup> Circuit.**
- *Lucoff v. Navient Solutions*, CASE NO. 18-CIV-60743-RAR, 2019 U.S. Dist. LEXIS 133577 (S.D. Fl. Aug. 7, 2019).
- No revocation of contractual consent permitted in 11<sup>th</sup> Circuit.
  - District Court held: “persuaded” by the *Reyes* 2<sup>nd</sup> Circuit decision - under common law, “Plaintiff’s consent was irrevocable, and any attempt to revoke his prior consent was ineffective...”
  - Consent must fall within the scope of the consent provision in contract.
  - **CRUX** – in certain jurisdictions, where consent provided in a ***bilateral contractual agreement***, consumer cannot freely revoke consent.

**THANK YOU**  
**Contact Us With QUESTIONS!**

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