

# The Evolving Telephone Consumer Protection Act Landscape Post-*Duguid*

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## Key Points

- Telephone Consumer Protection Act (TCPA) litigation continues to pose significant risks to businesses that use calls, texts and faxes to engage with consumers.
- The U.S. Supreme Court's unanimous decision in *Facebook, Inc. v. Duguid* caused a shift in the types of claims asserted in TCPA litigation.
- The Federal Communications Commission's recently launched Reassigned Numbers Database can safeguard businesses from liability for calls and texts to reassigned phone numbers.
- After *Duguid*, there has been an uptick in claims under certain state laws, including putative class actions under the amended Florida Telephone Solicitation Act.
- Businesses should review compliance practices, address recent developments with marketing and collections vendors, and renegotiate terms of vendor contracts.

The Telephone Consumer Protection Act, passed in 1991 to preserve “normal, expected or desired communications between businesses and their customers,” has been the focus of substantial litigation over the past decade. In the TCPA, Congress prohibited calls using an “automatic telephone dialing system” (ATDS) when made to certain specialized lines such as emergency services lines and cellphone numbers. The goal was to avoid tying up emergency lines or saturating then-nascent wireless networks. But the prohibition did not extend to residential landlines, the dominant means of communication at a time when there were only about 7 million cellular subscribers and plans cost \$63 for 60 minutes per month. Businesses routinely placed calls to residential landlines to contact customers for important reasons, whether to convey information about an order, a payment or an in-home visit. In seeking to curb “robocalls,” Congress was attempting to regulate certain indiscriminately placed calls that made use of a specific type of equipment prevalent in 1991, with no connection between the calling parties and the recipients.

Litigants and courts have often overlooked the purpose and history of the TCPA. Courts have expanded the statute to sweep in valued and expected communications between businesses and customers. These communications include order confirmations, shipping and delivery status updates, prescription refill notifications, appointment reminders, security alerts, customer surveys, loyalty program notifications, employment communications, collections calls and promotional messages.

Attempts to stretch the TCPA have exposed businesses to significant liability because the TCPA combines a private right of action with statutory damages of \$500 to \$1,500 per violation with no cap. Congress provided for statutory damages to incentivize consumers to vindicate their rights in small claims court. But a series of conflicting judicial decisions and murky Federal Communications Commission (FCC) regulations and declaratory rulings, combined with a prolific plaintiffs' TCPA bar, have resulted in an onslaught of class actions.

TCPA litigation has targeted businesses across industries with robust compliance programs. Companies that engage consumers through marketing and informational calls, texts and faxes have faced protracted litigation for what at times have amounted to technical violations of the law with no concrete injury.

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## Duguid: One Year Later

In *Duguid*, the Supreme Court resolved a circuit split and rejected an expansive and atextual interpretation of an ATDS by the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit had effectively erased the TCPA's limits on what constitutes an ATDS.

*Duguid* narrowed the scope of the devices that qualify as an ATDS, restricting them to equipment with the capacity to store a telephone number using a random or sequential number generator, or to produce a telephone number using a random or sequential number generator. That result followed from the plain language of the statute.

A shift in TCPA claims has followed *Duguid*. The focus is now primarily on communications that trigger provisions of the statute unaffected by *Duguid*: (1) prerecorded messages and artificial voice calls, (2) ringless voicemail, and (3) National Do Not Call Registry and companywide internal do-not-call issues. Prior to *Duguid*, claims rooted in a company's alleged failure to honor "STOP" or other opt-out requests were asserted under a revocation-of-consent theory that necessarily fails post-*Duguid*. Some plaintiffs' lawyers are now seeking to fold revocation-of-consent issues into the TCPA's do-not-call provisions to revive such claims.

## Reassigned Numbers Database

Beyond *Duguid*, companies have a new tool to protect themselves from liability for calls and texts to reassigned telephone numbers: the Reassigned Numbers Database (RND), which the FCC launched in November 2021. The RND includes data from all carriers and enables businesses or their vendors to query lists of phone numbers to identify deactivations/reassignments and scrub their records accordingly. Importantly, using the RND — which carriers update monthly — provides for a liability safe harbor for calls and texts to reassigned numbers.

## Is a Text Message a Call?

After *Duguid*, courts and litigants should pay closer attention to construing the provisions of the TCPA. One topic that continues

to be relevant is whether texts should even fall within the scope of the statute — especially given that the statute predates texts and never uses that term. In 2003, the FCC conclusively stated that a text message constitutes a "call," and courts have followed suit. But the question remains open. Indeed, [Justice Clarence Thomas noted at oral argument in \*Duguid\*](#) that he is "interested in why a text message is considered a call under the TCPA." Importantly, Congress has never added "text message" to the statutory text even though it has amended the statute several times since 1991. Given the ubiquity of texting — and consumers' growing preference for receiving texts from familiar businesses — this is an issue that warrants judicial review.

## Uptick in Claims Under State Laws

In the first quarter of 2022, the plaintiffs' bar brought claims challenging marketing calls and texts under the amended Florida Telephone Solicitation Act (FTSA). The amendment followed *Duguid* and includes a private right of action and statutory damages. It does not include an ATDS requirement, and its terminology (an "automated system") might apply to commonplace technology platforms used to aid businesses in scaling communications.

Some TCPA plaintiffs' lawyers based in Florida filed several dozen FTSA putative class actions during the first few months of 2022, and the legislative session ended in March without taking action to address noted statutory issues. Businesses should be mindful that, as with other types of privacy-based laws, a patchwork of state laws regulates calling and, in some cases, texting practices. Many of these laws, which the plaintiffs' bar had not taken an interest in while TCPA litigation reached its peak, are now being used to bring claims against businesses.

## Conclusion

2022 is poised to be another year of significant TCPA activity. Businesses would be well advised to review their compliance practices, address recent developments with their marketing and collections vendors, and renegotiate terms of their vendor contracts in light of the evolving landscape.