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The Supreme Court Adopts Narrow Definition of Autodialers Under the TCPA

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On April 1, 2021, the U.S. Supreme Court adopted a narrow interpretation of a key clause of the federal Telephone Consumer Protection Act of 1991 ("TCPA"), which restricts the use of devices known as "automatic telephone dialing systems" or "autodialers." In a unanimous opinion in *Facebook, Inc. v. Duguid et al.*, No. 19-511, the Court overturned a Ninth Circuit decision that broadly defined an autodialer to cover any equipment that has the capacity to store and dial numbers, regardless of whether those numbers were generated by a random or sequential number generator.

Instead, the Supreme Court held that to qualify as an autodialer under the TCPA, a device must have the capacity either 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.

This much-anticipated decision is a victory for companies who contact customers through automated text messages and will have a significant impact on the risks of sending such messages. The TCPA creates a private right of action for persons to sue for violations of the TCPA and to recover up to $1,500 per violation. § 227(b)(3).

Under the TCPA, an autodialer is defined as "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." 47 U.S.C. § 227(a)(1). This threshold statutory definition has been hotly debated in the courts and before the FCC over the past few years, resulting in a split among the Courts of Appeals, which the Supreme Court granted certiorari to resolve.[1]

Background

The case centers on account alerts Facebook texted to Noah Duguid in 2014, notifying him that someone had attempted to access the Facebook account associated with his cell phone number from an unknown browser. But Duguid did not have a Facebook account and never gave Facebook his number – Facebook claimed Duguid likely had a recycled number associated with another user. Unable to stop the notifications, Duguid brought a putative class action against Facebook. Duguid alleged that Facebook violated the TCPA by maintaining a database of stored phone numbers and then programming its equipment to send automated text messages to those numbers.

Facebook moved to dismiss the lawsuit, arguing that Duguid had failed to allege that Facebook had used an autodialer and had instead sent targeted, individualized texts messages to numbers linked to specific accounts. The U.S. District Court for the Northern District of California agreed and dismissed Duguid's amended complaint with prejudice.

The Ninth Circuit reversed, holding that Duguid had stated a claim because an autodialer need not be able to use a random or sequential generator to store numbers; it need only have the capacity to "store numbers" and "'to dial such numbers automatically.'" 926 F.3d 1146, 1151 (9th Cir. 2019) (quoting *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1053 (9th Cir. 2018)).

The Opinion

The Supreme Court began by examining the TCPA's text, relying on the rules of grammar and punctuation: “Congress defined an autodialer in terms of what it must do ('store or produce telephone numbers to be called') and how it must do it ('using a random or sequential number generator').” *Id.* at 5. Under conventional grammar rules, both of the antecedent verbs in the autodialer definition, “store” and “produce,” are qualified by the modifying phrase “using a random or sequential number generator.” Applying conventional rules of punctuation, the Court held that the use of a comma in 227(a)(1)(A) suggests that Congress intended the phrase “using a random or sequential number generator” to apply equally to both preceding elements. *See id.* at 6. Thus, the Court concluded, “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.” *Id.* at 7.

In addition to this plain-text analysis, the Court also held that the statutory context confirms that the TCPA's autodialer definition excludes equipment that does not “use a random or sequential number generator.” *See id.* at 8 (cleaned up). The TCPA's autodialer restrictions include making it unlawful to use an autodialer to call certain “emergency telephone line[s]” or “in such a way that two or more telephone lines of a multiline business are engaged simultaneously.” *See id*. Such prohibitions, the Court reasoned, “target a unique type of telemarketing equipment that risks dialing emergency lines randomly or tying up all the sequentially numbered lines at a single entity.” *See id.*

Expanding the autodialer definition to encompass any equipment that merely stores and dial telephone numbers, the Court warned, “would take a chainsaw to these nuanced problems when Congress meant to use a scapel.” *Id.* at 8. Duguid's interpretation would capture virtually all modern cell phones – which have the capacity to “store … telephone numbers to be called” and “dial such numbers” – and lead to the absurd result of making owners of those phones subject to liability under the TCPA for those phones' most commonplace usage – speed dialing or sending automated text message responses. *See id.*

Lastly, the Court held that Duguid's counterarguments simply “cannot overcome the clear commands of § 227(a)(1)(A)'s text and the statutory

context." *Id.* at 9. The Court brushed aside Duguid's concerns that accepting Facebook's interpretation will "unleash" a "torrent of robocalls," noting that Duguid's "quarrel is with Congress, which did not define an autodialer as malleably as he would have liked." *See id.* at 11-12. Rather than "eschewing the best reading of § 227(a)(1)(A)," the Court "must interpret what Congress wrote, which is that 'using a random or sequential number generator' modifies both 'store' and 'produce.'" *See id.* at 12.

For these reasons, the Court concluded that "a necessary feature of an autodialer under § 227(a)(1)(A) is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called." *Id.*

Key Takeaways

The *Facebook* decision is a significant and potentially game-changing win for businesses who use text messaging to communicate with their customers. It also provides much-needed clarity to the TCPA's autodialer definition, including these key takeaways:

- The Court rejected the broad definition of autodialers espoused by Duguid, the Ninth Circuit, and TCPA-plaintiffs in favor of the "narrow statutory design" Congress employed to target certain calls.
- Platforms that send automated text messages from a preexisting list or database of stored numbers, like that used by Facebook, are not autodialers and therefore do not violate Section § 227(a)(1)(A) of the TCPA.
- The *Facebook* decision expressly does not affect the TCPA's other prohibitions, including calls using "artificial or prerecorded voice" to cell phones and solicitation calls and texts to individuals who are on the national Do-Not-Call registry.

It remains to be seen whether the current Democratic-controlled Congress will introduce legislation to amend the TCPA to address this decision – early indications are that that it will. For now, however, it is expected that this decision will significantly reduce the numerous lawsuits – including class action lawsuits – that have emerged under the statute.

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[1] *Compare Gadelhak v. AT&T Servs., Inc.,* 950 F.3d 458, 464 (7th Cir. 2020) (finding a device that "dials numbers only from a customer database" was not an autodialer); *Glasser v. Hilton Grand Vacations Co.,* 948 F.3d 1301, 1306 (11th Cir. 2020) ("[T]o be an auto-dialer, the equipment must (1) store telephone numbers using a random or sequential number generator and dial them or (2) produce such numbers using a random or sequential number generator and dial them."); *Dominguez v. Yahoo Inc.,* 894 F.3d 116, 119 (3rd Cir. 2018); *with Marks v. Crunch San Diego,* 904 F.3d 1041, 1053 (9th Cir. 2018) (holding that an "ATDS includes a device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator"); *Duran v. La Boom Disco, Inc.,* 955 F.3d 279 (2nd Cir.

2020); *Allan v. Pa. Higher Educ. Assistance Agency,* 968 F.3d 567 (6th Cir. 2020).
