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Dial away? The future of TCPA after *Facebook v. Duguid*

By Palash Basu, Leslie Hartford, and Jason Kravitz

The Telephone Consumer Protection Act (TCPA) is a federal statute that was designed to protect consumers from businesses using mass telemarketing methods such as "autodialers." Although enacted in 1991, when such technology focused on telephone calls and fax messages, the TCPA has since been interpreted to include text messages as well.

Apart from certain exceptions or with the consumer's express consent, the statute prohibits such indiscriminate contact and awards statutory damages of up to $1,500 per violation, with no limit on potential damages. Because of the uncapped liability potential, the TCPA is an attractive instrument for class actions in which plaintiffs can aggregate their claims and seek astronomical damages.

One particular element of the statute — the definition of automatic telephone dialing systems (ATDS), known as "autodialers" — has been a primary driver of litigation. The TCPA defines an autodialer 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). Various parts of this definition have been extensively litigated, including the term "capacity" and whether a device that requires human intervention qualifies.

What did SCOTUS rule in *Facebook, Inc. v. Duguid*?[1]

The Supreme Court heard *Duguid* to decide a single question regarding interpretation of the TCPA: whether a device that can store and dial telephone numbers but does not use a random or sequential number generator to store those numbers is considered an autodialer.

The dispute in *Duguid* arose out of a Facebook security feature that allows a user to provide a telephone number to be contacted via text message in case a potentially unauthorized login attempt is made on their account. This is an "opt-in" feature, meaning that the user must affirmatively provide and verify a phone number at which to receive this message.

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[1] See our alert, "SCOTUS is not fooling around: April 1 ruling narrows TCPA's autodialer prohibition," April 02, 2021.

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Defendant Duguid received several of these security notification messages despite not having a Facebook account and thus not having provided Facebook with his phone number for this purpose. Duguid initiated litigation against Facebook for violation of the TCPA, based on Facebook maintaining a database that stored phone numbers and using programmed devices to send automated messages to the relevant number in response to a potential unauthorized access attempt.

The question then, which centered only on part (a) of the statutory definition, was whether the phrase "using a random or sequential number generator" applied to both "store" *and* "produce" or *only* to "produce." Here, Facebook stored the telephone numbers that it contacted but did not use a random or sequential number generator to store or contact those numbers; rather, Facebook's program contacted specific numbers (numbers belonging to those whom it was attempting to inform of a potentially unauthorized login).

Based on this reasoning, Facebook moved to dismiss the case at the district court level, arguing that Duguid failed to allege that it sent text messages to "randomly or sequentially generated" numbers. The District Court for the Northern District of California agreed, dismissing Duguid's complaint with prejudice. On appeal, the Ninth Circuit reversed, holding that an autodialer only had to have the capacity to "store numbers to be called" and to "dial such numbers automatically"; the device did not have to use a random or sequential generator to actually store the numbers.

The Supreme Court, noting the conflict among the various Courts of Appeal on this issue, granted certiorari. Following "conventional rules of grammar" and statutory context, the Court found that the modifying clause "using a random or sequential number generator" applies to all of the verbs that precede it — specifically, both "store" and "produce." Thus, regardless of whether an autodialer stores or produces numbers to be called, the device must use a random or sequential number generator to support a TCPA violation.

How do I know if my company is using an "autodialer" in light of the Supreme Court's ruling?

In *Duguid*, the Supreme Court said, "[i]n sum, 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."

Accordingly, if your company's communication system with current and prospective customers does not have the capacity to either "store[] numbers using a random or sequential number generator" or "produce[] numbers using a random or sequential number generator," it likely would not qualify as an autodialer. Most modern communications systems offered by vendors today are designed specifically to avoid the random or sequential number generator problem. In today's world, where targeted marketing is more feasible and more effective, most businesses do not care to use the blunt force mass marketing technology of the late 20th century. That said, you should consult with your vendor to determine whether their system complies with Supreme Court's narrow autodialer definition.

What is the likely impact of this ruling?

The *Duguid* decision enables businesses to continue communicating with their current and prospective customers without being subject to potentially unrestricted TCPA liability that ultimately could be consequential to their financial bottom line. By requiring the use of a random

or sequential number generator in a communication system to trigger liability under the TCPA, the Supreme Court has provided more clarity and therefore, more certainty in complying with applicable legal framework for companies that use phone calls and text messages to communicate for telemarketing and other purposes. It has also potentially freed businesses from obtaining prior consent for all calls and texts if they are not using an autodialer under the Supreme Court's narrower definition. That said, obtaining consent still probably makes sense from a customer relations standpoint, and may be required by state law, depending upon where the call or text is received.

While consumer advocates may be concerned that the narrowly defined meaning of an autodialer might unleash a flurry of undesired telemarketing calls, the Supreme Court's precise definition, more significantly, mitigates the greater risk that autodialers could be broadly interpreted to include any communication device that can store and dial numbers in everyday usage. Such a risk could have subjected many businesses, and even individuals, to liability under the TCPA simply by virtue of using modern cell phones, for example.

The *Duguid* decision may significantly reduce the volume of lawsuits filed under the TCPA because plaintiffs must show that a defendant's use of communication systems meets the requirements of the narrowly defined meaning of an autodialer. Further, since communication through text messages often relies on stored phone numbers without using a random or sequential number generator, such communication will also generally fall outside the scope of the TCPA's prohibition on calls made without recipients' consent. However, the *Duguid* decision likely does not affect the TCPA's continued regulation of calls using artificial or prerecorded voices. The Court's ruling also does not affect any of the Do-Not-Call restrictions of the TCPA, nor the various restrictions of the Federal Trade Commission's Telemarketing Sales Rule, the debtor protections in the federal Fair Debt Collection Practices Act, or relevant state laws.

As a final note, companies are encouraged to ensure full compliance with state and federal laws such as the TCPA *before* sending text messages or placing calls to current and prospective customers, even if through a third-party.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- Palash Basu, 202-585-8088, pbasu@nixonpeabody.com
- Leslie Hartford, 617-345-1369, lhartford@nixonpeabody.com
- Jason Kravitz, 617-345-1318, jkravitz@nixonpeabody.com