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SCOTUS is not fooling around: April 1 ruling narrows TCPA's autodialer prohibition

By Dan Deane

For more than a decade, courts across the country have wrestled with the Telephone Consumer Protection Act (TCPA) definition of an "automatic telephone dialing system" (often referred to as an ATDS or autodialer). The Federal Communication Commission (FCC) TCPA guidance over the years has only muddled the issue, and in the aftermath of the FCC's failure to clarify it, the U.S. Circuit Courts of Appeal have become locked in a hopeless split.

The disagreement is consequential in the modern age of tele- and text-marketing, which has evolved in many ways since the statute was passed in 1991. On the one hand, consumer advocates argue that the TCPA's autodialer restrictions should evolve to cover nearly all dialing devices that use automated technology to call (or text) consumers, even calls that are targeted to specific subsets of consumers. On the other hand, businesses and industry groups argue that the TCPA's autodialer ban was only designed to put an end to an outdated 20th-century telemarketing strategy — the *en masse* carpet bombing of everyone with a phone number by using a computer to dial all the numbers in the phone book in sequential order, or by generating and dialing numbers at random, to deliver a prepackaged telemarketing message to whoever should pick up.

In Thursday's ruling in *Facebook, Inc. v. Duguid et al.*,[1] the Supreme Court finally weighed in with a narrow interpretation that conclusively sides with businesses and telemarketers that wish to employ more-modern techniques to interact with consumers.

Duguid v. Facebook[2]

Noah Duguid's case against Facebook began in 2014 after he received several text message notifications from Facebook on his cellphone, informing him that someone had attempted to access the Facebook account associated with his number. The problem was that Duguid did not have a Facebook account and never authorized Facebook to send him text messages. Most likely,

[1] Slip Op., Case No. 19-511 (April 1, 2021).

[2] See our alert, "Dial away? The future of TCPA after *Facebook v. Duguid*," April 05, 2021.

Facebook was attempting to reach a Facebook member who previously had the phone number that was later reassigned to Duguid when he bought a new cellphone.

Whatever the reason for the mix-up, Duguid filed a class action lawsuit alleging that Facebook had violated the autodialer prohibitions in the TCPA by using an autodialer to send him text messages to his cellphone without his consent. Such class action lawsuits have become commonplace in the past decade as consumer class action lawyers seek to cash in on the generous statutory damages provision of the statute, which awards up to $1,500 for every wayward text or call.

A federal district court in California dismissed Duguid's case based on Facebook's argument that Duguid had failed to allege that Facebook used an autodialer to send the text. If no autodialer was used, Facebook was clear to send the text even without Duguid's prior consent. The district court agreed with Facebook that the allegations established that Facebook sent targeted notification texts to its members, not texts generated by a random or sequential number generator. The U.S. Court of Appeals for the Ninth Circuit reversed, holding that the ATDS definition does not require that the dialing device be able to use a random or sequential number generator. Making automated calls from a stored list is all that is required under the Ninth Circuit's ruling.

As other circuit courts have reached the opposite conclusion, the Supreme Court granted certiorari to resolve the circuit split. On Thursday, in a unanimous 9–0 decision authored by Judge Sotomayor, the Supreme Court reversed and remanded the judgment of the Ninth Circuit, largely adopting Facebook's arguments.

The Supreme Court's interpretation of the autodialer prohibition

The Supreme Court's analysis relies mainly on a grammatical analysis of the plain language of the statute. The autodialer provision prohibits making certain calls[3] "using any **automatic telephone dialing system** or an artificial or prerecorded voice . . . (i) to any emergency telephone line . . .; (ii) to the telephone line of any guest room or patient room of a hospital [or similar healthcare facility]; or (iii) to any telephone number assigned to a . . . cellular telephone service . . . or any service for which the called party is charged for the call[,]" without "the prior express consent of the called party."[4] The statute defines an ATDS 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."[5]

The issue comes down to this simple question: Does the clause "using a random or sequential number generator" modify both verbs that precede it ("store" and "produce"), or does it only modify the closest verb ("produce")? Facebook argued the former, while Duguid argued the latter. Under Duguid's interpretation, a device is an autodialer if it either "produces" telephone numbers to be called using a random or sequential number generator, or merely "stores" telephone numbers to be called with or without the use of a random or sequential number generator.

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[3]The FCC has previously declared that the term "call," as used in the TCPA, applies to text messages as well as actual telephone calls. Because Facebook did not dispute that application of the statute, the Supreme Court assumed without deciding that the TCPA governs text messages.

[4]47 U.S.C. § 227(b)(1)(A) (emphasis added).

[5]47 U.S.C. § 227(a)(1).

Relying on canons of statutory construction (including, most significantly, the "series-qualifier canon"), the Supreme Court rejected Duguid's construction and endorsed Facebook's more-restrictive reading: "In sum, Congress'[s] 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. This definition excludes equipment like Facebook's login notification system, which does not use such technology."[6]

Statutory context and legislative history further confirmed the court's conclusion. While the TCPA as a whole is a broad consumer protection statute meant to protect Americans from intrusive telemarketing calls, the specific autodialer provision was targeted to the telemarketing techniques of the late 20th century, which, by dialing mass numbers in sequence or randomly, threatened to tie up emergency phone lines and cause cellphone owners to incur costs for unwanted incoming calls. The Supreme Court concluded that Congress intended to outlaw only those mass call techniques.[7]

The court was also unwilling to expand Congress's definition to evolve with the times. Echoing the arguments of TCPA critics, the Supreme Court recognized that "Duguid's interpretation of an autodialer would capture virtually all modern cell phones, which have the capacity to 'store . . . telephone numbers to be called' and 'dial such numbers.'"[8] The court was not convinced that Facebook's interpretation did not make sense, stating that "classifying almost all modern cell phones as autodialers . . . would produce an outcome that makes even less sense."[9] The court also rejected Duguid's proposal to impose limits on the autodialer prohibition based on whether the dialing system could be considered automated as opposed to manual, declining to require "such a difficult line-drawing exercise around how much automation is too much."[10]

What now? Is the TCPA dead?

The Supreme Court's ruling is clearly a massive landmark in TCPA jurisprudence, but reports of the TCPA's demise are premature. To be sure, the court has opened the door to businesses using automated technology to call cellphones without prior consent. Many of the communications systems (including predictive dialers) that telemarketing vendors offer to their business clients today are likely to comply with the Supreme Court's narrower interpretation of an autodialer because they do not have the capacity[11] to generate numbers randomly or sequentially. Rather, they are designed only to dial from targeted, pre-populated customer or prospect lists, and that is now fine under the TCPA.

Businesses must remember, however, that the autodialer ban of the TCPA is but one strand of a tapestry of telemarketing regulation that blankets the country. The *Duguid* ruling does not alter any of the TCPA's other prohibitions. For example, businesses must still comply with the prior consent requirements for making both marketing and non-marketing calls to cellphones and

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[6] *Duguid*, Slip Op. at 7.

[7] *See id*. at 8, 11.

[8] *Id*. at 8 (quoting 47 U.S.C. § 227(a)(1)).

[9] *Id*. at 10.

[10] *Id*. at 9, n.6.

[11] Unfortunately, the Supreme Court did not address the meaning of the word "capacity" in the ATDS definition, which has also been a hotly contested issue in TCPA litigation. The failure to clarify that point directly gives plaintiffs' lawyers at least some hook for future arguments seeking to narrow the impact of the *Duguid* decision.

landlines when the call delivers a prerecorded or artificial voice message.[12] 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.[13] Businesses must remain vigilant (perhaps even more so) about not calling consumers who have registered their phone numbers with the Do-Not-Call list or who have instructed the business to "stop calling."

Debtor protections in the federal Fair Debt Collection Practices Act also remain completely untouched by the court's ruling.[14] Moreover, many states have enacted their own telemarketing protections, some of which include regulations about autodialed calls.[15] Those laws and regulations remain enforceable at the state level.

In short, while the court's ruling finally resolves one massive compliance headache for businesses, telemarketing compliance writ large remains as relevant today as it did a couple of days ago.

Finally, as the Supreme Court often likes to do when it interprets a statute narrowly, it pointed disappointed consumer advocates back to Congress. If the court's ruling in *Duguid* "unleash[es]" a "torrent of robocalls[,]" as predicted by Duguid in his argument to the court, the response could be mounting pressure in Congress to pass an amendment to the TCPA to make it more muscular and consumer-protective than ever. Bills to amend the TCPA in one way or the other are almost always pending in Congress. If the problem of intrusive and annoying telemarketing calls gets worse in the weeks, months, and years ahead, it easy to imagine such legislative efforts gaining momentum.

In summary, while consumer-facing businesses can breathe easier knowing that the looming threat of TCPA liability has been mitigated to some extent, it would be wise to take the *Duguid* ruling with a grain of salt and continue to practice a certain level of self-restraint in deploying telemarketing strategies. Compliance with federal and state telemarketing laws remains an important consideration before embarking on a new calling or texting campaign. Among other things, businesses should take care to ensure that they or their telemarketing vendors:

- Are not using an autodialer if they do not have the required consent for marketing or non-marketing calls;
- Are not using prerecorded or artificial voice messages without first obtaining the prior express consent of call recipients;
- Enable processes for customers to easily opt out of communications they do not wish to receive;
- Continue to maintain an internal do-not-call list of all customers who have opted out;
- Scrub their call lists against national and state do-not-call lists;
- Comply with the time of day and other restrictions of the Telemarketing Sales Rule;
- Provide caller identification in all messages to customers or consumers; and
- Do not send communications containing false or misleading messages to consumers.

For advice about your specific telemarketing needs, contact your NP attorney or:

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[12] *See* Slip Op. at 12 (citing 47 U.S.C. §§ 227(b)(1)(A) and (B)).

[13] *See* 47 C.F.R. § 64.1200(c); 16 C.F.R. 310.

[14] *See* 15 U.S.C. §§ 1692-1692p.

[15] For example, Connecticut, Conn. Stat. § 16-256e; Illinois, 815 ILCS §305/1; Massachusetts, M.G.L. Ch. 159C, §3; Ch. 159, § 19B; New Hampshire, N.H. Stat. Ann. § 359-E:1-E:6.

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