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SCOTUS Weighs in on the TCPA, Narrows Autodialer Definition

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April 02, 2021

In its newly released decision in *Facebook, Inc. v. Duguid*, the Supreme Court of the United States (SCOTUS), in an opinion authored by Justice Sotomayor, issued a long-awaited ruling resolving a circuit split on the definition of an autodialer under the Telephone Consumer Protection Act (TCPA). In doing so, the Court takes us on a lengthy grammar lesson on statutory construction, before ultimately ruling in favor of Facebook and holding that a necessary feature of an autodialer under the TCPA is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called.

In 2014, Noah Duguid received a series of login notification text messages from Facebook, alerting him that someone had attempted to access a Facebook account associated with his cellular phone number from an unknown browser. However, Duguid never had or maintained a Facebook account, and never provided Facebook with his cellular phone number. As such, he brought a putative class action against Facebook in the Northern District of California, arguing that Facebook had violated the TCPA by maintaining a database that stored phone numbers and programming its equipment to send automated text messages to those numbers each time an associated account was accessed by an unrecognized device or web browser.

Duguid and Facebook both asserted arguments that hinged on the interpretation of the TCPA's definition of an autodialer: "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." Their arguments boiled down to whether "using a random or sequential number generator" acted as a modifier of both "store" and "produce" (Facebook's argument) or just "produce," meaning that any autodialer which could store and dial telephone numbers would fall under the statutory definition (Duguid's argument). The district court initially granted Facebook's motion to dismiss, but the case was revived on appeal by the Ninth Circuit, which held that Duguid had stated a claim under the TCPA by alleging that Facebook's notification system automatically dialed stored numbers. The Ninth Circuit further held that 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 to be called' and 'to dial such numbers automatically.'"

In the Court's opinion, Justice Sotomayor goes into great detail to discuss the Court's canons of interpretation, which often come into play when SCOTUS decides issues of statutory interpretation. Ultimately, the Court reasons that the reading of "using a random or sequential number generator" as applying to both "store" and "produce" is required, as "[E]xpanding the definition of an autodialer to encompass any equipment that merely stores and dials telephone numbers would take a chainsaw to these nuanced problems when Congress meant to use a scalpel." The Court further articulated that if it accepted Duguid's interpretation of what constitutes an autodialer, it would "capture virtually all modern cell phones, which have the capacity to 'store … telephone numbers to be called' and 'dial such numbers.'"

SCOTUS's decision has the impact of taking the wind out of the sails of potentially thousands of putative class actions and individual TCPA violation claims that have been filed across the country. Of particular import will be the fallout of these types of actions in the Ninth Circuit, as the *Facebook* decision has upended the course of that court, reversing the prior judgment it had entered in favor of Duguid, and throwing out a long line of

precedent that TCPA plaintiffs' counsel relied on heavily in bringing claims across the country. This decision will likely continue the decline in TCPA litigation as plaintiff's firms shift their focus to alternative causes of action.

However, the decision will not be the death of TCPA litigation. Suits against telemarketers violating the "do not call" list will continue and potentially increase. In addition, although the decision is clear that an autodialer must have "the capacity to use a random or sequential number generator to either store or produce phone numbers to be called," the decision offers no practical guidance on the technical requirements of an autodialer. District courts will continue the process of weeding out arguments in regard to the capabilities of specific dialers.

If you're currently in litigation for an alleged violation of the TCPA based on the use of an autodialer, it is worth reviewing the specific mechanics of how your telephone dialing system is used to send messages or make calls. If the dialing system does not have the capacity to either store or produce a telephone number based on a random or sequential number generator, you should speak with your legal counsel about the impact of this decision. In addition, companies should review their dialers and consider phasing out dialers that have the capacity to generate random or sequential numbers in favor of other dialing systems.

Please contact Eve A. Cann for assistance.