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High Court's Autodialer Ruling Raises Bar For TCPA Plaintiffs

By **Andrew Wong, Amisha Patel and Amy Lesperance** (April 2, 2021, 4:51 PM EDT)

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On April 1, the U.S. Supreme Court issued its widely anticipated ruling in Facebook Inc. v. Duguid, adopting a narrow construction of the definition of "automatic telephone dialing system," or ATDS, for purposes of liability under the Telephone Consumer Protection Act.[1]

Key Takeaways

The Supreme Court unanimously held that an ATDS must have the capacity either (1) to store a telephone number using a random or sequential generator; or (2) to produce a telephone number using a random or sequential number generator.

The ruling resolves an even 3-3 circuit split and adopts the view of the U.S. Courts of Appeal for the Third, Seventh and Eleventh Circuits that the statutory language of the TCPA should be narrowly construed so as not to sweep unreasonably within its scope any device capable of dialing numbers from a stored list.

Litigants in the U.S. Courts of Appeal for the Second, Sixth and Ninth Circuits now face a newly defined legal landscape, with courts in these jurisdictions losing their preferred position as favorable venues for TCPA lawsuits.

The court declined to line-draw and adopt a test for ATDS functionality based on "how much automation is too much," noting that all devices require at least some human intervention.

Companies employing automated calls and texts should determine whether their equipment has the capacity to store or produce telephone numbers using a random or sequential number generator. If the answer is yes, the threat of TCPA liability remains imminent and real.

The Ninth Circuit's Broad Take on ATDS

The TCPA makes it illegal to use an ATDS to call certain devices, including pagers and cellphones, without the "prior express consent of the called party."[2] The Federal Communications Commission has made clear that TCPA liability for autodialed phone calls encompasses both voice calls and text messages.[3]

In recent years, consumers have filed lawsuits under the statute in response to marketing and debt collection calls — whether the calls are manually dialed or placed using a predictive dialer.

In the case below, plaintiff Noah Duguid alleged that he received text messages alerting him to login activity on a Facebook account linked to his cellular telephone number, though he had no Facebook account. When he was unable to stop unwanted messages, he brought a putative class action against Facebook, alleging that the company violated the TCPA by maintaining a database that stored phone numbers and programmed its equipment to send automated texts.

Facebook responded that the TCPA did not apply because the technology used to text Duguid did not use a random or sequential number generator as required by the statutory text. The Ninth Circuit disagreed, and held that Section 227(a)(1) applies to notification systems with the capacity to dial automatically stored numbers, following its prior ruling in Marks v. Crunch San Diego LLC, which held similarly.

The Supreme Court Reverses

The unanimous 9-0 opinion, authored by Justice Sonia Sotomayor, reversed the Ninth Circuit below and abrogated Marks. It held that to qualify as an ATDS, a device must have the capacity either (1) to store a telephone number using a random or sequential generator; or (2) to produce a telephone number using a random or sequential number generator.[4]

The court thus sided with Facebook, holding that the system used — one that maintained a database of stored numbers to send automated text messages, but did not use a random or sequential number generator to do so — did not meet the statutory definition of an ATDS.[5]

Grammar Matters

For the better part of the past four years, courts have grappled with the definition of what qualifies as an ATDS. The TCPA defines "automatic telephone dialing system" 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."[6]

The issue before the court — and the subject of an even 3-3 Circuit split[7] — was whether the phrase "using a random or sequential number generator" modifies both verbs "store" and "produce," as advanced by Facebook, or whether the phrase modifies only the verb "produce," as advanced by Duguid.

In other words: Does a system that automatically dials or texts from a list of stored numbers qualify as an ATDS?

In short, no, at least not alone.

The Supreme Court adopted a narrow definition of an ATDS, siding with those circuits holding that a textualist (and practical) interpretation of the statute excludes devices with the capacity to dial automatically from a stored list of numbers.[8]

Citing a treatise authored by the respondent Duguid's own counsel, Bryan A. Garner, and the late Justice

Antonin Scalia, the court held that the most natural reading of the provision requires that the modifying clause ("using a random or sequential number generator") apply to both verbs in the preceding list ("store" and "produce").[9]

Justice Sotomayor noted that it would be odd to apply the modifying clause to just one of the verbs when the two verbs are followed by a shared common direct object ("telephone numbers to be called") and separated from the modifying clause by a comma.[10] She also clarified that the court's interpretation does not conflict with the rule of the last antecedent.

In fact, in applying the rule, Justice Sotomayor clarified that the last antecedent here is the phrase "telephone numbers to be called," not the verb "produce," as argued by Duguid.[11] Thus, the court found no grammatical basis to arbitrarily stretch the modifier back to the verb produce but not store.[12]

The court also found that Duguid's counterarguments held little weight. Duguid advocated for an interpretive approach based on the sense of the text, noting that it is odd to say that a piece of equipment would store numbers using a random or sequential number generator.[13]

Justice Sotomayor countered that when the TCPA was enacted, devices existed that used a random number generator to store numbers to be called later rather than immediately.[14] On that basis, Justice Sotomayor also rejected Duguid's argument that under the distributive canon of statutory interpretation, a subsequent clause should be read to modify the antecedent that most logically fits together with the clause.[15]

Logic aside, the application of that canon, Justice Sotomayor noted, is highly questionable where there are two antecedents (store and produce) but only one subsequent modifying clause (using a random or sequential number generator).[16]

Scalpels Over Chainsaws

The court also looked to the context of the TCPA, which Congress enacted to limit the use of dialing equipment that tied up emergency lines, inconvenienced consumers and foisted unwanted and significant cellular provider fees for incoming calls.[17]

Thus, Justice Sotomayor cautioned, an expansive reading of the autodialer provision "would take a chainsaw to these nuanced problems when Congress meant to use a scalpel" and could subject ordinary cellphone owners that use speed dialing or turn on automated text message responses to uncapped fines of between $500 and $1,500 for each unwanted call or text.[18]

The ubiquity of technology that automatically dials from a list of stored numbers implicates widespread liability issues associated with the all-encompassing interpretation advanced by the Second, Sixth and Ninth Circuits, including the very cellphones we use every day.

While Duguid argued that cellphones would not be autodialers under his interpretation because they require human intervention, the court explicitly rejected that argument, noting that all devices require some form of human intervention and declining to impose or engage in the line-drawing exercise around "how much automation is too much."

Raising the Bar for Plaintiffs, Temporarily at Least

TCPA lawsuits will now be more difficult for plaintiffs across the board. To sufficiently allege use of an ATDS, a plaintiff must now establish that the dialing system used to call them used a random or sequential number generator to either store or generate a list of numbers.

Plaintiffs are now foreclosed from forum shopping for a favorable jurisdiction, and companies operating nationwide can find solace in a more clearly defined legal landscape.

The court's opinion, however, leaves open the question of whether a device must actually use the random or sequential number generator functionality to send the unwanted calls or text messages, or whether it is sufficient that the device has the current or potential capacity to function as an ATDS.

The Second and Ninth Circuits have held "that the TCPA applies to calls from a device that can perform the functions of an autodialer, regardless of whether it has actually done so in a particular case."[19]

So far, the U.S. Courts of Appeal for the Eleventh and D.C. Circuits have ruled against expanding liability to devices with the potential capacity to function as an ATDS,[20] but it is unclear whether courts will go further to hold that usage of the device, rather than its functional capacity, controls TCPA liability.

Whatever the effects of the court's long-awaited guidance, they may be short-lived.

As Justice Sotomayor noted in closing, "Duguid's quarrel is with Congress, which did not define an autodialer as malleably as he would have liked."[21] With the recent change in the political landscape, Congress may now choose to revisit the 30-year-old statute.

Indeed, 21 Democratic members of Congress, some of whom helped pass the TCPA, filed an amicus brief in support of Duguid, arguing that when Congress enacted the TCPA, it intended the definition of an ATDS to encompass dialing systems that automatically dialed numbers from a list.[22]

Now that the Supreme Court has issued its final ruling, plaintiffs advocates may seek amendment of the TCPA, especially if companies interpret the decision as free reign to send automated notifications from stored lists of numbers without prior consent.

One can be sure that if Congress does take up the pen to rewrite the TCPA, it will likely carefully consider and perhaps heed the important grammar lessons cited throughout the court's opinion.

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[1] Facebook, Inc. v. Duguid et al., 592 U.S. ___ (2021) ("Slip Op.").

[2] 47 U.S.C. § 227(b)(1)(A).

[3] FCC Enforcement Advisory No. 2016-06, Text Message Senders Must Comply With The Telephone Consumer Protection Act, Fed. Election Comm'n, DA 16-1299 (Nov. 18, 2016).

[4] Slip Op. at 1.

[5] Id. at 4.

[6] 47 U.S.C. § 227(a)(1).

[7] Compare Dominguez ex rel. Himself v. Yahoo, Inc., 894 F.3d 116 (3d Cir. 2018); Gadelhak v. AT&T Servs., Inc., 950 F.3d 458 (7th Cir. 2020); Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301 (11th Cir. 2020) (adopting a narrow interpretation of the TCPA); with Marks v. Crunch San Diego, LLC, 904 F.3d 1041 (9th Cir. 2018); Duran v. La Boom Disco, Inc., 955 F.3d 279 (2d Cir. 2020); Allan v. Pennsylvania Higher Education Assistance Agency, 968 F.3d 567 (6th Cir. 2020) (adopting a broad interpretation of the TCPA).

[8] See Dominguez ex rel. Himself v. Yahoo, Inc., 894 F.3d 116 (3d Cir. 2018); Gadelhak v. AT&T Servs., Inc., 950 F.3d 458 (7th Cir. 2020), aff'd. Jackson v. Regions Bank, No. 20-2624 (7th Cir. February 26, 2021); Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301 (11th Cir. 2020). The Gadelhak decision was authored by now Associate Justice Amy Coney Barrett.

[9] Slip Op. at 5 (citing Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 147 (2012)).

[10] Id. at 6. In a concurring opinion, Justice Alito took issue with the majority's straightforward application of statutory canons of interpretation. Justice Alito advised that "interpretation is not a technical exercise to be carried out by mechanically applying a set of arcane rules" and warned that the Supreme Court's "heavy reliance" on canons of interpretation may cause lower courts to overlook the many nuances and caveats of those canons. Id. (Alito, J., concurring at 1, 4).

[11] Id. at 7.

[12] Id. at 6-7.

[13] Id. at 9.

[14] Id. at 9-10.

[15] Id. at 10-11.

[16] Id.

[17] Id. at 2 n. 1, 8.

[18] Id. at 8 (citing 47 U.S.C. §227(b)(3)).

[19] King v. Time Warner Cable Inc., 894 F.3d 473, 480 (2d Cir. 2018) (emphasis in original); Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 951 (9th Cir. 2009).

[20] ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687 (D.C. Cir. 2018); Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301 (11th Cir. 2020).

[21] Slip Op. at 12.

[22] Brief Amici Curiae of 21 Members of Congress Supporting Affirmance, Facebook Inc. v. Duguid, No. 19-511 (filed Oct. 23, 2020).