CLIENT ALERT

Supreme Court Limits the TCPA's Definition of Autodialer

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Earlier this month, in *Facebook, Inc. v. Duguid*, the Supreme Court held that to be considered an "automatic telephone dialing system" (or "autodialer") for purposes of the Telephone Consumer Protection Act ("TCPA"), a device must have the capacity to either (1) store a phone number using a random or sequential number generator, or (2) produce a phone number using a random or sequential number generator. In so ruling, the Supreme Court overturned the Ninth Circuit's holding that an autodialer need only have the capacity to "store numbers to be called" and "to dial such numbers automatically," resolving a contentious circuit split on the scope of the term autodialer.

Background

Congress passed the TCPA in 1991 in an effort to combat the proliferation of intrusive nuisance calls from telemarketers to businesses and consumers. With certain exceptions, the TCPA generally prohibits using an autodialer to make calls (or send text messages) without the called party's prior express consent. It defines an autodialer as equipment with the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator." This definition of autodialer has remained in place since 1991, when Congress passed the TCPA, despite advances in telemarketing technology and the proliferation of smartphones.

History of *Duguid*

Duguid arose out of several text messages that Facebook sent Duguid in 2014 alerting him that someone had attempted to access the Facebook account associated with his phone number from an unknown browser. Duguid, who did not have a Facebook account, was unable to stop the text message notifications and subsequently brought a putative class action against Facebook alleging violations of the TCPA's prohibition on communications made with an autodialer. Facebook moved to dismiss, arguing that because Duguid did not claim that Facebook messaged numbers that were randomly or sequentially generated, he failed to allege that Facebook used an autodialer.

The U.S. District Court for the Northern District of California agreed with Facebook and dismissed the suit. Duguid appealed, and the U.S. Court of Appeals for the Ninth Circuit reversed, holding that (1) Duguid stated a claim under the TCPA by alleging that Facebook automatically dialed stored numbers, and (2) an autodialer need only have the capacity to "store numbers to be called" and "to dial such numbers automatically."

The Supreme Court's Decision

The Supreme Court's decision turned on whether the phrase "using a random or sequential number generator" modifies both verbs ("store" and "produce") or just the closest verb ("produce"). Duguid argued for the latter interpretation, which the Court rejected, primarily based on the series-qualifier canon. This interpretive rule provides that a modifier at the end of a series of

nouns or verbs normally applies to the entire series, not only the closest noun or verb. Based on this rule, the Court held that to constitute an autodialer, equipment must have the capacity either to produce numbers using a random or sequential number generator or to store numbers using a random or sequential number generator. Because Facebook's notification system neither stored nor produced numbers using a random or sequential number generator, the Supreme Court ruled that it was not an autodialer and reversed the Ninth Circuit's decision.

The Court also emphasized the statutory context, noting the TCPA's prohibitions on using an autodialer to call certain "emergency telephone line[s]" and lines "for which the called party is charged for the call," and to use an autodialer "in such a way that two or more telephone lines of a multi-line business are engaged simultaneously." The Court reasoned that such prohibitions evidence an intent by Congress to 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." Therefore, according to the Court, an expansive interpretation of autodialer such as Duguid's would capture virtually all modern cell phones and "take a chainsaw to these nuanced problems when Congress meant to use a scalpel."

The Court rejected Duguid's counterargument that it makes little sense to apply the phrase "using a random or sequential number generator" solely to the verb "store" and therefore the "sense" of the text should prevail. In addition, the Court was unpersuaded by Duguid's reference to Congress' "broad privacy-protection goals." The Court also dismissed Duguid's warning that siding with Facebook would "unleash" a "torrent of robocalls," citing the separate prohibition on calls using "an artificial or prerecorded voice" (which remains unaffected by the decision in *Duguid*) and stating that Duguid's quarrel is with Congress, not the Court.

Takeaways

The ruling in *Duguid* resolves a contentious circuit split and may reduce the high volume of TCPA class action litigation, which has become popular among the plaintiffs' bar due to the private right of action and potential recovery of up to $1,500 per TCPA violation. With the Supreme Court's narrow interpretation of what constitutes an autodialer, companies may not need prior express consent when using automated systems that store and dial (or message) phone numbers as long as they do not use a random or sequential number generator to store or produce numbers, provided they do not run afoul of the separate prohibition on the use of an artificial or prerecorded voice (and the prohibition on fax advertising). Since most businesses generally use automated technologies to make phone calls or send text messages using pre-established lists of phone numbers rather than randomly or sequentially generating them, *Duguid* is likely to lead to the dismissal of many pending TCPA cases. Regardless of the Court's much needed clarification, companies should generally continue to obtain consent where practicable and follow other best practices when calling or texting individuals.

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