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The U.S. Supreme Court Narrowly Construes the Definition of an ATDS (or *Autodialer*) under the Telephone Consumer Protection Act

The U.S. Supreme Court, in *Facebook, Inc. v. Duguid*,[1] resolved a circuit split on how to interpret the term "automatic telephone dialing system" (ATDS, or autodialer) in the Telephone Consumer Protection Act (TCPA) (47 U.S.C. § 227). A unanimous Court adopted a narrow definition of ATDS that requires that an autodialer have the capacity to generate numbers randomly or sequentially (and not merely the ability to dial from a list), thereby limiting the types of equipment and systems that are subject to TCPA's restrictions. This decision provides clarity to entities that rely on calls to mobile phones and text messages for marketing and communicating with customers, as well to numerous federal courts that have stayed litigation pending the Supreme Court's decision.

The TCPA prohibits any person from calling a wireless telephone number using an ATDS (or autodialer) unless: (1) the caller has obtained the called party's prior express consent for informational calls or prior express written consent for telemarketing calls; or (2) the call is made for emergency purposes.[2] The TCPA also contains restrictions on the use of an artificial or prerecorded voice for calls. For example, the TCPA requires prior consent for calls to residential lines using an artificial or prerecorded voice, but does not require consent for autodialed calls to residential lines unless those calls use an artificial or

[1] *Facebook, Inc. v. Duguid*, _ S. Ct. _, 2021 WL 1215717 (U.S. Apr. 1, 2021).
[2] 47 U.S.C. § 227(b); 47 C.F.R. § 64.1200(a). The Court assumed, without deciding, that a text message is a *call* under the TCPA.

prerecorded voice. The *Facebook* opinion does not address calls that use an artificial or prerecorded voice, but that do not use an autodialer, nor does it address fax marketing or calls made to landline phone numbers.

The TCPA defines 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."[3] While three circuits construed the term to require the capacity to generate numbers randomly or sequentially,[4] three other circuits had considered the phrase "using a random or sequential number generator" to modify only the word "produce" and not both "store" and "produce" and thus broadly construed the term to include equipment that can store and dial telephone numbers (even if the equipment does not use a random or sequential number generator).[5] Under the narrower definition of autodialer ultimately adopted by the Supreme Court, equipment that automatically dials telephone numbers from a list of customer numbers would not be considered an autodialer. As explained by Justice Sotomayor, writing for the Court, "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."[6] Stated differently, she wrote that "[t]he statutory context confirms that the autodialer definition excludes equipment that does not 'us[e] a random or sequential number generator.'"[7]

The *Facebook* case was an appeal from a decision by the U.S. Court of Appeals for the Ninth Circuit. In the underlying case, the plaintiff, Noah Duguid, alleged that Facebook sent him several text messages notifying him that someone had attempted to log into a Facebook account associated with his telephone number, even though he alleged that he did not have a Facebook account and had not provided Facebook with his telephone number (which the Court suggested might have resulted from a reassigned number). The federal district court for the Northern District of California granted Facebook's motion to dismiss on the basis that the plaintiff failed to allege that Facebook used an autodialer because he did not assert that the text messages were sent to numbers that were randomly or sequentially generated. On appeal, the Ninth Circuit found that the plaintiff had stated a claim under the TCPA because, under preexisting Ninth Circuit precedent, to qualify as an autodialer a device only needed to have the capacity to store numbers to be called and to automatically dial those numbers.

The Supreme Court reversed and remanded the case to the Ninth Circuit, writing that "[t]o qualify as an 'automatic telephone dialing system' a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential generator." The Supreme Court based its conclusion on a natural reading of the sentence and conventional rules of grammar, which provide that when there is a series of nouns or verbs followed by a modifier at the end of the list, the modifier normally applies to the entire series. The Supreme Court also noted that the placement of a comma before the modifying phrase "using a random or sequential number generator" suggests that the phrase applies to both preceding elements, i.e., to store and to produce. The Court cautioned that a broad interpretation of the term ATDS to include any equipment that stored and

[3] 47 U.S.C. § 227(a)(1).
[4] *See Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018); *Gadelhak v. AT&T Servs.*, 950 F.3d 458 (7th Cir. 2020); *Glasser v. Hilton Grand Vacations Company, LLC*, 948 F.3d 1301 (11th Cir. 2020). Greenberg Traurig, LLP represented the successful defendant in the *Dominguez* case, which was the first circuit court to construe the term (and did so consistently with the way the U.S. Supreme Court ultimately ruled).
[5] *See Duran v, La Boom Disco, Inc.*, 955 F.3d 279 (2d Cir. 2020); *Allan v. Pennsylvania Higher Educ. Assistance Agency*, 968 F.3d 567 (6th Cir. 2020); *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018), *cert. dismissed*, 139 S. Ct. 1289 (2019); *see generally* 4 Ian C. Ballon, *E-Commerce & Internet Law 2d* § 29.16 (2020) (cited in the petition for cert. in *Duguid*, explaining the evolution of the law in this area and the circuit split preceding the Supreme Court's ruling).
[6] *Facebook, Inc. v. Duguid*, _ S. Ct. _, 2021 WL 1215717, at *5 (U.S. Apr. 1, 2021).
[7] *Facebook, Inc. v. Duguid*, _ S. Ct. _, 2021 WL 1215717, at *6 (U.S. Apr. 1, 2021), *quoting* 47 U.S.C. § 227(a)(1)(A).

dialed telephone numbers would include all calls and texts coming from smartphones – a result that is at odds with the aim of the TCPA to proscribe narrowly only limited types of calls. Based on this natural reading of the statute, the Supreme Court held that Facebook's login notification system, which does not use a random or sequential number generator, did not fall within the TCPA's definition of ATDS.

While the *Facebook* decision should limit the volume of litigation seeking statutory damages of up to $1,500 per text or call under the TCPA, businesses that engage in lawful text and other mobile marketing should be careful to ensure that their practices and procedures comply with all aspects of the TCPA, as well as other laws governing telemarketing and any applicable industry guidelines. In recent months, for example, plaintiffs' lawyers have increasingly sued over alleged do-not-call violations (including calls to reassigned landline numbers). Plaintiffs' lawyers will likely continue to explore ways to file putative class action suits seeking statutory damages. For this reason, businesses should ensure that they comply with the TCPA's restrictions on artificial and prerecorded voice calls, the FTC's Telemarketing Sales Rule, the requirements associated with the national and state do-not-call registries, and the requirements to maintain company-specific, internal do-not-call lists. Compliance may include establishing calling procedures, maintaining accurate opt-out records, and training personnel.

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