wiley

ALERT

SCOTUS Provides TCPA Clarity by Rejecting Expansive Autodialer Definition

April 5, 2021

In its second major Telephone Consumer Protection Act (TCPA) ruling since last July, on April 1, 2021, the U.S. Supreme Court rendered a unanimous decision interpreting a critical term in the statute: "automatic telephone dialing system" (ATDS or autodialer). At issue in the case—*Facebook, Inc. v. Duguid*—was the breadth of the definition of the term, with Respondent Duguid arguing for an expansive definition that would "encompass any equipment that merely stores and dials telephone numbers," and Petitioner Facebook contending that if "a system neither stores nor produces numbers 'using a random or sequential number generator,' it is not an autodialer." The Court held that both the text and statutory context of the TCPA supports the narrow construction of the term advocated by Facebook, resolving a circuit split that has led to much confusion and litigation in recent years.

The decision in *Facebook v. Duguid*, which was highly anticipated by both industry and consumers, will have a significant impact on the TCPA landscape. The definition of the term "ATDS" is a threshold for determining whether a calling party is liable for statutory damages of $500-$1,500 assessed on a per-call basis.

The Definition of "Autodialer" and Its Longstanding Circuit Split

The TCPA prohibits a party from making non-emergency calls to wireless numbers, among others, using an autodialer without the consent of the called party. The statute has been interpreted to apply to text messages as well as voice calls.[1]

Authors

Megan L. Brown
Partner
202.719.7579
mbrown@wiley.law

Kevin G. Rupy
Partner
202.719.4510
krupy@wiley.law

Kathleen E. Scott
Partner
202.719.7577
kscott@wiley.law

Stephen J. Conley
Associate
202.719.4572
sconley@wiley.law

Practice Areas

Election Law & Government Ethics

Health Care

Telecom, Media & Technology

The Telephone Consumer Protection Act (TCPA)

The breadth of the definition of ATDS or autodialer has long been contested. The TCPA defines "autodialer" as any 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."[2] In 2015, the Federal Communications Commission (FCC or Commission) created an extremely broad definition of ATDS in its *2015 Declaratory Ruling*, defining "capacity" to include "potential functionalities" and "future possibility" as opposed to present ability.[3] However, the D.C. Circuit invalidated this expansive reading in 2018, finding that, among other things, the Commission's interpretation would result in an "eye-popping sweep" that threatened to bring every smartphone in the country under the statute's purview because "smartphone apps can introduce ATDS functionality into the device[.]"[4]

While the D.C. Circuit's decision effectively nullified the FCC's *2015 Declaratory Ruling*, the Commission did not take action to clarify the autodialer definition. As a result, widespread litigation precipitated a circuit split. The Third, Seventh, and Eleventh Circuits construed the ATDS definition narrowly, finding that an ATDS encompasses only those devices that use a random or sequential number generator to either store *or* produce numbers. The Second, Sixth, and Ninth Circuits, on the other hand, interpreted ATDS more broadly, finding that the "clause requiring the use of 'a random or sequential number generator' modifies only the verb 'produce' in the statute but not the word 'store[.]'"[5] The broader reading would conceivably encompass any smartphone, because calling devices that store telephone numbers – regardless of whether they use a random or sequential number generator – could fall under the TCPA's purview.[6] This divide between six federal circuits resulted in widespread uncertainty regarding the jurisdictional reach of the TCPA.

Duguid's TCPA Challenge Explained

The controversy in *Facebook, Inc. v. Duguid* stems from one of Facebook's optional security features, which sends social media users text messages to notify them when an attempt is made to access their Facebook account. The user must opt-in to this service and verify a phone number to which Facebook can send security messages. In 2014, Duguid received a number of notification text messages from Facebook, alerting him that another user was trying to access his account. However, Duguid did not have a Facebook account, so he made a number of requests that the social media platform cease sending text messages. When Duguid allegedly could not stop the texts, he brought a class action against Facebook, alleging that the company violated the TCPA by maintaining a database that stored numbers and sent automated text messages to those numbers. Facebook argued that Duguid had failed to allege that the company used an autodialer, and the U.S. District Court for the Northern District of California agreed with Facebook and dismissed Duguid's complaint.

On appeal, the Ninth Circuit reversed, holding that "the equipment need only have the 'capacity' to store numbers to be called." The Ninth Circuit maintained its broad reading of the autodialer definition, finding that "random or sequential number generator" only modified the word "produce."

Facebook filed a petition for certiorari in October 2019, asking the Supreme Court to resolve the circuit split that had grown around this issue. The Court granted the petition in July 2020. As an indication of the interest in the decision, over 20 parties filed amicus briefs.

The Court's 9-0 Decision

Justice Sotomayor penned the unanimous decision on behalf of the Court, concluding 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 number generator." The Court reached its decision based on (1) the text of the ATDS definition, and (2) the statutory context of the TCPA.

Textual Analysis. The Court noted that the ATDS definition uses a familiar structure – namely, a list of verbs – "store" and "produce" – followed by a modifying clause: "using a random or sequential number generator." When faced with this sentence construction, the Court noted that it has applied the "series-qualifier canon" in the past. Specifically, the Court noted that when there is a construction that involves all nouns or verbs in a series, a modifier at the end of the list typically applies to the entire series of words. Thus, the Court reasoned that the series qualifier canon would recommend qualifying both "store" and "produce" with the phrase "using a random or sequential number generator." Moreover, drawing on statutory construction treatises, the Court argued that "[t]he comma in §227(a)(1)(A) thus further suggests that Congress intended the phrase 'using a random or sequential number generator' to apply equally to both preceding elements." Of note, Justice Alito concurred in the judgment, but wrote separately to address the Court's "heavy reliance" on the "series-qualified" canon.

At the same time, the Court rejected Duguid's argument that it should apply the "rule of the last antecedent," which would require "using a random or sequential number generator" to only modify "produce." The Court reasoned that rule of the last antecedent is "context dependent" and that it does not apply because "[t]he last antecedent before 'using a random or sequential number generator' is not 'produce'" but rather "telephone numbers to be called." Accordingly, the Court held that the most natural reading of the autodialer definition is that an ATDS must use a random or sequential number generator when storing or producing numbers to be called.

Statutory Context. The Court also held that the TCPA's context affirms that the definition of ATDS excludes calling or texting equipment that does not utilize a random or sequential number generator. Justice Sotomayor's opinion based this reasoning on other provisions of the statute. For example, the Court noted that Section 227(b)(1) makes it unlawful to use an ATDS to call an "emergency telephone line" and lines "for which the called party is charged for the call."[7] Moreover the opinion noted that Section 227(b)(1)(D) makes it unlawful to utilize an autodialer "in such a way that two or more telephone lines of a multiline business are engaged simultaneously."[8] The Court found that these restrictions "target a unique type of telemarketing equipment" which would risk dialing emergency lines or tying up multiple lines at a single business. Expanding this definition to include any equipment storing and dialing numbers, the Court argued, "would take a chainsaw to these nuanced problems when Congress meant to use a scalpel . . . [t]he TCPA's liability provisions, then, could affect ordinary cell phone owners in the course of commonplace usage. . . ."

The Court last dispensed with Duguid's counterarguments. *First*, the Court rejected Duguid's argument that its construction of the autodialer definition accords with the "sense" of the text because the verb "store" is not closely connected to the word "generator." The Court noted that there were patented devices "as early as 1988" that used a random number generator to store numbers, and that Duguid's reading makes less sense because it would sweep all cellphones under the purview of the TCPA. *Second*, the Court dismissed Duguid's use of the distributive canon of interpretation, which requires reading sentences with several antecedents and consequents in a distributive fashion to apply words to the subjects in the sentence that they most reasonably relate to. Specifically, the Court noted that "using a random or sequential number generator," the only consequent, would have to pertain to both antecedents. *Third*, the Court disagreed with Duguid's argument that because Congress had "broad privacy-protection goals," that should result in a broad reading of the TCPA. The Court found that just because Congress was "broadly concerned about intrusive telemarketing practices . . . does not mean it adopted a broad autodialer definition." *Fourth* and finally, the Court rebutted Duguid's warning that a narrow reading would lead to a "torrent of robocalls." The Court reasoned that Duguid "greatly overstates the effects" of a narrow interpretation because the TCPA "separately prohibits using 'an artificial or prerecorded voice' to various types of phone lines."[9]

Impacts of the Court's Decision for TCPA Litigation

The Court's narrow interpretation of an autodialer significantly limits the reach of the TCPA: rather than applying to a broad range of calling equipment, including "virtually all modern cell phones," it only applies to equipment with the "capacity to use a random or sequential number generator to either store or produce phone numbers to be called." Accordingly, the Court's action will go a long way to stemming the tide of class action TCPA suits brought against legitimate businesses.

However, the TCPA is a complex statute with multiple prohibitions that are distinct from the autodialer prohibition. While the decision in *Facebook v. Duguid* is a decisive win for calling parties with respect to the autodialer definition, other issues and risks raised by the TCPA remain unresolved, and will continue to be addressed by the FCC and courts.

---

1 *Campbell Ewald Co. v. Gomez*, 136 S. Ct. 663, 667 (2016).

2 47 U.S.C. § 227(a)(1).

3 *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, CG Docket No. 02-278, WC Docket No. 07-135, FCC 15-72, ¶¶ 16 & 20 (2015) ("*2015 Declaratory Ruling*").

4 *ACA International v. FCC*, 885 F.3d 687, 697 (D.C. Cir. 2018).

5 *Duran v. LaBoom Disco, Inc.*, 955 F.3d 279 (2d Cir. 2020).

6 *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1309 (11th Cir. 2020).

7 47 U.S.C. § 227(b)(1).

8 47 U.S.C. § 227(b)(1)(D).

9 47 U.S.C. §§ 227(b)(1)(A)-(B).