Updates
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Supreme Court Narrows TCPA's Definition of "Autodialer"

In *Facebook, Inc. v. Duguid et al.*, the U.S. Supreme Court overturned the U.S. Court of Appeals for the Ninth Circuit's interpretation of the Telephone Consumer Protection Act's (TCPA) definition of "automatic telephone dialing system" (autodialer) that had fueled a wave of class actions against defendants seeking to call and text their own customers. The Ninth Circuit's interpretation of autodialer, the Supreme Court observed, was so broad that it would have prohibited even many commonplace uses of cell phones by consumers. The Supreme Court held that to meet the definition of autodialer under the TCPA, a dialing system 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. This narrow definition of autodialer will likely stem the tide of litigation and allow businesses to use modern technologies, such as texting platforms, to text and call customers with a reduced threat of TCPA liability.

Background

This case arose from automated text messages that Facebook sent to Duguid, notifying him that someone had attempted to log in to his Facebook account from a new device or browser. Duguid claimed he had never created a Facebook account or consented to receive automated texts from Facebook. (As the Court noted, it was possible Duguid had been assigned a cell phone number that had previously been used by a Facebook subscriber who opted into receiving texts.) Duguid then filed suit, alleging that Facebook had "violated the TCPA by maintaining a database [of] stored phone numbers and programming its equipment to send automated text messages." In other words, Duguid proposed that the mere act of storing telephone numbers and sending automated messages was enough to make a device an autodialer and trigger the prior express consent requirements of the TCPA, regardless of whether the stored telephone numbers had been randomly or sequentially generated in the first instance. The Ninth Circuit agreed with Duguid's interpretation, holding that an autodialer need only have the capacity to store numbers and to dial those numbers automatically.

On appeal, the Supreme Court reversed the Ninth Circuit. In delivering the Court's unanimous opinion (with Justice Alito concurring in the judgment), Justice Sotomayor relied on certain canons of statutory interpretation to discern the "ordinary reading of the text." Justice Sotomayor explained that the statute's random or sequential number generation requirement applied equally to both storing and producing telephone numbers. It held, "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." Based on this requirement, the Court concluded that the definition of autodialer, "excludes equipment like Facebook's login notification system, which does not use such technology."

In response to Duguid's argument that the autodialer definition should be broadly construed to avoid locking in the TCPA to an old and easily circumvented technology, Justice Sotomayor found that the "Court cannot rewrite the TCPA to update it for modern technology." In other words, it is not for the courts to cure Congress' inability to draft the statute with language that flexibly anticipates changes in dialing technology. With this statement, the Court also indirectly rebuked the Federal Communications Commission (FCC), which has frequently sought a more expansive reading of the TCPA to cover emerging dialing technologies. The Court colorfully explained its reasoning as follows: "Expanding 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."

Takeaways

After a lengthy period of varying interpretations by the FCC and federal courts, the Court has finally provided needed clarity to stakeholders who feared that their legitimate dialing practices could be treated as unlawful under the Ninth Circuit's more expansive interpretation of the TCPA's term autodialer. Following the U.S. Court of Appeals for the District of Columbia Circuit's *ACA International* decision that vacated and remanded an expansive interpretation of autodialer adopted by the FCC in 2015, many stakeholders have been frustrated by the FCC's failure to adopt its own clarification of autodialer. However, now that the Court has interpreted the statutory language, it appears that the FCC would not have the discretion to adopt its own, potentially varying, interpretation of "autodialer."

In response to *Duguid*, Congress remains free to amend the TCPA definition of autodialer to address changes in technology but it is unclear whether there are sufficient votes to do so. Those in the legislature opposed to amending the TCPA are likely to observe that the effect of the Court's interpretation of the term autodialer should not significantly affect the TCPA's ability to deter the type of activity it was intended to prohibit: use of specific dialing technology and robocalls using artificial or prerecorded voice (which the Court did not address). Moreover, any congressional effort to revise the TCPA with an overly broad definition of autodialer likely would be met with strong opposition from a broad range of businesses and nonprofit organizations, among others, contending that the Ninth Circuit's broad interpretation unfairly ensnared legitimate communications practices that benefited consumers.

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