Consumer Litigation

American Bar Association Litigation Section

Summer 2021, Vol. 20 No. 1

July 15, 2021

Facebook Decision Upends TCPA Litigation Landscape

The Supreme Court's decision was a victory for Facebook and any other business that routinely attempts to communicate with its consumers using stored lists of consumer numbers.

By Michael P. Daly and Mark E. Rooney

The Supreme Court recently settled a long-simmering circuit split over a key component of the Telephone Consumer Protection Act (TCPA). The unanimous decision in *Facebook, Inc. v. Duguid* limits the scope of the statute's restriction on autodialing and is expected to drastically decrease the volume of litigation arising under that part of the statute—which in recent years has been one of the most active areas of class-action litigation.

The Background

The decision centers on the TCPA's definition of an "automatic telephone dialing system" (ATDS). Under the statute, an ATDS is defined 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." 47 U.S.C. § 227(a)(1).

Most lay readers would likely understand that a device is not an ATDS unless it generates numbers randomly or sequentially. But the prospect of uncapped statutory damages has prompted plaintiffs to proffer several atextual readings of the statute, chief among them that anything is an ATDS as long as it can "store" and then "dial" numbers. Under that reading, whether equipment uses a random or sequential number generator is irrelevant, businesses could be liable for calling from a stored list of their customers, and indeed all people who use a smartphone could be liable for calling from a stored list of their contacts.

This proplaintiff position gained a toehold in the U.S. Court of Appeals for the Ninth Circuit, *see Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018), and then traction in the U.S. Court of Appeals for the Second and Sixth Circuits. *See Duran v. La Boom Disco,*

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Inc., 955 F.3d 279 (2d Cir. 2020); *Allan v. Pa. Higher Educ. Assistance Agency*, 968 F.3d 567 (6th Cir. 2020).

But other circuit courts came to the opposite conclusion, holding that equipment is not an ATDS unless it generates numbers randomly or sequentially. *See 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); *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018).

In light of this stark split in the circuits, the Supreme Court agreed to review *Facebook, Inc. v. Duguid*, which arose from text messages that Facebook had sent to alert a user (whose number had, unbeknownst to it, been reassigned to the plaintiff) that an account had been accessed from an unknown browser.

The Decision

The Court reversed the Ninth Circuit and held that equipment does not qualify as an ATDS unless it has "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." *Facebook, Inc. v. Duguid*, No. 19-511, slip op. at 1 (2021). In other words, using a "random or sequential number generator" is a quintessential characteristic of an ATDS. Justice Sotomayor wrote the opinion and was joined by every justice except Justice Alito, who concurred in the outcome and wrote separately only to express his view that the Court sometimes places undue emphasis on certain canons of construction.

The Court began by noting that Congress believed that automatically dialing random or sequential numbers was "uniquely harmful" because (among other things) it could cause congestion in emergency lines and reach cell phones that (when the statute was enacted in 1991) paid substantial per-minute fees for incoming calls. It was "against this technological backdrop," the Court found, that Congress made it unlawful to use an ATDS to call certain kinds of numbers without the "prior express consent" of the called party. *Id.* at 2–3.

The Court next turned to the plain language of the statute and certain "conventional rules of grammar," for example, the "series-qualifier canon," which, it explained, "generally reflects the most natural reading of a sentence." *Id.* at 5. The Court explained that applying that canon to this definition "recommends qualifying both antecedent verbs, 'store' and 'produce,' with the phrase 'using a random or sequential number generator.'" *Id.* at 6. That, the Court concluded, "produces the most natural construction" of the statute. *Id.*

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The Court next rejected the plaintiff's reliance on the last-antecedent canon, which generally suggests that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Id.* at 7. That canon is "context dependent," the Court explained, and does not necessarily apply when, as in this case, "the modifying clause appears after an integrated list." *Id.* In any event, the Court noted, the "last antecedent" here was not "produce" but rather "to be called." *Id.* As a result, this canon "would provide no help" to Duguid.

The Court also reasoned that adopting the Ninth Circuit's reading of the statute "would take a chainsaw" to the "nuanced problem" of autodialed numbers "when Congress meant to use a scalpel." *Id.* at 8. Of most concern to the Court was the possibility that the Ninth Circuit's reading "could affect ordinary cell phone owners in the course of commonplace usage, such as speed dialing or sending automated text message responses." *Id.* It explained as follows:

> That Congress was broadly concerned about intrusive telemarketing practices . . . does not mean it adopted a broad autodialer definition. Congress expressly found that the use of random or sequential number generator technology caused unique problems for business, emergency, and cellular lines. Unsurprisingly, then, the autodialer definition Congress employed includes only devices that use such technology, and the autodialer prohibitions target calls made to such lines. The narrow statutory design, therefore, does not support Duguid's broad interpretation.

Id. at 11.

Finally, the Court rejected the parade-of-horribles argument that reading the statute according to its plain language would "unleash" a "torrent of robocolls." *Id.* That argument failed for two reasons: (1) because other parts of the statute would still restrict other kinds of calls, and (2) because in any event this argument should be directed to Congress rather than the Court. If Congress "did not define an autodialer as malleably as he would have liked," the Court noted, then "Duguid's quarrel is with Congress." *Id.* at 12. Put differently:

> "Senescent" as a number generator (and perhaps the TCPA itself) may be, that is no justification for eschewing the best reading of §227(a)(1)(A). This Court must interpret what Congress wrote, which is that "using a random or sequential number generator" modifies both "store" and "produce."

Id.

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The Takeaway

The Supreme Court's decision was a victory for Facebook and any other business that routinely attempts to communicate with its consumers using stored lists of consumer numbers. The ruling is expected to significantly stanch the flow of TCPA litigation premised on violations of the law's ATDS restrictions. It may also, however, bring a renewed emphasis on litigation based on other calling restrictions that are unaffected by the decision—including the prohibitions on nonconsensual use of prerecorded or automated voice messages, Do-Not-Call restrictions, and even fax restrictions.

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