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Supreme Court Resolves Circuit Split On TCPA Autodialer Definition

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On April 1, 2021, the United States Supreme Court issued a long-awaited landmark decision that finally resolves a deep split of authority in the Circuit Courts of Appeal regarding the definition of an "autodialer" under the Telephone Consumer Protection Act (TCPA). In a unanimous opinion, the justices overturned a Ninth Circuit ruling that broadly defined the type of automatic telephone dialing system (ATDS) prohibited by the TCPA. *See Facebook, Inc. v. Duguid*, Case No. 19-511 (2021).

While the TCPA defines an ATDS as equipment that "has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such numbers," the Ninth Circuit broadly construed that definition and held that it is enough for a phone to be able to dial stored numbers automatically to qualify as an ATDS under the TCPA -- which definition would encompass the capabilities of most smartphones. Giving rise to a deep split of authority between the Circuit Courts, the Second Circuit and Sixth Circuit agreed with the Ninth Circuit's broad definition while, on the other hand, the Third, Seventh, Eleventh and DC Circuits held that a device is not an ATDS unless it generates and dials random or sequential phone numbers.

This split of authority was significant, as claims for TCPA violations are ripe for class action suits as text message marketing campaigns increase and TCPA violations carry statutory fines of between $500 and $1,500 per call or text.

Last July, the Supreme Court agreed to review the Ninth Circuit's revival of Petitioner Noah Duguid's proposed class action against Facebook, wherein Duguid alleged that Facebook had used an ATDS without the requisite consent to contact him via text message to alert him to suspicious activity on his account, despite the fact that he did not have a Facebook account and never provided consent for Facebook to send him text messages. Facebook claimed that the texts were sent by mistake, and that the calls likely resulted from the reassignment of an actual user's former number to Duguid (which is not uncommon but was not contemplated at the time of the TCPA's enactment). Regardless, Facebook argued that it had not used a random or sequential number generator to send the messages and therefore could not be held liable. The Ninth Circuit, however, reasoned that Duguid had sufficiently pled the use of an ATDS by alleging Facebook's equipment "had the capacity to store numbers to be called and to dial such numbers automatically" and

thus held that any device or system that could store telephone numbers was an ATDS restricted by the TCPA.

In arguing for reversal and dismissal of the case, Facebook asserted that its automated system, which only stores and automatically dials numbers, operates similarly to a standard smartphone, and that the Ninth Circuit's broad interpretation could expose millions of people to TCPA claims and its stiff penalties, a position that was supported by many high profile companies, trade associations, public interest firms and the federal government that filed amicus briefs supporting Facebook's arguments.

In an opinion authored by Justice Sotomayor, the Supreme Court relied upon conventional rules of grammar and the statutory intent of the TCPA, holding that "[i]n sum, 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. This definition excludes equipment like Facebook's login notification system, which does not use such technology."

In reaching its interpretation, the Court primarily relied upon the "series-qualifier canon" rule of grammar, which generally reflects the most natural reading of a sentence and, as applied here, recommends qualifying both antecedent verbs "store" and "produce" with the modifying phrase "using a random or sequential number generator." Additionally, the Court reasoned that because the modifying phrase immediately follows the concise integrated clause "store or produce telephone numbers to be called", it would be odd to apply the modifier to only a portion of this cohesive preceding clause, where the clause hangs together as a unified whole, using the word "or" to connect two verbs that share a common direct object, "telephone numbers to be called."

In relying upon the statutory context of the TCPA to support the Court's holding, the Court noted that the TCPA's ATDS restrictions "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". The Court reasoned that: "[e]xpanding 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", noting that Duguid's expansive interpretation of an autodialer would capture virtually all modern cell phones, which have the capacity to "store … telephone numbers to be called" and "dial such numbers" and would expose ordinary cell phone owners to TCPA liability in the course of commonplace usage, such as speed dialing or sending automated text message responses, which could not have been Congress' intent. To the extent that the ATDS definition fails to cover dialing technologies that did not exist at the time of the TCPA's 1991 enactment, as Justice Sotomayor explained, "Duguid's quarrel is with Congress, which did not define an autodialer as malleably as he would have liked."

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With hundreds of litigations and arbitrations stayed pending the Supreme Court's decision, it is certain to alter the outcome of those and future cases now that the courts and litigants have a uniform definition of an ATDS when assessing potential TCPA violations. The decision likewise has impact on companies wishing to market to current and prospective customers via text message, by resolving the question as to what types of technologies and systems will be considered an ATDS so that companies can better assess the requirements of prior consent.

If you have any questions regarding the matter raised in this Alert, please feel free to contact Terese Arenth at tarenth@moritthock.com or (516) 880-7235.

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