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Supreme Court Strikes Down Broad Interpretation of Autodialer Under the TCPA

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On Thursday, the Supreme Court issued a decision in *Facebook v. Duguid* that resolved a circuit split concerning the definition of "automatic telephone dialing system"—ATDS or "autodialer"—under the Telephone Consumer Protection Act (TCPA). The Court held that "a necessary feature of an autodialer under §227(a)(1)(A) is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called." The Court's judgment was unanimous, and Justice Alito wrote a concurring opinion. The *Duguid* decision provides significant clarity in this area of law and will lower the risk for organizations who seek to send legitimate calls and text messages to their individual constituencies. However, while the *Duguid* decision will immediately impact the TCPA landscape, it did not totally obliterate TCPA litigation. In addition, the decision will intensify the policy debate about the proper regulation of automated calls and text messages and calls for Congress to regulate.

***Duguid* resolved a significant battle over the definition of an autodialer.** By way of background, the TCPA and its implementing regulations impose significant restrictions on calls and text messages sent using an ATDS or with a pre-recorded voice. Both the FCC and private plaintiffs have the power to enforce the TCPA, and each can seek significant penalties for violations.

Before Thursday, "Exactly what type of dialing technology qualifies as an ATDS?" had been a highly unsettled issue. The statute defines an 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." 47 U.S.C. § 227(a)(1). But neither the court system nor the FCC had managed to settle on a workable, nationwide interpretation of this definition. Of particular note, in 2015, the FCC interpreted an autodialer as any device that has the "potential functionality" or "future possibility" of performing autodialer functions, even if the autodialer functions were not actually used, and even if substantial modifications would be required to render the device an autodialer. But the D.C. Circuit invalidated this interpretation in *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), finding fault in the Commission's inconsistent rationales for its definition and its overly broad approach, which would turn virtually every smartphone into an ATDS. Since this ruling, the FCC has not offered an alternative interpretation of the term. In the absence of further guidance from the FCC, courts have taken different approaches to defining the necessary qualities of an autodialer, creating substantial legal uncertainty across the country.

The *Duguid* case grew out of this uncertain landscape. Duguid alleged that Facebook had sent

him text messages using an ATDS without his consent, in violation of the TCPA. The district court dismissed Duguid's suit, on the ground that he had insufficiently pled Facebook's use of an autodialer. The Ninth Circuit reversed, holding that systems that had the capacity to "store numbers to be called" and "to dial such numbers automatically" should qualify as an ATDS, even if the device was unable to use a random or sequential number generator. The Ninth Circuit reasoned that the "random or sequential number generator" requirement only applied to devices that "produce" telephone numbers, and not to devices that "store" numbers. The Second and Sixth Circuits had similarly broad interpretations, while the Third, Seventh, and Eleventh Circuits interpreted autodialer more narrowly.

Relying primarily on the plain text of the statute, the Supreme Court rejected the broad approach. The Court held that "in all cases, whether storing or producing numbers to be called, the equipment in question must use a random or sequential number generator," and that Duguid had failed to plausibly plead that Facebook used such a device. The Court also rejected Duguid's argument concerning legislative intent, explaining: "That Congress was broadly concerned about intrusive telemarketing practices . . . does not mean it adopted a broad autodialer definition."

***Duguid* resolves key issues, but not the entire debate over automated calls and texts.** In the wake of the *Duguid* decision, dialing systems that store lists of numbers and dial from those lists —and that do not have the capacity to dial randomly generated or sequential numbers—clearly fall outside of the scope of the TCPA. But it does not mean the end of government regulation of automated calling technology, nor a complete halt to TCPA suits where a defendant has allegedly called randomly generated or sequential numbers.

First, the Supreme Court decision does not directly state what the "capacity" to dial randomly generated or sequential numbers means in practice, and whether the ability to make future modifications to a device could give it such capacity. Indeed, stakeholders vigorously debated these issues as part of the FCC's 2015 TCPA proceeding that resulted in its now-defunct ATDS definition. But the opinion offers potential guidance on how the Court might view this issue. The Court rejected Duguid's argument in part because "Duguid's interpretation of an autodialer would capture virtually all modern cell phones," since cell phones generally have the capacity to store and dial numbers. And in a footnote, the Court further stated that "all devices require some human intervention," and declined to interpret the TCPA as requiring a "line-drawing exercise around how much automation is too much." This suggests that the Court would disfavor an expansive interpretation of "capacity" that encompasses the potential or future capabilities of a device if it were modified, since such an expansive interpretation likely would capture all cell phones or devices.

Second, the TCPA's ATDS provisions are not the exclusive path for plaintiffs and regulators to bring lawsuits alleging unwanted, automated calls and texts. The TCPA's restrictions on pre-recorded voice calls remain untouched by the *Duguid* decision, as may some state laws limiting the intrastate use of automated calling technology. Additionally, the Federal Trade Commission and various states have stringent rules regulating telemarketing, which may be enforced with even more vigor in the wake of *Duguid.*

Last, in light of widespread consumer frustration with unwanted automated calls, legislators at the state and federal level will likely respond quickly with proposals for new restrictions on calls and dialing technology. And while the FCC's authority to interpret the statute is limited both by the *Duguid* and *ACA International* decisions, the FCC could again attempt to define "capacity" or other portions of the ATDS decision in a manner that limits *Duguid*'s scope. Entities that have a legitimate need to contact American consumers should closely monitor both legislative and agency action on this issue, to ensure that legitimate communications are not unduly restricted in an effort to address consumers' understandable frustration.

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