

Supreme Court Sides with Facebook and Limits Federal Robocall Ban

April 2, 2021 Andrea Levenson

PRACTICES Class Action Defense, Privacy and Cybersecurity, Media and Entertainment Litigation, Social Media, Litigation

In *Facebook v. Duguid*,¹ the Supreme Court recently issued an opinion that should significantly reduce class action litigation under the Telephone Consumer Protection Act (“TCPA”). The Court adopted a narrow reading of what constitutes an “automatic telephone dialing system,” resolving a critical circuit split and expanding companies’ ability to communicate with customers and employees alike.

The circuit split regarding what constitutes an autodialer

The TCPA proscribes most types of calls made with an “automatic telephone dialing system,” or autodialer, which 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.” In recent years, there has been a significant circuit split over the term. The issue is a grammatical one—does the clause “using a random or sequential number generator” modify only the immediately preceding verb or the entire preceding clause? The Second, Sixth, and Ninth Circuits held that the clause modified only “produce,” and that any equipment that could “store” telephone numbers was an autodialer. The Third, Seventh, and Eleventh Circuit adopted the narrower reading, and held that equipment is only an autodialer if the numbers it stores or produces are randomly or sequentially generated.

Procedural Background

Noah Duguid never signed up for a Facebook account but received text messages about supposed log-ins to his account, even after he asked Facebook to stop. He brought a suit on behalf of a nationwide class, alleging that the unsolicited messages violated the TCPA. Facebook sought dismissal, arguing that these were targeted, individualized text messages sent to telephone numbers that were linked to specific accounts—not messages to numbers that were randomly or sequentially generated, as required by the TCPA. The district court agreed, holding that Duguid failed to allege that Facebook used an autodialer to send the texts, and dismissed the suit.

The Ninth Circuit reversed and held that Duguid had stated a claim under the TCPA by alleging that Facebook’s notification system automatically dialed stored numbers. An autodialer, the Ninth Circuit held, need not be able to use a random or sequential generator to store numbers; it need only have the capacity to “store numbers to be called” and “to dial such numbers automatically.”²

The Supreme Court ruling

Facebook appealed, arguing that its practice of sending targeted messages to specific individuals cannot be equated to sending messages through an autodialer “using a random or sequential number generator,” and is not prohibited by the TCPA. Facebook argued that the only logical

reading of the TCPA is that the clause “using a random or sequential number generator” modifies both verbs that precede it (“store” and “produce”).

The Supreme Court agreed, and held that under the “series qualifier canon,” a modifier at the end of a series of verbs applies to the entire series, particularly when it follows a concise, integrated clause. It criticized the Ninth Circuit’s expansive interpretation of autodialers, noting that it would cover calls and texts placed by modern mobile phones—and that Congress did not intend such a sweeping impact when it passed the TCPA in 1991. Moreover, the Court noted that the broad interpretation was inconsistent with the statute’s goal of stopping aimless, random calls.

In light of the decision, businesses can begin to evaluate how technology can help them in reaching clients, potential clients, or any other person through direct targeting. But businesses seeking to expand their outreach should still proceed with caution, as a separate provision of the TCPA prohibits calls made using an artificial or pre-recorded voice. For information regarding how to comply with the TCPA in your business communications, please contact one of the attorneys listed below.

¹ *Facebook, Inc. v. Duguid et al.*, case number 19-511.

² 926 F. 3d 1146, 1151 (2019) (quoting *Marks v. Crunch San Diego, LLC*, 904 F. 3d 1041, 1053 (9th Cir. 2018)).