The Supreme Court Rules for Facebook: What It Means for TCPA Compliance and Class Certification Defense

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In a decision that has the potential to significantly shift the landscape of litigation under the Telephone Consumer Protection Act ("TCPA"), the Supreme Court in *Facebook v. Duguid* unanimously rejected a broad definition of a key term in the statute. The TCPA prohibits, among other things, calls made using an automatic telephone dialing system ("ATDS") under circumstances enumerated in the statute, such as calls made to cellular telephone numbers without the prior express consent of the called party. In recent years, TCPA class action litigation has become a multibillion dollar industry. Plaintiffs frequently bring TCPA suits against a wide swath of consumer-oriented businesses and other entities, including, for example, digital marketers, technology companies, healthcare providers, debt collectors, naval recruiters and political campaigns. These claims are generally predicated on the allegation that the automated dialing software used by such entities to contact their consumers falls within the definition of an ATDS.

Resolving a circuit split, the Supreme Court sided with TCPA defendants, who have argued that the definition of ATDS should be limited to 1990s-era devices that make calls using a random or sequential number generator. This ruling makes it difficult—if not impossible—for plaintiffs to continue bringing the TCPA claims based on standard dialing software. That said, commercial entities whose business practices include placing automated calls or text messages should take advantage of the opportunity to update their TCPA compliance programs to the extent necessary because the plaintiffs' bar will continue to pursue TCPA claims in the hopes of securing large settlements or statutory damages (from $500 to $1,500 per call).

The Supreme Court's Opinion. *Duguid* arose out of a class action complaint by Noah Duguid that alleged Facebook violated the TCPA by sending automated text messages containing "login notifications" regarding access to a Facebook account. Duguid claimed that he did not have a Facebook account and had not provided prior express consent to receive these text messages. Facebook moved to dismiss on the basis that its text messaging platform was not an ATDS.

The TCPA 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." Facebook argued that "using a random or sequential number generator" modifies both verbs in the phrase "to store or produce"—and Duguid did not plead that Facebook's texting platform used a random or sequential number generator. Duguid, by contrast, argued that it was sufficient that Facebook's platform "stored" numbers because "using a random or sequential number generator" modifies only the term "produce."

The Supreme Court unanimously sided with Facebook. Applying basic canons of statutory interpretation, it held that "using a random or sequential number generator" modified both antecedent verbs, "store and produce." Thus, "Congress' definition of an [ATDS] 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." The Court explained that statutory history was consistent with the plain text. At the time of the TCPA's passage in 1991, technology allowed callers to dial random or sequentially generated telephone numbers automatically, which had the result of seizing telephone numbers used by public emergency service, businesses with sequentially numbered phone lines, and cellular telephone numbers. These calls were an inconvenience to cellular telephone users and saddled them with fees because at the time the TCPA was enacted, cellular providers typically charged for incoming calls (as well as outgoing ones). The Court held that the ATDS was tailored to address this type of conduct. Plaintiff's theory, by contrast "would take a chainsaw to these nuanced problems when Congress meant to use a scalpel," as his definition "would capture virtually all modern cell phones."

The opinion ended by dismissing plaintiffs' concern that Facebook's interpretation would lead to a flood of so-called "robocalls" because the TCPA still separately prohibits various types of calls using "an artificial or prerecorded voice." Further, the Court rejected Duguid's argument that the "TCPA must be treated as an 'agile tool'" because "technology 'adapts to change.'" Instead, the Court stated that "Duguid's quarrel is with Congress, which did not define an autodialer as malleably as he would have liked." In the context of the Court's focus in its analysis on technology available at the time the TCPA was enacted, this observation is a strong indication that the Court does not believe the judiciary should engage in creative statutory construction in response to technological innovation.

What's Next for TCPA Litigation? In the aftermath of *Duguid*, plaintiffs are likely either to seek to limit its impact or to file different TCPA causes of action. These developments may require defendants to implement new litigation strategies:

- Plaintiffs may seek to distinguish or limit the scope of *Duguid* by arguing that certain commonly used dialers still fall within the Supreme Court's interpretation of an ATDS. These arguments likely face an uphill battle in light of the Supreme Court's

language that makes clear that the ATDS definition was meant to address specific problems caused by the use of dialers that randomly or sequentially generate telephone numbers—technology not used by companies that call lists of consumers.

- Plaintiffs may file suits based on allegations about calls made using "artificial or pre-recorded voice" messages or based on violations of "Do Not Call" regulations. Defendants who come forward with appropriate factual and/or expert evidence may have arguments under either theory regarding why a class cannot be certified because there are prerequisites to liability that may generate fact-intensive inquiries that defeat class certification. For "artificial or prerecorded voice" allegations, defendants may be able to demonstrate that individualized inquires are required to determine whether each call recipient actually received a voice message. For "Do Not Call" claims, individualized inquiries may be required to determine whether calls were made to residential telephone subscribers. Additionally, any TCPA defendant who, in the ordinary course, places calls only to consenting consumers, may be able to demonstrate that individualized determinations are required to assess whether calls were made with prior express consent.

- Plaintiffs may file suit under state-law "mini-TCPA" statutes. For a company with nationwide operations, the maximum class size is likely to be significantly smaller because it will be limited to certain call recipients within the state—not the whole country. Defendants may also be able to argue that the state law statute applies only to calls made to recipients inside a state's borders, and individualized inquiries are needed to determine whether call recipients were located in state at the time of the call at issue.

Companies should also be alert to the possibility that Congress may change the statute—and some representatives have already indicated they plan to do just that. It is unknown, however, whether these efforts will succeed or what a revised version of the TCPA might prohibit. There may also be opportunities for commercial entities to advocate the development of legislation or regulation by the Federal Communications Commission that targets entities making "spam" calls and does not ensnare companies making good faith efforts to reach their consumers.

TCPA Compliance and Risk Mitigation Strategies. In light of *Duguid*, companies can potentially eliminate exposure to certain TCPA claims by not using dialers that fall within the Supreme Court's interpretation of an ATDS, *i.e.*, dialers that make use of random or sequential number generators. That said, since TCPA litigation is certain to continue, companies should maintain strong TCPA compliance programs. The foundation of any compliance program should be ensuring that calls are made only with prior express consent—in writing where required—and that compliance can be documented. Companies may wish to consider using third-party services that are

designed to minimize the risk that calls are being made to incorrect or reassigned numbers. Additionally, companies that make use of marketers or lead generators should ensure (to the extent feasible) that such entities have appropriate TCPA compliance protocols and should take appropriate remedial steps if they become aware of noncompliance. TCPA defendants that can incorporate evidence of a robust compliance program into their class action defense typically fare far better than those that cannot.

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