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Client Alert

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Supreme Court Accepts Narrow Definition of Autodialer, Limiting Reach of TCPA

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On April 1, in a highly anticipated decision that likely will have a significant effect on litigation under the Telephone Consumer Protection Act (TCPA), the Supreme Court ruled on what qualifies as an "automatic telephone dialing system," as that phrase is used in the TCPA. In a unanimous decision written by Justice Sotomayor, the Supreme Court decided that to qualify as an "automatic telephone dialing system", a device must have the capacity either to store, or to produce, a telephone number using a random or sequential number generator.

The TCPA bans certain telemarketing practices by, among other things, imposing restrictions on making calls with an "automatic telephone dialing system". The TCPA defines "Automatic Telephone Dialing System" (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). The law, enacted in 1991, did not contemplate the advancements in telephone technology that were to come, and the Federal Communications Commission attempted to fill the void in a 2015 Declaratory Ruling, broadening the statutory definition of an ATDS by stating, "a piece of equipment can possess the requisite 'capacity' to satisfy the statutory definition of 'autodialer' even if, for example, it requires the addition of software to actually perform the functions described in the definition."

The D.C. Circuit later invalidated the FCC's expansive interpretation but left open the question of what devices the definition encompasses. A circuit split arose as courts interpreted the statutory definition. In the case that reached the Supreme Court, Facebook sent text messages to a non-Facebook user notifying him that someone had attempted to access the Facebook account associated with his telephone number. When he was unable to stop the notifications, he brought a class action against Facebook for violation of the TCPA. After the complaint was dismissed, the plaintiff appealed, and the Ninth Circuit determined that an ATDS included any equipment with the capacity to store phone numbers on a

list, rather than just phone numbers that equipment randomly or sequentially generates. The Ninth Circuit's opinion was in line with similar decisions out of the Second and Sixth Circuits, but it was at odds with decisions out of the Third, Seventh, and Eleventh Circuits, which had given a narrower definition to an ATDS, requiring that it *both* store and produce numbers "using a random or sequential number generator."

The Supreme Court adopted the Third, Seventh, and Eleventh Circuits' narrower definition of ATDS. Relying on a close reading of the text, the Supreme Court determined that the relevant modifier--to use a random or sequential number generator--applied to the entire rule, both to storing and producing phone numbers. Moreover, the Court observed that under the broader interpretation of the term—that an ATDS need only store and dial telephone numbers—nearly every modern cell phone could be an ATDS, a result that the Court said would "take a chainsaw to these nuanced problems when Congress meant to use a scalpel."

This Supreme Court ruling significantly limits what devices, and, by extension, what calls, are subject to the TCPA's prohibitions. Any device without the capacity either to store *or* to produce a telephone number using a random or sequential number generator now is not subject to the law's restrictions on the use of an ATDS. Notably, the Supreme Court did not expressly require that the system must actually *use* the random or sequential number generator, leaving open the question of whether mere "capacity" is sufficient, an issue that will need to be sorted out in the lower courts.

The TCPA is not, however, dead in the water. The provisions regulating the use of artificial or prerecorded voice calls and regulations surrounding calls to numbers that are registered on the Do Not Call Registry continue to affect permissible outbound communications. Further, several state laws continue to regulate calls made via autodialers; many state laws have their own statutory definition of autodialers and may not follow the Supreme Court's ruling. Beyond the legal restrictions, the major cellular carriers have cracked down on calling practices deemed too aggressive and are expected to continue monitoring their networks for any new flare ups in such practices.

In the aftermath of the *Facebook* decision, Senators Ed Markey (D-MA) and Anna Eshoo (D-CA) announced plans to introduce an amendment to the TCPA to broaden the statute's scope beyond the Supreme Court's interpretation. However, it currently appears unlikely that such measure would receive the necessary bipartisan support for passage in the near future.

The case is *Facebook Inc. v. Duguid*, case number 19-511, before the U.S. Supreme Court.

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