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## **No Chainsaws When a Scalpel Will Do: Supreme Court Clarifies that the Use of a Random or Sequential Number Generator is Fundamental to what Constitutes an Autodialer under TCPA**

The United States Supreme Court issued a unanimous decision in *Facebook, Inc. v. Duguid* on April 1, 2021, resolving a split between the Ninth Circuit and the Seventh and Eleventh Circuits on what constitutes an “automatic telephone dialing system” or “autodialer” under §227(a)(1) of the Telephone Consumer Protection Act of 1991 (TCPA).

The facts in the case are relatively straightforward—Duguid began receiving login-notification text messages from Facebook, alerting him that someone had attempted to access the Facebook account associated with his phone number from an unknown browser. However, Duguid never had a Facebook account and never provided his phone number to Facebook. In bringing the proposed class action, Duguid did not contend that Facebook randomly generated his phone number in order to send these text messages, instead, Duguid argued that Facebook violated the TCPA by maintaining a database that stored phone numbers and by programming its equipment to send automated text messages to those stored phone numbers each time the associated account was accessed by an unrecognized device or web browser.

While the facts were simple, the real dispute lay in parsing the TCPA’s definition of an autodialer. Equipment qualifies as an autodialer under the TCPA if it has the capacity to do two things: (1) to *store or produce telephone numbers* to be called, using a random or sequential number generator; and (2) to dial such numbers. The Ninth Circuit sided with Duguid, finding that the phrase “using a random or sequential number

generator” only applied to the ways the numbers were initially produced. Thus, even though Facebook’s equipment didn’t use a random or sequential number generator to produce the numbers, the fact that Facebook’s equipment stored phone numbers and dialed them was enough to bring the equipment within the scope of an autodialer.

Conversely, the Seventh and Eleventh Circuits have previously held that the phrase “using a random or sequential number generator” applied to both the storage and production components of the definition, meaning that equipment that simply stored numbers that were not generated through a random or sequential number generator, ostensibly through another piece of equipment, is not an autodialer even if it is capable of automatically dialing the stored numbers.

Justice Sotomayor, writing for the Court, cited conventional rules of grammar, namely the “series-qualifier cannon” which provides that, when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a modifier at the end of the list normally applies to the entire series; thus, the Court adopted a position more in line with the position taken by the Seventh and Eleventh Courts, holding that “a necessary feature of an autodialer under §227(a)(1)(A) is the capacity to use a random or sequential number generator either to store or produce phone numbers to be called.”

While the opinion is an excellent grammar lesson (through, among other principles of grammar, evaluating qualifying phrases separated from antecedents by a comma), the Court also examined the propriety of interpreting the definition of an autodialer to include equipment that merely stores and dials telephone numbers. Referring to this approach as a “chainsaw . . . when Congress meant to use a scalpel,” the Court noted that the Ninth Circuit’s interpretation of an autodialer would mean that virtually all modern cell phones would be considered autodialers, as they have the capacity to store numbers to be called and dial them, and the use of features such as speed dialing and sending automated text message responses could give rise to liability under the TCPA.

The Court’s opinion is limited to the use of autodialers and does not implicate other prohibitions under the TCPA, such as the use of an artificial or prerecorded voice for calls to various types of phone lines, including home phones and cell phones absent any applicable exceptions.

Michael Best will continue to monitor the implications of the Court’s decision and provide updates. For additional information on the TCPA as well as assistance in complying with other privacy laws, please contact a member of our Privacy & Cybersecurity Team.

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