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Supreme Court Narrowly Defines "Autodialers" Subject to Federal Regulation

The Supreme Court on April 1 unanimously chose the narrower of two competing interpretations adopted by lower courts throughout the country concerning what kind of equipment qualifies as an "automatic telephone dialing system" (ATDS or "autodialer" (or, more commonly, "robocalls")) under the Telephone Consumer Protection Act (TCPA). As a result, equipment that merely stores telephone numbers *without* using "a random or sequential number generator" to do so is *not* for that reason alone an autodialer. This may mean that at least some predictive dialing equipment that loads the phone numbers of particularly selected individuals are not autodialers. Overall, the Court's ruling establishes a single, national definition of "autodialer" that alleviates the complexity, risk and confusion for organizations (and autodialer vendors) that use dialing technology to reach people in multiple states.

The decision's practical importance arises from the TCPA prohibition against anyone making a call or sending a text message using an autodialer to any cell phone without the prior express consent of the called party. A non-consenting person who is contacted via an autodialer may file civil claims, including class actions where the facts warrant, against the sender; in addition, the Federal Communications Commission may impose penalties or fines in an enforcement action. The penalty for a TCPA violation, even without proof of actual damages, is $500 (that is, per individual text or call) or $1,500 for each "willful or knowing" violation. (Actual damages, if greater, may instead be obtained, and are subject to the same tripling.) Because autodialing is an inexpensive technology that can reach vast numbers of people quickly, the cost of error can easily add up quite substantially. For that reason, it is critical to have clarity about what is an "autodialer" in the first place.

Before last week's decision, three federal appeals courts covering 16 states had ruled that phone number storage capacity alone qualifies equipment as an ATDS. The Supreme Court instead sided with the holdings of three other appellate courts covering nine states[1] and concluded that the TCPA applies only to equipment that either (or both) "stores" numbers using a random or sequential number generator or "produces" numbers using a random or sequential number generator (plus, in either case, the equipment must have the capacity to "dial" the numbers in order to be an autodialer). The Court explained: "Expanding the definition of an autodialer to encompass any equipment that merely stores

[1] Federal district courts in numerous other states had also sided variously with the broader and narrower interpretations, exacerbating these geographic inconsistencies in TCPA coverage.

and dials telephone numbers would take a chain saw to [problems caused by autodialers] when Congress meant to use a scalpel."

The case decided, *Facebook v.Duguid*, arose from a Facebook practice of automatically sending text messages to Facebook users when someone sought to access the Facebook page associated with their cellphone number from an unknown browser. The individual plaintiff wasn't a Facebook user and sued, alleging a TCPA violation because Facebook had "stored" his number. But Facebook successfully argued that it stored numbers without using a random or sequential number generator, and that it could produce numbers only on an individualized basis, for specific cause, also not by using a random or sequential number generator.

The decision also minimized the significance of "human intervention" as a factor in deciding whether or not equipment is an autodialer, pointing out that "all devices require some human intervention, whether it takes the form of programming a cell phone to respond automatically to texts received in 'do not disturb' mode or commanding a computer program to produce and dial phone numbers at random." For that reason, the Court refused to engage in "a difficult line-drawing exercise around how much automation is too much" in interpreting the TCPA. In doing so, the Court appears to have rejected a common approach used to date by lower courts in deciding whether particular equipment is an autodialer.

For more information about federal regulation of autodialing, see the 2016 Alliance for Justice publication authored by Trister, Ross, Schadler & Gold, *Robocalling Rules: What You Need to Know About Robocalls, Robotexts, and Autodialers*.

This memorandum does not provide legal advice. Persons should consult their legal counsel regarding the application of its information to any particular matter.