Looking Forward After the U.S. Supreme Court Adopts Narrow, Business-Friendly TCPA "Autodialer" Standard

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On April 1, 2021, the U.S. Supreme Court announced its decision in *Facebook, Inc. v. Duguid*, adopting the narrow "autodialer" standard under the Telephone Consumer Protection Act that Facebook favored. The unanimous opinion establishes that equipment can be regulated as a TCPA "autodialer" only if it has the capacity either to store a telephone number using a random or sequential number generator, or to produce a telephone number using a random or sequential number generator. This decision rejects the broader, consumer-friendly interpretation that applied the TCPA "autodialer" definition to equipment that was capable of automatically dialing numbers from a stored list.

The Court's decision will not make TCPA cases, or even just TCPA "autodialer" cases, disappear overnight. For that reason, auto dealers, finance companies, and all other businesses that contact consumers by phone or text still need to think about compliance while celebrating the good outcome in this case. Justice Sotomayor noted this in the Court's decision, perhaps in an effort to make the outcome less painful to a nation frustrated by unending interruptions from unwanted calls and texts. At the close of her opinion, she writes that prerecorded messages delivered to cell phones and residential lines are still subject to TCPA consent requirements, whether or not an autodialer is used. The TCPA's national do-not-call list and company-specific do-not-call standards are still in place. And each of these remaining provisions offers plaintiffs a private right of action. However, the Court's narrow "autodialer" definition should take away, or at least complicate, a path to litigation that TCPA plaintiffs have relied on for years.

The plaintiffs' bar has already been scrambling for bits and pieces in the *Facebook* decision that it can use to cobble together TCPA cases under the new nationwide "autodialer" standard. This group has focused its attention on footnotes 6 and 7 of the opinion. In footnote 6, Justice Sotomayor refers in passing to the concept that the TCPA's "autodialer" standard could consider whether the equipment is capable of dialing without human intervention. The Federal Communications Commission introduced the "human intervention" concept in 2003 to expand the reach of the "autodialer" definition beyond obsolete random or sequential dialers to more common predictive dialers. Justice Sotomayor was undeniably critical of an amorphous "human intervention" standard in this context, but look for the plaintiffs' bar to grasp onto footnote 6 to argue that the TCPA's "autodialer" definition remains ambiguous enough to get plaintiffs beyond a motion to dismiss.

Footnote 7 gives the plaintiffs' bar a second straw to grasp at in bringing TCPA "autodialer" cases following the *Facebook* decision. In footnote 7, Justice Sotomayor unnecessarily muddied the water of an otherwise clear decision by suggesting that equipment that could randomly or

sequentially dial numbers from a stored list could satisfy the TCPA "autodialer" standard. Justice Sotomayor was responding to comment in a pro-*Facebook* filing regarding old dialing equipment. Perhaps not realizing how her footnote could be misconstrued, she wrote, "For instance, an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list." Look for the plaintiffs' bar to argue that this excerpt from footnote 7 opens the door to applying the TCPA "autodialer" standard to predictive dialers and other equipment that dials automatically from a stored list. Courts considering these arguments in the future would do well to remember that footnote 7 is clearly ancillary to the Court's opinion and that the opinion otherwise squarely rejects the idea that equipment that automatically dials numbers from a stored list should be regulated as TCPA "autodialers."

Another development to monitor in post-*Facebook* TCPA "autodialer" litigation is how courts decide motions to dismiss. Pre-*Facebook*, many courts recognized the difficulty plaintiffs had in sufficiently asserting that a challenged call was placed using an autodialer. To lower the pleading bar for plaintiffs, courts frequently looked for the complaint to include allegations of "circumstantial evidence" of autodialer use: a clicking sound before the call was connected to a live agent, an extended pause after the consumer's greeting, a generic script, and calls connected to prerecorded messages. Courts will now likely find themselves in the position of assessing whether this circumstantial evidence is still enough to allow a plaintiff's complaint to survive a motion to dismiss. These categories of evidence are not indicia of equipment that is capable of generating phone numbers randomly or sequentially; rather, they are indicia of any equipment capable of automatic dialing. With the new narrow "autodialer" standard, plaintiffs will likely find that their burden to survive a motion to dismiss in an autodialer case has become much heavier. As some courts have already pointed out, there is no persuasive reason why a company would engage in random or sequential dialing for servicing and collection calls and other contacts that are based on an existing relationship between the parties to a call or text.

Notwithstanding the favorable outcome in *Facebook*, this is not the time for companies to throw away their TCPA compliance materials. The TCPA's prerecorded message and do-not-call standards are alive and well and can trigger the same ruinous monetary penalties as the autodialer standards. Moreover, history shows that courts are capable of misinterpreting the TCPA as well as stretching it to serve the law's privacy protection purpose. There is also the possibility that Congress will amend the TCPA's "autodialer" definition to codify the broader "autodialer" interpretation that the Court rejected in *Facebook*. Companies should consider sitting down with counsel to discuss the impact of the *Facebook* decision on their consumer contact models before making big changes or celebrating too much.

The Supreme Court's decision can be found here.