



U.S. Supreme Court Hears Oral Argument in the TCPA “Autodialer” Case

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On December 8, 2020, the U.S. Supreme Court heard oral arguments in *Facebook, Inc. v. Duguid*, a case that should establish a nationwide standard for the “autodialer” definition adopted by the Telephone Consumer Protection Act (TCPA). The Court must resolve a split among federal appellate courts regarding that definition. While predicting the outcome of Supreme Court decisions based on oral argument is a risky venture, the likelihood of a decision in Facebook’s favor, with a narrower “autodialer” interpretation, seems greater than a decision supporting Duguid.

The U.S. Court of Appeals for the Ninth Circuit, the appellate court that issued the most recent opinion in *Duguid*, adopted an expansive view of the autodialer definition. According to this view, equipment can be regulated as an autodialer if it is capable of automatically dialing telephone numbers from a stored list, even in the absence of random or sequential telephone number generation. At least two other federal appellate courts have adopted this interpretation.

Three, and arguably four, federal appellate courts have adopted a narrow view of the autodialer definition, limiting it to equipment with the capacity to store or produce telephone numbers to be called, using a random or sequential number generator.

All federal appellate courts that have addressed this issue seem to agree that the TCPA’s autodialer definition is frustratingly imprecise. As a result, these courts, as well as the attorneys representing Facebook, Duguid, and the United States at oral argument, have had to channel their advocacy for one interpretation or another between a rock of grammatical rules and a hard place of congressional intent from 1991. The grammatical puzzle is whether the definition’s reference to random or sequential number generation applies to both the capacity to store telephone numbers *and* the capacity to produce them (the narrow interpretation, favoring defendants), or whether it applies only to the latter (the broad interpretation, favoring plaintiffs). At oral argument, both sides claimed to have grammar on their side.

The challenge regarding congressional intent from 30 years ago is to determine how to apply the TCPA to technology that no one in Congress at the time was contemplating, such as smartphones. Several justices signaled their sense that the TCPA had exhausted its useful life as a regulator of the everyday technology around telephone calls. At the same time, no justice offered a strong defense of the TCPA’s consumer privacy purpose.

The justices were clearly concerned about the prospect that the Ninth Circuit's expansive autodialer interpretation could result in TCPA lawsuits arising from people's routine smartphone use. Under the expansive approach, equipment can be regulated as an autodialer if it has the capacity to store numbers and dial them automatically. Justice Alito noted that this sounded like call-forwarding technology, while Justice Barrett made the more modern observation that iPhones come equipped with the ability to autoreply to calls when someone is driving or does not want to be disturbed.

Interestingly, Duguid was represented at oral argument by Bryan Garner, the co-author with Antonin Scalia of *Reading Law: The Interpretation of Legal Texts*, a popular book regarding statutory interpretation. This could be seen as an attempt to win over the Court's bloc of justices who purport to be guided by a statute's text above other considerations. Garner did his best to defend the expansive interpretation as the most sensible reading of the text, but he did not appear to have won over a majority of the Court. He had an even harder time convincing the Court that ordinary smartphone use would not attract TCPA lawsuits under the expansive view.

As noted at the outset of this article, we should all be cautious about guessing the outcome of Supreme Court decisions based on oral argument. Having said that, this article's prediction is a majority opinion in Facebook's favor, making the case that it is time to retire the TCPA and replace it with modernized standards regulating the way we communicate by phone today.