



What Is an Autodialer (Part II)? The Supreme Court (Mostly) Resolves a Robocall Enforcement Question

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The Telephone Consumer Protection Act (TCPA) makes it illegal to call any wireless phone number using an “automatic telephone dialing system” (an autodialer) or an artificial or prerecorded voice. While the text of the TCPA [defines](#) “automatic telephone dialing system,” uncertainty has emerged over how this definition—written in 1991—applies to a technological landscape that is far different today from what existed at the time the TCPA became law.

On April 1, 2021, the Supreme Court issued a unanimous decision in *Facebook, Inc. v. Duguid*, reversing the Ninth Circuit’s interpretation of the term “automatic telephone dialing system” used in the TCPA. The TCPA defines an automatic telephone dialing system 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.” The Ninth Circuit had [held](#) that the qualifying phrase “random or sequential number generator” only applies to the word “produce.” Consequently, according to the Ninth Circuit, the definition [includes](#) “devices with the capacity to dial stored numbers automatically,” even if those devices do not have the capacity to store or produce numbers using a random or sequential number generator. The Supreme Court disagreed. It [held](#) that an automatic telephone dialing system is one that has the capacity to either store a telephone number using a random or sequential number generator or produce a telephone number using a random or sequential number generator.

This Legal Sidebar briefly discusses the Supreme Court’s decision and considerations for Congress relating to the TCPA’s autodialer definition. For a more detailed background on the autodialer definition and prior legal developments, see [this earlier Legal Sidebar](#).

Background

Facebook offers its users the ability to [receive automated text message notifications](#) when a user’s account is accessed from a new device. Despite not being a Facebook user, Noah Duguid [received](#) these text message notifications repeatedly. Duguid asked Facebook to [stop sending](#) the notifications by text message and email but he continued to receive messages. Duguid then [sued](#) Facebook for violating the TCPA, specifically alleging that Facebook sent the text messages using an [automatic telephone dialing](#)

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system in violation of the law. In response, Facebook argued that its automated notification system is not an autodialer under the TCPA because it does not use randomly or sequentially generated numbers.

After the trial court dismissed Duguid's lawsuit, the Ninth Circuit held on appeal that the lawsuit could proceed. Relying on earlier Ninth Circuit precedent, the court held that the TCPA's autodialer definition includes equipment capable of storing numbers, even if the numbers are not randomly or sequentially generated. Following the Ninth Circuit's decision, a circuit split emerged: the Second Circuit followed the Ninth Circuit's interpretation, while the Seventh and Eleventh Circuits did not, holding instead that "using a random or sequential number generator" modifies both "store" and "produce."

The Supreme Court's Decision

The Supreme Court reversed the Ninth Circuit's judgment and held that an autodialer must "have 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." Writing for a unanimous court, Justice Sotomayor focused on the TCPA's text, grammar, and punctuation to determine that the clause "using a random or sequential number generator" modifies both "storing" and "producing" telephone numbers. Justice Sotomayor also voiced concerns that a broad autodialer definition could apply to "virtually all modern cell phones, which have the capacity to 'store . . . telephone numbers to be called' and 'dial such numbers.'" She concluded by again emphasizing that the Supreme Court "must interpret what Congress wrote, which is that 'using a random or sequential number generator' modifies both 'store' and 'produce.'"

Considerations for Congress

While the Supreme Court's decision resolves a circuit split over what functions an autodialer must perform, it does not address what it means for equipment to have the "capacity" to perform those functions. The Second, Third, and D.C. Circuits have all interpreted "capacity" to refer to a device's capabilities at the time of the offending call. On the other hand, the Seventh, Ninth, and Eleventh Circuits have focused on an autodialer's functions, rather than its capacity to perform those functions. Some TCPA practitioners have speculated that future court decisions may hinge on how courts apply the "capacity" language in the TCPA's autodialer definition.

Some lawmakers have already expressed a desire to amend the TCPA in response to the Supreme Court's decision. Should Congress seek to modify the TCPA's autodialer definition, one consideration may be the specificity the statute uses to define an autodialer's technology. The Supreme Court was unwilling to extend the TCPA's autodialer definition beyond equipment that uses a "random or sequential number generator," though the Federal Communications Commission has interpreted the autodialer definition to include other technologies (such as predictive dialers), reasoning that technological changes in telemarketing may have rendered random or sequential number generation obsolete. An autodialer definition delineated by reference to a specific technology may require future amendments if callers can employ new technology to circumvent the TCPA's restrictions.

Author Information

Eric N. Holmes
Legislative Attorney

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