

Supreme Court Defines ATDS Under The TCPA

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On April 1, 2021, in a unanimous decision, the Supreme Court ruled that the definition of an automatic telephone dialing system (“ATDS”) under the TCPA is limited by the plain grammar of the statute itself. The Court, in a decision authored by Justice Sotomayor, held that a device must have the capacity to **use** a random or sequential number generator in either storing or producing a telephone number, to qualify as an ATDS under the TCPA. *Facebook, Inc. v. Duguid et al.*, Case No. 19-511 (2021).

Our preview of the Supreme Court’s consideration of *Duguid* can be found [here](#) and our analysis of the oral argument can be found [here](#). The Court’s decision is discussed below, and its opinion can be found [here](#).

Background

Plaintiff Noah Duguid alleged that defendant Facebook had used an ATDS without the requisite consent to contact him via text message when its systems used an automated response protocol to alert a customer-provided number of an access attempt. Mr. Duguid alleged that he did not have a Facebook account and never provided consent for Facebook to send him text messages. In 2018, the Northern District of California dismissed Duguid’s TCPA claim against Facebook because it held that he had failed to properly allege the use of an ATDS where the complaint’s allegations “strongly suggested direct targeting rather than random or sequential dialing.” In 2019, the Ninth Circuit reversed the lower court’s decision. It reasoned that Duguid had sufficiently pled the use of an ATDS by alleging Facebook’s equipment “had the capacity to store numbers to be called and to dial such numbers automatically.” The Ninth Circuit thus held that any device or system that could store telephone numbers was an ATDS restricted by the TCPA. Facebook appealed this decision to the Supreme Court.

The TCPA defines an ATDS as equipment that has the capacity “(A) to store or produce telephone numbers to be called, using a random sequential number generator; and (B) to dial such numbers.” The Supreme Court took up the following question: “Whether the definition of ATDS in the TCPA encompasses any device that can ‘store’ and ‘automatically dial’ telephone numbers, even if the device does not ‘us[e] a random or sequential generator?’”

Although the Supreme Court’s *Duguid* decision stemmed out of a challenge to the Ninth Circuit’s ATDS definition, five other federal circuit courts of appeals had weighed in on that issue, creating a deep circuit split. The [Second](#), [Sixth](#), and [Ninth](#) Circuits had held that any predictive dialer or system that dials from a stored list should be considered an ATDS under the TCPA. On the other hand, the [Third](#), [Seventh](#), and [Eleventh](#) Circuits held that an ATDS must have the capacity to generate random or sequential telephone numbers to be subject to the restrictions of 47 U.S.C. § 227(b).

SCOTUS's Decision: Supreme Court Reverses the Ninth Circuit

In an opinion authored by Justice Sotomayor, a unanimous Supreme Court held that to qualify as an ATDS subject to Section 227(b)'s restrictions, a device or system must use a random or sequential number generator in storing or in producing a telephone number. The Court found that because "the equipment in question must use a random or sequential number generator" to be an ATDS, "[t]his definition excludes equipment like Facebook's login notification system, which does not use such technology."

The Court started by confirming that a proper reading of the statutory text confirmed the narrower standard. The Court reasoned that under clear rules of grammar, the modifying phrase "using a random or sequential number generator" modifies both antecedent verbs: "store" and "produce." Additionally, the Court reasoned that because the modifying phrase immediately follows the cohesive clause "store or produce telephone numbers to be called" it would be odd to apply the modifier to one part of the cohesive clause. Thus, the Supreme Court cut through the grammatical roadblock that had led some circuit courts into opining that equipment that could simply "store" telephone numbers could be considered to be a restricted ATDS.

Justice Sotomayor's opinion also relied on the statutory context of the TCPA to support the Court's holding. The Court noted that the TCPA's ATDS restrictions "target a unique type of telemarketing equipment that risks dialing emergency lines randomly or tying up all the sequentially numbered lines at a single entity." Congress intended to address a very nuanced problem; therefore, expanding the definition of an ATDS to encompass any equipment that merely stores telephone numbers would go beyond the intent of Congress, and "take a chainsaw to these nuanced problems when Congress meant to use a scalpel." Additionally, the Court noted that such an expansive definition would encompass virtually all modern cellphones and expose ordinary cell phone owners to TCPA liability when they engage in speed dialing or send automated text message responses, which could not have been Congress's intent.

As to public policy concerns, the Court refused to impose "broad privacy-protection goals" onto the statute's narrow definition of ATDS, noting: "[t]hat Congress was broadly concerned about intrusive telemarketing practices, however, does not mean it adopted a broad autodialer definition." The Court noted that the TCPA would continue to restrict artificial and prerecorded voice calls, regardless of the narrow reading of ATDS, and that fears of a "torrent" of "robocalls" are thus overstated. In the end, as Judge Sotomayor explained, "Duguid's quarrel is with Congress, which did not define an autodialer as malleably as he would have liked."

In a short concurrence, Justice Alito agreed with the Court's ruling, but wrote separately to take issue with the main opinion's reliance on a "set" grammar rule. He advised that the canons of statutory interpretation are meant to be used as tools to help identify the way in which "a reasonable reader" would have understood the text of a statute at the time it was issued. The other justices dealt with Justice Alito's concurrence in a footnote, and reminded lower courts to be methodical when interpreting statutory text.

Impact

There are hundreds of litigations and arbitrations pending around the country dealing with claims of illegal use of an ATDS, and dozens of high-profile class action cases have been stayed pending the Supreme Court's decision in *Duguid*. The Court's decision will alter the course of current and future cases as courts and litigants now have a uniform definition of an ATDS when assessing ATDS-based claims brought under Section 227(b) of the TCPA. Additionally, *Duguid* has provided guidance for

companies that wish to directly reach out to current and prospective customers, by settling the question of what types of devices and systems will be considered an ATDS so as to require specific prior consents for their use. The decision has already prompted calls for a legislative response to the Court's more narrow interpretation of ATDS from lawmakers who want to "amend the [TCPA], fix the Court's error, and protect consumers."

The Court's decision also moots much of the ATDS question [remanded to the FCC](#) in 2018 in *ACA International v. FCC*. Given that the Court has now interpreted the ATDS definition, the FCC will not be required to provide its own interpretation of the term. In addition, the Court undermines alternative formulations of the ATDS definition occasionally advanced by the FCC that inquire as to the ability to initiate a high volume of calls or texts in a short period of time. The Court's statement that it does not "interpret the TCPA as requiring such a difficult line-drawing exercise around how much automation is enough" likely moots that line of inquiry. Finally, [several pending petitions](#) ask the FCC to create or modify exceptions to the ATDS restriction. Many of those petitions will have less practical impact going forward.

Prerecorded/artificial voice call claims and Do Not Call violation claims under the TCPA, however, were not the focus of the Court's decision. Callers should remain vigilant about their communications practices and ensure that they have procedures in place to remain fully compliant with the TCPA.

If you have any questions, please contact our experienced TCPA team.