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Banking Operations & FinTech Update

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U.S. SUPREME COURT NARROWS TCPA DEFINITION OF "AUTODIALER"

In a recent landmark decision and near-unanimous ruling (with seven Justices joining Justice Sotomayer's opinion and an eighth Justice separately concurring), the U.S. Supreme Court held that in order to qualify as an "automatic telephone dialing system" (autodialer) under the Telephone Consumer Protection Act (TCPA), the equipment 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." *Facebook, Inc. v. Duguid et al.,* 2021 U.S. LEXIS 1742 (Apr. 1, 2021) (emphasis added).

The TCPA defines autodialers as follows:

. . . 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. 47 USC 227(a)(1).

Prior to using an autodialer to place an informational call or text to a consumer's cell phone number, the TCPA requires the caller to obtain the called party's prior express consent (note that the TCPA rules are even stricter for telemarketing calls). Section 227(b)(1)(A)(iii).

Mr. Duguid filed a class action suit against Facebook related to its text messaging practices, claiming that Facebook violated the TCPA when it sent him "unauthorized login notification" text messages. Duguid had never owned a Facebook account, and was unsuccessful in getting Facebook to stop sending him text messages. The Court noted that Duguid may have been receiving the texts due to possibly having a reassigned cell phone number that might have previously belonged to a Facebook user. Duguid alleged that Facebook violated the TCPA by sending him unauthorized texts using a database that stored phone numbers and programming its equipment to send automated text messages to those numbers each time the associated account was accessed by an unrecognized device or web browser, which Duguid claimed constituted an "autodialer." The Ninth Circuit had agreed with Duguid's interpretation. *Duguid v. Facebook, Inc.,* 926 F. 3d 1146, 1151 (9th Cir. June 13, 2019).

Facebook appealed the Ninth Circuit's ruling, countering that it did not violate the TCPA, because the equipment it used to send the texts did not meet the TCPA's definition of an autodialer. Specifically,

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Facebook reasoned that although the equipment it used had the capacity to store and dial telephone numbers, its equipment did not dial numbers "using a random or sequential number generator" as required by Section 227(a)(1)(A). In turn, Duguid claimed that to constitute an autodialer under Section 227(a)(1)(B), the equipment need only have the capacity to store or produce and dial telephone numbers, and "a random or sequential number generator" was not required to dial those numbers.

According to the Supreme Court, in 1991 Congress enacted the TCPA in response to telemarketers' widespread use of autodialers, which revolutionized telemarketing by allowing companies to dial random or sequential blocks of telephone numbers automatically. Congress found autodialer technology to be uniquely harmful, in that it threatened public safety by "seizing the telephone lines of public emergency services, dangerously preventing those lines from being utilized to receive calls from those needing emergency services." *Facebook*, at p. 2 (citing HR Rep. No. 102–317). The Court pointed to Congressional findings which established due to the sequential manner in which they could generate numbers, autodialers could simultaneously tie up all the lines of any business with sequentially numbered phone lines.

The Supreme Court found that Facebook's interpretation of TCPA Section 227(a)(1)(A) better matched the scope of the TCPA with regard to Congress's specific concerns related to random or sequential dialing of numbers which could simultaneously tie up numerous telephone lines. The Court reasoned that Duguid's interpretation, on the other hand, would encompass any equipment that stores and dials telephone numbers, which arguably went beyond the scope of the TCPA's Congressional intent.

As a result, the Court held that "to qualify as an [autodialer] a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator." The Court's ruling overturned the Ninth Circuit's much broader interpretation, which has long held that any equipment that could store and dial numbers could be an autodialer for purposes of the TCPA.

Although the Court's ruling appears to represent a win for financial institutions placing informational calls or texts to customers (such as fraud alerts) as it restricts the Ninth Circuit's Court's broader TCPA interpretation of an autodialer, institutions are still encouraged to proceed with caution. The TCPA carries not only a private right of action but substantial penalties for each call or text that violates the TCPA ($500 to $1,500 per violation). Even in light of the Supreme Court's ruling, financial institutions are still encouraged to use robust TCPA consent language in consumer-facing agreements to avoid potential TCPA claims. Although the Supreme Court has narrowed the scope of what constitutes an autodialer, it remains to be seen whether the ruling will discourage California plaintiffs' attorneys' zealous pursuit of TCPA class action lawsuits.