

Impact of Supreme Court Opinion in Facebook v. Duguid on TCPA

The Telephone Consumer Protection Act (TCPA) prohibits, with limited exceptions and without prior consent of the called party, all telephone calls for the purpose of telemarketing messages using an automatic telephone dialing system (auto dialer) to wireless numbers as well as pre-recorded telemarketing calls to residential lines. Under the Act, an automatic dialing system is defined as having the ability "to store or produce telephone numbers to be called, using a random or sequential number generator" and "to dial such numbers."

Noah Duguid sued Facebook after he received text messages alerting him to supposed suspicious activity on his Facebook account. Although Facebook has prior express consent to alert account holders if suspicious activity is detected, Duguid claimed he did not have a Facebook account and the complaint stated Facebook used an auto dialer to send the text alerts. The success of the case for Duguid depended on his ability to prove Facebook used an auto dialer.

While Duguid stated Facebook maintained a database of customer mobile phone numbers and automatically generated messages to be sent to those numbers, Facebook argued that their equipment did not meet the definition of an auto dialer under the TCPA. In examining the definition of an auto dialer, the Supreme Court considered whether the phrase "using a random or sequential number generator" modifies both preceding verbs "store" and "produce" in the TCPA's definition. The Court held that the phrase does modify both verbs and that this definition excluded equipment such as that used by Facebook.

This ruling overturns all prior contrary findings of the FCC and lower courts and is retroactive. At this time, dialing systems currently in use by banks should fall outside of the definition of an auto dialer as interpreted by the Supreme Court. With some exceptions, calls and texts sent to mobile devices using the current technology do not require prior consent as they are not using random number generators but are using a list of phone numbers.

In order to ensure their equipment is not considered to meet the definition of an auto dialer, Banks should determine that their equipment cannot readily be used to generate numbers randomly or in a sequence by installing a simple software plug in or by means of an operator enabling such a feature. In addition, Banks should be aware that state law still has jurisdiction over calls to residents of their state and that some state laws are more restrictive than the TCPA.