SCOTUS Decision on Autodialers Under TCPA Provides Handy Primer on Statutory Construction and Interpretation

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To many, robocalls have become one of the more annoying aspects of modern communications. Last year, the United States Supreme Court noted that in 2019 the federal government received 3.7 million complaints about automated calls. Now, in *Facebook, Inc. v. Noah Duguid, et al.*, 592 U. S. ___ (2021), a long-awaited decision intended "to resolve a conflict among the Courts of Appeals regarding whether an autodialer must have the capacity to generate random or sequential phone numbers" to violate the Telephone Consumer Protection Act of 1991 (TCPA), the Supreme Court of the United States has answered with a clear and unambiguous "yes." *Facebook, Inc. v. Noah Duguid, et al.*, 592 U. S. ___ (2021) (slip op., at 4).

Noah Duguid did not have a Facebook account and never provided Facebook with his cell phone number. However, in 2014, he received a number of text messages from Facebook alerting him that someone had attempted to access his Facebook account. Like many who suffer through such intrusions, Duguid sought to stop them. He was unsuccessful in unsubscribing from the alerts so, in 2015, he filed a putative class action against Facebook. His case ultimately arrived at the Supreme Court after its dismissal by the District Court was reversed by the United States Court of Appeals for the Ninth Circuit.

The Supreme Court's opinion in *Duguid*, reversing the judgment of the Court of Appeals for the Ninth Circuit, was delivered by Justice Sotomayor and joined by the other Justices, except for Justice Alito who filed a concurring opinion. Justice Sotomayor discusses at length the constraints of judicial examination of legislative intent and statutory construction. While the Court's ruling that "[t]o qualify as an 'automatic telephone dialing system,' [] a device must have a 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" is fairly concise, the Court's analysis requires one's full attention. *Id.*, at 1.

No doubt, many privacy law experts are just a bit disappointed that the opinion does not provide a detailed dissertation on the TCPA or other laws considered relevant to an analysis of the autodialer provision. The Court did note that, while the TCPA was intended to address "intrusive telemarketing practices," Congress did not opt to adopt "a broad autodialer definition." *Id.*, at 11. The Court then reminded us all: "This Court must interpret what Congress wrote, which is that 'using a random or sequential number generator' modifies both 'store' and 'produce.'" *Id.*, at 12. As such, "a necessary feature of an autodialer under §227(a)(1)(A) is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called." *Id.*

It is important to appreciate that with this decision, the Supreme Court reminds us of what is often most important in the practice of law – the text of a statute. As explained in this decision, the words chosen *and how they are used in context* are especially important to understanding legislative meaning.

In an eleven-page opinion, along with a four-page concurring opinion by Justice Alito, the Court provides clear instruction on rules often applied by courts in disputes over statutory interpretation. The Court discusses the "series-qualifier canon," as explained by Justice Antonin Scalia and Bryan Garner in *Reading Law: The Interpretation of Legal Texts*: "Under conventional rules of grammar, when there is a straightforward, parallel construction that involves all nouns and verbs in a series, a modifier at the end of the list normally applies to the entire series." *Id.*, at 5 (internal quotation marks and brackets removed). The Court observed that "[t]his canon generally reflects the most natural reading of a sentence." *Id.* The Court then concluded that, in this case, "the series-qualifier canon recommends qualifying

both antecedent verbs, 'store' and 'produce,' with the phrase 'using a random or sequential number generator'[, which] produces the most natural construction, as confirmed by other aspects of §227(a)(1)(A)'s text." *Id.*, at 6.

The Court's analysis also considered the "rule of the last antecedent," under which "a limiting clause or phrase [] should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Id.*, at 7 (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). The Court concluded, "[t]he last antecedent before 'using a random or sequential number generator' is not 'produce,' as Duguid needs it to be, but rather 'telephone numbers to be called.'" *Id.*, at 7. Therefore, "Congress' definition of an autodialer requires that in all cases, whether storing or producing numbers to be called, the equipment in question must use a random or sequential number generator. This definition excludes equipment like Facebook's login notification system, which does not use such technology." *Id.*

The Court also observes that Justice Alito, in his concurring opinion, states that he "agrees with much of the Court's analysis as well as its ultimate conclusion about the interpretive question before [the Court], yet he concurs in the judgment only." *Id.*, at n. 5 (citation, brackets, internal quotation marks and punctuation removed). The Court continued: "His apprehension appears to stem from what he sees as the Court's 'heavy reliance' on the series-qualifier canon." *Id.* The Court respectfully disagreed with Justice Alito's concerns stating:

> Difficult ambiguities in statutory text will inevitably arise, despite the best efforts of legislators writing in English prose. [] Courts should approach these interpretive problems methodically, using traditional tools of statutory interpretation, in order to confirm their assumptions about the "common understanding" of words.

Id. (citation and internal quotation marks removed).

The Court went on to state that "[t]he statutory context confirms that the autodialer definition excludes equipment that does not use a random or sequential number generator." *Id.*, at 8 (quoting 47 U. S. C. §227(a)(1)(A)) (internal quotation marks and brackets removed). The Court rejected Duguid's argument that the correct definition of autodialer requires "a construction that accords with the 'sense' of the text," noting that "Duguid's interpretation is contrary to the ordinary reading of the text and, by classifying almost all modern cell phones as autodialers, would produce an outcome that makes even less sense." *Id.*, at 9-10. The Court also rejected Duguid's analysis under the "distributive canon" which provides that "where a sentence contains several antecedents and several consequents, courts should read them distributively and apply the words to the subjects which, by context, they seem most properly to relate." *Id.*, at 10 (citing 2A Singer, Sutherland Statutes and Statutory Construction §47:26, at 448) (internal quotation marks and punctuation removed).

Finally, the Court dismissed Duguid's argument that Congress had "broad privacy-protection goals" in mind when it enacted the TCPA, noting that even if "Congress was broadly concerned about intrusive telemarketing practices [that] does not mean it adopted a broad autodialer definition." *Id.*, at 11. Rejecting Duguid's argument challenging Facebook's interpretation of the statute as "greatly overstat [ing] the effects" of the Court accepting such an interpretation, the Court noted that the "statute separately prohibits calls using 'an artificial or prerecorded voice' to various types of phone lines, including home phones and cell phones, unless an exception applies [and that the Court's] decision does not affect that prohibition." *Id.*, at 12 (internal citation omitted).

While the Court's decision directly applies to the litigants in the Facebook case, it will also undoubtedly impact pending litigation in hundreds, if not thousands, of class action lawsuits where an expanded definition of an autodialer is central to the plaintiffs' claims under the TCPA. It may also lead to fewer class actions under the TCPA, thereby relieving some of the growing pressure on the federal court system as civil filings continue to rise in the U.S. Finally, the ruling stands as an invitation for privacy advocates to petition Congress for more restrictive legislation.

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