Published on *The National Law Review* https://natlawreview.com

Facebook and the United States Submit Briefs in Facebook, Inc. v. Duguid

Article By:

Nikku D. Khalifian

The Supreme Court's decision to grant certiorari in *Facebook, Inc. v. Duguid* has been in the forefront of the TCPA world since July when news of the decision hit. With this granting of certiorari comes the promise to resolve the growing circuit split over the interpretation of the definition of an ATDS. Now, Facebook and the United States Government have filed briefs, bringing the case one, albeit small, step closer to resolution.

In its brief, the United States addresses whether 227(a)(1)'s definition of "automatic telephone dialing system" ("ATDS") encompasses a device that has the capacity to store and automatically dial telephone numbers, even if the device does not "us[e] a random or sequential number generator." The Government's brief asserts that the Ninth Circuit's decision to reverse the dismissal of TCPA claims related to Facebook's automated security text messages was incorrect and equipment can only be an ATDS if it randomly or sequentially generates numbers.

The Government first explains that the phrase "using a random or sequential number generator" modifies both of the verbs "store" and "produce", disagreeing with the Court's holding in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018). The Government explains that at the time the TCPA was enacted, some automated dialing devices "used a random or sequential number generator to identify numbers for contemporaneous dialing," while other devices "used such a generator to compile a list of numbers that could be dialed at a later time." In order to eliminate any doubt that both of these devices were covered, the Congress included the word "produce" to describe the first type of device and the word "store" to describe the other.

The United States next explained that the *Marks* court's reasoning that a device incorporating a random or sequential number generator could not feasibly be used to make calls falling within the consent and government-debt exceptions is unsound because calls to deliver prerecorded-voice messages, to which the automated-call restriction applies, unquestionably can fall within the exceptions, so "adopting the most natural construction of Section 227(b)(1)(A) would not render those exceptions superfluous."

Next, the Government explains that at the time the TCPA was enacted in 1991, there were numerous state laws in effect that regulated the use of automated devices for telemarketing, at least 25 of which encompassed automated equipment that did not utilize a random or sequential number generator. A

natural reading of Section 227(a)(1)(A)'s text is reinforced by the Congress's rejection of available state-law language that would have unambiguously achieved the result that Duguid advocates. Additionally, while most of the prior state laws only applied if a specific dialing technology was used *and* the system could deliver a message using an artificial or prerecorded voice, the TCPA's restriction applies to calls made using an ATDS *or* an artificial/prerecorded voice. Regardless of the dialing technology used, the TCPA restricts prerecorded calls to cell phones. Therefore, the Congress could adopt a comparatively narrow definition of ATDS "while still covering a broader range of calls than most antecedent state laws had covered."

The Government shoots down the Second Circuit's suggestion that the FCC has consistently adopted the interpretation Duguid now advocates, noting in the early years of the TCPA, the FCC interpreted Section 227(a)(1)(A) to require the use of a random or sequential number generator. Although a broader interpretation was adopted in 2003, the agency's most recent order, issued in 2015, was vacated, leaving no current FCC interpretation to which a court could potentially defer. Further, the United States argues the adoption of the government-debt exception in 2015 did not amend or reenact Section 227(a)(1)(A) because the legislative history of the exception did not discuss the autodialer definition and the relevant FCC interpretation was ultimately vacated by the DC Circuit.

Lastly, the Government addresses the reasoning that an expansive view of 227(a)(1)(A) would give rise to a potential argument that an ordinary smartphone could be an ATDS. The Government explains that "the present near-obsolescence" of random or sequential number generators should be viewed as evidence of the TCPA's success, rather than its failure, because the automated-call restriction was intended to discourage their use. The fact that these devices may have been replaced by devices that fall outside the TCPA's ATDS definition is an issue most appropriately addressed by the Congress.

Facebook's brief touches on many of the same points addressed in the United States' brief, explaining the "plain text and basic rules of construction and grammar resolve this case." Facebook reasons the phrase "using a random or sequential number generator" modifies both "store" and "produce" based on a straightforward application of the series-modifier rule. The verbs "store" and "produce" are the only two verbs in the section and share a common direct object – "telephone numbers to be called" – which follows "produce" and precedes the modifier "using a random or sequential number generator." Therefore, Facebook argues, at least some of what follows "produce" modifies both "store" and "produce."

Further, Facebook argues that the very feature that makes an ATDS automatic, distinguishing it from an ordinary phone, is not the capacity to store a number for later dialing – which any ordinary phone with a speed-dial feature could do in 1991 – but rather the capacity to use a random or sequential number generator to store or produce numbers. This reading aligns with Congress's concerns and intent in enacting the TCPA, such as tying up two business lines simultaneously and protecting ordinary telephone users and businesses from abusive telemarketer practices.

Facebook explains that the Ninth Circuit's approach violates rules of punctuation and grammar and poses the risk of extending the ATDS prohibitions to devices such as the modern smartphone or ordinary telephones with call-forwarding or speed-dial features, which were not Congress' target in enacting the TCPA. Additionally, Facebook argues the Ninth Circuit's reading of the statute converts the TCPA into a statute that "penalizes wrong numbers," rather than one that targets the specialized technologies of telemarketers that pose a risk of tying up emergency numbers or business lines.

The Supreme Court has announced that it will conduct a telephonic oral argument for this matter on December 8, 2020.

National Law Review, Volume X, Number 267