TCPA
Facebook v Duguid: It Ain't over Yet

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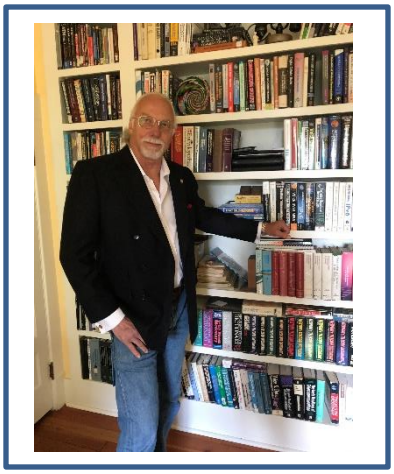

The decision of the Supreme Court of the United States (SCOTUS) in the matter of Facebook v Duguid has been perhaps the single most anticipated in the realm of the Telephone Consumer Protection Act (TCPA), at least in the last decade or so, and all over a punctuation mark—a comma, to be exact. I'm not an attorney with a TCPA focus—actually, I'm not an attorney of any sort—but I know a bunch of them, have been retained by more than a few, and read a lot of their opinions, arguments and musings. Not particularly surprising to those of us who work in the TCPA domain or are impacted by it, the published articles, blogs and such are mostly, if not all, written by attorneys in the defendants' bar. I reckon those in the plaintiffs' bar like to keep their opinions, musings and strategies to themselves until the litigation process begins. I provided some TCPA background and context in a previous article, TCPA: Facebook v Duguid, but will repeat some of that here to refresh your memory.

TCPA in Summary

The TCPA placed restrictions on unsolicited telemarketing calls to consumers and the National Do-Not-Call (NDNC) Registry designed to end those annoyances…or opportunities, depending on your perspective. The TCPA states "It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States… (47 USC 227(b)(1)(iii))

"It shall be unlawful for any person to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice…(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call…." Id. § 227(b)(1)(A)(iii).

The TCPA defined the term *automatic telephone dialing system* (ATDS) to mean "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" at § 227(a)(1).

The FCC subsequently expanded the reach of the TCPA to cover not only voice calls but also SMS messaging, aka text messaging.

Over time, the volume of class action cases grew exponentially and the circuits and even individual courts within them split with respect to their interpretation of the statutory language and, in particular, the significance of the comma in the provision "to *store or produce* telephone numbers to be called, using a *random or sequential number generator*". Specifically, did the phrase "using a random or sequential number generator" apply to both "store" and "produce", or only "produce"? The battle between the plaintiffs' bar and defendants' bar was in full gear and so was the battle between the forces of technological evolution, common sense, and linguistics.

Facebook v Duguid in Summary

Noah Duguid alleged that Facebook sent him a text login notification in violation of the TCPA by using equipment that drew telephone numbers from a stored list. Facebook did indeed send a login notification as a standard security measure in service of its end users. Facebook denied any TCPA violation as the list comprised telephone numbers provided by its customers rather than numbers generated randomly or sequentially and that, therefore, an autodialer, as described in the statutory language, was not employed.

The District Court for the Northern District of California sided with Facebook, but the Ninth Circuit Court of Appeals overturned that decision in favor of Duguid. Facebook appealed to the Supreme Court, which overturned the Ninth Circuit, ruling that "We hold that 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." As Facebook, in this case, *neither* stored numbers nor produced numbers using a random or sequential number generator, it was *off the hook*, so to speak.

The SCOTUS opinion goes beyond an interpretation of the language of the statute to apply a little common sense, as well. "It would make little sense…to classify as autodialers all equipment with the capacity to store and dial telephone numbers, including virtually all modern cell phones."

Some Things Old and Some Things New

As a consulting/testifying technical expert, rather than an attorney, I strive to avoid expressing opinions that might be construed as legal rather than technical in nature. I do, however, feel competent to consolidate and even elaborate a bit on some of the legal opinions expressed. I also am involved in numerous cases and follow more as they work through the courts, so I see the opinions and arguments offered by "experts" on behalf of the Plaintiffs. I also see how the federal district courts variously respond to those arguments. So, here we go:

- **ATDS Definition:** Clearly, the SCOTUS decision applied considerable linguistics expertise to narrow the definition of *ATDS*, ruling that a device must have the *capacity* to *either* store or produce phone numbers to be called using a *random or sequential number generator*.
- **Produce or Pick:** The SCOTUS decision may have clarified and narrowed a thing or two, but also introduced some confusion via Footnote 7: "For instance, an autodialer might use a random number generator to determine the order in which to *pick* phone numbers from a preproduced list. It would then store those numbers to be dialed at a later time."
- **Random vs Pseudorandom:** The ruling does not address the difference between *random* vs *pseudorandom* number generation. Pseudorandom numbers are not generated in a truly random fashion but rather based on the selection of a starting number and then applying an algorithm for generating a sequence of numbers, the properties of which may approximate the properties of sequences of truly random numbers.
- **Capacity:** The ruling does not define the term *capacity*, which has long been an issue in TCPA litigation. There commonly is debate about whether *capacity* refers to *present capacity* and, further, whether that translates to inherent capability (i.e., out of the box) or capability as configured and deployed. There is also debate about whether applying a short script or program to enable a function is simply enabling the inherent capability of a computing platform to perform a function or modifying the capability of that device.
- **Capacity vs Use:** All computers, clearly, have the inherent capability to compute but there remains debate over whether the TCPA applies to the capability of a device (think computer-based *dialer*) or the manner in which a device is actually used to place a call.
- **Type of Call:** As a result of the narrowing of the ATDS definition, informational calls, both voice and text, to parties with whom there exists an *established business relationship* may enjoy some newfound exemption from TCPA exposure. However, marketing and promotional calls, in particular, remain subject to regulation under the TCPA rules with respect to the NDNC Registry.
- **Prerecorded Voice Messages:** Assuming the caller has not obtained *prior express consent* from the target party, the SCOTUS decision provides no relief for calls triggering prerecorded voice messages or synthesized (machine generated) voice messages.

There is more to debate, but I've run out of ink and I just don't want to *feed the beast*, so to speak.

What about Compliance?

In the context of the Facebook v Duguid decision, considering all the issues it addressed and didn't, clarified and confused, honest and conscientious actors have to be freshly concerned about compliance with the TCPA. I'll offer some of my thoughts in the next article. Stay tuned.

Ray Horak is a seasoned author, writer, columnist, telecom consultant, and industry analyst who provides litigation support services as a consulting and testifying expert across a wide range of telecom matters, including the TCPA. He also frequently conducts corporate compliance reviews to assess the risk levels associated with customer contact and related systems, policies and procedures in the context of the TCPA, with the goal of minimizing, if not eliminating, the risk of adverse judgments.

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