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# Facebook Gets More Backing On Autodialers At High Court

By **Allison Grande**

Law360 (September 10, 2020, 10:06 PM EDT) -- The Washington Legal Foundation and a marketing trade association are the latest to back Facebook's bid to persuade the U.S. Supreme Court to narrowly define what qualifies as an autodialer under the Telephone Consumer Protection Act, arguing that such a reading is clearly what Congress intended and that it's up to federal lawmakers to broaden the statute's reach.

In the first of what is expected to be a crush of amicus briefs filed in the case, the Washington Legal Foundation urged the high court on Thursday to overturn a unanimous Ninth Circuit panel decision **from June 2019** that held that plaintiff Noah Duguid had adequately alleged Facebook sent unsolicited security notification text messages using an automatic telephone dialing system, or autodialer, in violation of the TCPA.

The nonprofit public-interest law firm and policy center took issue with the Ninth Circuit's decision to construe "autodialer" broadly to encompass all devices with the capacity to store and automatically dial numbers. The group argued that this interpretation is inconsistent with the plain language of the TCPA, which generally bans using equipment that stores and dials numbers randomly or sequentially to contact consumers without consent, and that only Congress has the power to expand this prohibition.

"Courts have opined that the TCPA is too intricate, too narrow, or too outdated.This they are entitled to do," the foundation wrote. "What they may not do, however, is treat these qualms as a reason to edit the statute."

The foundation characterized the Ninth Circuit's take on the autodialer definition — which runs counter to rulings from several other circuits that have narrowly defined the term to cover only devices that send messages or make calls to randomly or sequentially generated phone numbers — as part of a broader trend among courts to "replace the detailed and balanced law Congress passed with an all-purpose anti-robocall law."

In addition to the autodialer debate, the foundation in its brief pointed to "an even more arresting example of unwarrantable TCPA expansion" in the form of the statute being extended to cover text messages.

While the text of the TCPA, which was enacted in 1991, only bans certain "calls" to cellphones and never mentions text messages, the Federal Communications Commission and at least six Circuit courts have agreed that texts fall under the law, the foundation noted.

"No normal person refers to text messages as calls; and no one suggests that Congress meant, when it passed the TCPA, for 'call' to mean 'call or text message,'" the group said. "The wide agreement that a text is a TCPA call has arisen, not from attentive analysis of the TCPA's words, but from overreliance on the statute's purpose and a game of follow the leader."

Allowing the courts and the FCC to broadly interpret the statute to account for technological changes that have occurred during the past 30 years is "simply not a good idea," the foundation said.

"It is in fact quite a bad idea, because only Congress can craft substantive rules that keep pace as technology changes." the group asserted. "The Court should use this case to remind the lower courts that these fundamental principles apply even to statutes that govern fast-moving technologies. Even, indeed, to the TCPA."

In another amicus brief filed Thursday, the Professional Association for Customer Engagement, a trade group, and Noble Systems Corp., a manufacturer and service provider to the contact center industry, also backed the argument that Congress clearly meant for the the disputed statutory term to cover only equipment that's being used to contact random or sequentially generated numbers.

"The statutory ATDS definition, at its core, is based on technology," the parties wrote. "Knowledge of the relevant digital computer and dialer technology provides helpful and necessary context to interpret the statutory terms."

Unlike the Seventh and Eleventh Circuits, which **have endorsed** a narrow autodialer definition, the decisions handed down by the Ninth, Second and Sixth Circuits backing a broader reading "are sparse with respect to explaining how the underlying technology operates" and glossed over evidence that certain dialers prior to 1991 incorporated a sequential number generator that was used to store numbers into memory.

"Because equipment at that time was capable of using a random number generator and/or a sequential number generator for producing and storing numbers to be dialed, the statutory language is not ambiguous," the amici argued. "With a basic understanding of the underlying technology, any perceived ambiguity in the language evaporates."

They also urged the Supreme Court to refrain from rewriting the autodialer definition "to accommodate new dialer technologies or to accommodate a presumption of what Congress might have intended," arguing that a narrow reading is "properly calibrated" to protect consumers from the harms that the TCPA was designed to prevent and that the existing statutory language provided a "clear answer" about what Congress intended.

The new support comes on the heels of the Trump administration filing **a notable brief** last Friday throwing its weight behind Facebook's argument that the Ninth Circuit had erred in its broad reading of the statutory term.

"The possibility that Duguid's interpretation could be adopted without sweeping in ordinary smartphones provides no affirmative reason to reject the most natural reading of [the TCPA's] text," the U.S. Department of Justice wrote, in pushing the high court to hold that the statute "requires the capacity to use a random or sequential number generator, leaving the political branches free to amend the statute if they believe that other policy considerations warrant that step."

The debate over the precise phrasing of autodialer turns on whether both the verbs "store" and "produce" are modified by the words "using a random or sequential number generator."

The DOJ maintained in its filing that, contrary to the Ninth Circuit's ruling, the latter key phrase modifies both the verbs. The government said "it would be odd to construe the modifying phrase" to modify only one of the two verbs that share it.

Facebook has also vigorously pressed that stance, similarly arguing in its opening brief last Friday that the Ninth Circuit was wrong to view the phrase in a way that converts any telephone that can store and dial numbers — as the company says, "virtually any modern phone" — into an autodialer, and every call to a cellphone without the recipient's prior express consent into a TCPA violation, which is punishable by up to $1,500 per illegal call or text.

The Supreme Court **agreed in July** to weigh the autodialer dispute and is expected to hear arguments and issue a ruling in the case sometime before the end of its upcoming term, which is slated to begin in October.

The Washington Legal Foundation is represented in-house by Corbin K. Barthold and Cory L. Andrews.

The customer engagement trade association and its member company Noble Systems are represented by Karl H. Koster of Noble Systems; and Michelle A. Shuster and Joshua O. Stevens of Mac Murray & Shuster LLP.

Facebook is represented by Andrew B. Clubok, Roman Martinez, Susan E. Engel, Samir Deger-Sen and Gregory B. in den Berken of Latham & Watkins LLP; and Paul D. Clement, Erin E. Murphy, Devin S. Anderson, Kasdin M. Mitchell and Lauren N. Beebe of Kirkland & Ellis LLP.

Duguid is represented by Sergei Lemberg and Stephen Taylor of Lemberg Law LLC; and Scott L. Nelson and Allison M. Zieve of Public Citizen Litigation Group.

The case is Facebook Inc. v. Duguid, case number 19-511, before the U.S. Supreme Court.

--Additional reporting by Christopher Cole. Editing by Peter Rozovsky.

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