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BLOG

TCPA Litigation in the High Court: Potentially Big Changes Coming for Companies

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The first week of July saw an interesting but relatively low-impact Supreme Court decision for the Telephone Consumer Protection Act (TCPA) in *Barr v. American Ass'n of Political Consultants Inc.* In a split decision, the justices upheld the TCPA as we know it, striking down only a 2015-drafted exception within the statute that allowed companies to make auto-dialed calls if the call recipient owed a debt to the federal government. The TCPA defense bar had hoped that the justices might strike down the entire automated call ban. Alas, based on the decision's relatively minor scope, it will not affect the day-to-day compliance and protection measures that most companies can take against TCPA suits.

More impactful for companies, however, is the Court's recent decision to grant certiorari in *Facebook, Inc. v. Duguid*, where the Court has been tasked with clearing up the circuit split over what types of dialing equipment are considered an automatic telephone dialing system (ATDS) under the TCPA. The decision in *Facebook* may change the TCPA landscape forever, causing companies to either rejoice with one-less litigation headache, or have to rethink the systems used in everyday phone calls made to customers.

The TCPA defines an ATDS as "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." 47 U.S.C. § 227(b)(1)(A). But litigants have been arguing about the meaning (and the necessity) of a "random or sequential number generator" for a system to be considered an ATDS.

The Second and Ninth Circuits are more TCPA-plaintiff-friendly in their interpretation of this definition, using an expansive meaning of ATDS. Those circuits hold that a system does not *have* to randomly or sequentially generate numbers to be called in order to be considered an ATDS. In the Ninth Circuit, for example, the definition of ATDS has been expanded to include any "equipment which has the capacity…to store numbers to be called…and to dial such numbers." *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1151-52 (9th Cir. 2019). That definition bans a greater number of calls (and encourages more TCPA lawsuits) because it is so broad that even everyday smartphones may be encapsulated. *Id.* If the Supreme Court adopts that definition, it would likely affect companies' determinations concerning what type of equipment to use. For example, a company might switch over to a specific type of phone system, even if that equipment is costlier or less efficient, simply because it wants to avoid potential TCPA lawsuits.

The Seventh and Eleventh Circuits interpret the definition of ATDS more narrowly and in line with the statutory definition, holding that an ATDS is a system that can send messages or make calls using a random or sequential number generator. *See, e.g., Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 469 (7th Cir. 2020). In *Gadelhak*, that approach resulted in AT&T avoiding liability under the TCPA because its "Customer Rules Feedback Tool" neither stored nor produced numbers using a random or sequential number generator. Rather, since the AT&T system "exclusively dials numbers stored in a customer database," it was "not an 'automatic telephone dialing system' as defined by the act…" *Id.* at 460. From a compliance perspective, if the Court adopts this narrower definition, companies would still have to make sure they are not using systems that can randomly and sequentially dial, but could potentially be less concerned about systems that merely store customer numbers and then automatically dial them. In other words, companies' options might be greater when choosing a phone system to use and still avoid TCPA litigation.

The *Facebook* decision will be crucial in determining the scope of TCPA litigation moving forward. As it stands, plaintiffs (especially in the Ninth and Second Circuits) have wide berth to file complaints that accuse companies of using systems that merely store numbers and then automatically dial those numbers, without attention to the "random" and "sequential" nature of a true robocall. If the Court comes out on the more plaintiff-friendly side, companies can expect more TCPA cases in all jurisdictions. Companies can also expect to reevaluate their calling systems to avoid costly litigation.

Based on the Court's decision in *Barr*, it seems that a disdain for robocalls spans the ideological spectrum, with conservative and liberal justices alike agreeing that the federal government debt exemption should be struck down and that robocalls are "the scourge of modern society." But the statutory interpretation issue in *Facebook* might tip the scales in favor of the TCPA defense bar. It is difficult to imagine the majority of conservative justices reading more into Congress's intent in drafting the ATDS definition than the plain language of the ATDS provision, itself. For now, companies must wait and see; the *Facebook* case will be decided in the October 2020 term.
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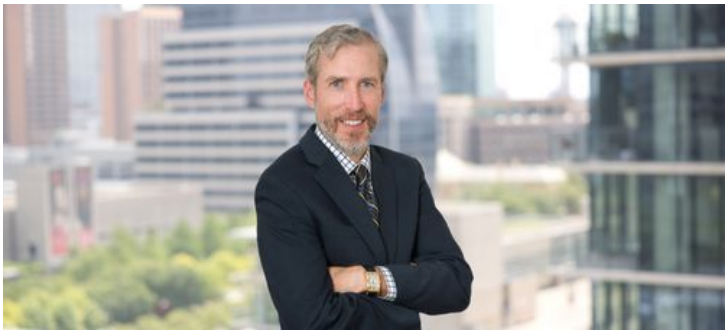

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