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What To Watch As High Court Tackles TCPA's Autodialer Ban

By **Allison Grande**

Law360 (May 5, 2020, 10:17 PM EDT) -- The U.S. Supreme Court is gearing up to consider the constitutionality of the most litigation-fueling provision of the Telephone Consumer Protection Act, a challenge that will not only raise thorny First Amendment issues, but could also drastically transform the liability that companies face for placing autodialed calls.

Barr v. American Association of Political Consultants is set to come before the justices for oral arguments held via an unprecedented livestream teleconference Wednesday. The case asks the high court **to determine** the constitutionality of a 2015 amendment to the TCPA that exempts automated calls that relate to the collection of student loans and other debts "owed to or guaranteed by the federal government" from the statute's general prohibition on placing autodialed calls to cellphones without consent.

If this provision is found to be constitutionally deficient, the justices then must decide whether the appropriate remedy is to strike down just the exemption, as the Fourth Circuit did, or invalidate the statute's entire autodialer ban.

While the exemption for the collection of government-backed debts has been the main driver behind the constitutional challenge, court watchers say they will be more focused on how the justices tackle the second half of their mandate: weighing whether the statute's blanket ban on autodialers without the receiver's consent to get such calls or texts, which has spurred an avalanche of litigation against scores of businesses in recent years, can be preserved.

"Our team is going to be listening in not so much for the actual debt collection exemption at issue, but to hear the questions that go to the much larger issue of whether the Supreme Court is going to gut the heart of the TCPA," said Christine Reilly, a Manatt Phelps & Phillips LLP partner who heads the firm's TCPA compliance and class action defense practice group.

"The Nuclear Option"

There are several ways the justices could elect to resolve the dispute, including by adopting one of the "fairly extreme options" being pressed by the parties in the high-stakes litigation, Troutman Sanders LLP partners David Anthony and Misha Tseytlin said in a joint email.

On the one hand, Attorney General William Barr and the Federal Communications Commission, who are named as defendants in the case and successfully petitioned the Supreme Court to hear the dispute, **have asked the court** to either uphold the exemption that allows collectors of government-backed debt to skirt the statute's blanket ban on autodialed and prerecorded calls to cellphones without prior permission, or, if they find the provision to be constitutionally flawed, to merely sever the carveout from the statute.

Opponents have argued that since scrapping the exemption would lead to these calls also being prohibited, such a move would go against the First Amendment's objective of promoting as much speech as possible.

Three political groups that are challenging the prohibition on their ability to use automatic telephone

dialing systems **are urging the justices** to strike down the statute's sweeping ban on autodialed calls to cellphones, which they claim is an unlawful content-based restriction on speech.

"It's not a given that the Supreme Court will get to the nuclear option and basically blow up the TCPA, but it's certainly a possibility," Reilly said.

Those defending the ban, including the congressman who authored the TCPA in 1991 and more than a dozen of his Democratic colleagues, **have countered** that the autodialer ban remains an "essential" tool for fighting the robocalls the statute was enacted to deter and that decimating this protection would have a "dramatic and devastating impact" on consumers who already face a barrage of these calls.

During the past decade, plaintiffs have flooded federal courts with proposed TCPA class actions seeking uncapped statutory damages of between $500 to $1,500 per call. Because most of these lawsuits turn on the assertion that the defendant used a prohibited autodialer or prerecorded voice to call or text consumers without consent, eliminating or narrowing that restriction would drastically alter the current litigation landscape, attorneys say.

"If the nuclear option happens, there will be a flurry of defense motions seeking immediate dismissal of any of these TCPA cases that rely on the automated calling provision," Reilly said. "It would be the end of TCPA litigation as we know it today."

On the other hand, if the court decides to uphold the statute as written or affirm the Fourth Circuit's decision to scrap only the debt-collection exemption, new TCPA filings, which have been down slightly so far in 2020, would again skyrocket, according to Squire Patton Boggs LLP partner Eric J. Troutman.

The questions that the justices ask Wednesday that go beyond the constitutionality of the government-backed debt exemption will therefore be an important indicator of which way the justices are leaning or if they're looking to go a different route than the litigants are seeking.

"We will be looking closely during argument to see if the court is inclined to a solution that finds a middle ground between these all-or-nothing outcomes," Anthony and Tseytlin said.

Given the ubiquity of spam calls or texts, the justices may be influenced in this endeavor by their own personal experiences, attorneys noted.

Those who oppose the autodialer ban have argued that it unfairly restricts legitimate business communications rather than the genuine spam calls it was intended to curb. But the justices may be hesitant to completely scrap the ban if they personally dislike these calls and agree with the government that there is no other law that adequately replaces these protections.

"It will be very interesting to watch whether any of the justices put the First Amendment issues aside for a second and pursue a line of questioning that's a general airing of the complaints they might have with spam calls," said Mark Eisen, a TCPA defense attorney at Benesch Friedlander Coplan & Aronoff LLP.

The Constitutional Question

Wednesday's arguments also promise to shed light on the broader question of where the justices fall on the First Amendment ideological spectrum, attorneys say.

"On its face, the case presents what seems like a simple question: Does this consent exemption that Congress put in the TCPA violate the First Amendment, or doesn't it?" said Richard Perr, chair of the consumer financial services practice at Kaufman Dolowich & Voluck LLP.

"But the speech argument naturally presents fundamental issues about how you view the Constitution, so it will be interesting to see where the justices come down on this and where the middle ground is that could produce a swing vote," Perr added.

The political groups have argued that the challenged exemption is a content-based restriction on

speech subject to strict scrutiny review and that it unconstitutionally favors debt collectors over other businesses that are prohibited from making political calls to cellphones. The government has countered that the debt collection carveout is narrowly tailored and is content-neutral because it turns on the economic activity in which the caller is engaged rather than the content of the communications.

"This case happens to arise in the context of the TCPA, but the issue of what the right standard is for determining whether a provision is content-based goes well beyond the TCPA," Reilly said.

The justices could quickly dispose of the case by rejecting the argument that the carveout is unconstitutional. But given the justices' decision to take up the issue absent a circuit split and the historical tendency of the more conservative justices to embrace broad First Amendment rights, such a straightforward outcome is unlikely, attorneys say.

The justices' competing viewpoints are likely to be most apparent when debating the question of whether the relatively new autodialer exemption for callers collecting debt on behalf of the federal government can be severed from the rest of the broad autodialer ban, which has been in the statute since its inception in 1991.

While the portion of the TCPA that contains the challenged autodialer provision is silent on severability, Section 702 of the Communications Act, of which the TCPA is a part, states that if one provision of the act is found to be invalid, "the remainder of the act shall not be affected." The Fourth Circuit cited this provision as well as the Supreme Court's "strong preference" for severing flawed statutory provisions in **reaching its conclusion** last year.

How the justices approach this issue during arguments will offer valuable insight into whether they agree that Congress had clearly stated whether TCPA provisions are severable. The high court provided a glimpse into its thinking during **a March argument session** on the fate of the Consumer Financial Protection Bureau when several conservative justices signaled that they were leaning toward a narrow remedy due to the clear severability clause that lawmakers included in the statute that created the CFPB.

"If there's no severability provision that they feel is directly on point in this TCPA case, strict statutory constructionalists might say that since Congress didn't say anything, Congress didn't intend for the provision to be severed because it knows how to write a severability provision," Perr said.

On the other hand, "if there's someone who believes in the purpose of the TCPA provision and is looking for reasons not to strike it down," they might come out the other way, according to Perr.

Attorneys will also be watching whether the justices ask any questions about the constitutionality or severability of other exemptions, such as those for charities and certain health-related calls, that the FCC has established through the TCPA regulations that it has issued over the years.

While the government-backed debt exemption may be relatively easy to remove from the statute, the other carveouts are "a lot more difficult to separate" from the broader autodialer ban, according to Eisen.

"Hiding behind the government-backed debt exemption is a long history of the FCC treating calls differently depending on the purpose of the call and who the caller is," Eisen said.

The Great Autodialer Debate

While the dispute at hand centers on the constitutionality of the TCPA, attorneys who specialize in this area will be on high alert for any mentions about the meaning and scope of the autodialer provision — an issue that has fueled a growing circuit split and that the justices have been separately asked to address in two petitions that the high court has yet to act on.

"The justices are likely well aware of this other boiling issue related to the TCPA that's happening but is not currently before the court," Reilly said.

Both businesses and consumers have been clamoring for years for guidance about what counts as an

automatic telephone dialing system, or autodialer, that the TCPA prohibits the use of without consent. Challenges to autodialed calls have formed the basis for scores of class actions.

The Seventh and Eleventh circuits have **narrowly interpreted** the term to cover only devices that send messages or make calls to randomly or sequentially generated phone numbers. The Ninth Circuit was long an outlier with its broad statutory reading that encompassed all devices with the capacity to automatically dial numbers, but the Second Circuit joined it in a **ruling last month** that similarly found that any device that calls from a list of numbers triggers the statute.

The Second Circuit decision has hastened the urgency for the high court to address this issue either by taking up the petitions that were filed by Facebook and Charter Communications Inc. last year challenging the Ninth Circuit's statutory interpretation, or by moving to indirectly resolve the split through the constitutional challenge currently before it, attorneys say.

"A month ago, the Ninth Circuit looked like it had gone too far, but with the Second Circuit coming out the way it has, it's a whole new ballgame," said Troutman, the Squire Patton Boggs partner.

If the justices appear more focused during Wednesday's arguments on whether the entire autodialer provision rather than just the debt collection exemption survives First Amendment scrutiny, that could be an indicator that they're looking into whether the autodialer definition needs to be refined to cure sweeping restrictions on free speech, Troutman said.

To survive strict scrutiny review, speech restrictions must be narrowly tailored to further a compelling governmental interest. Interpreting the autodialer provision to encompass any equipment designed to dial numbers without human intervention, as the Second and Ninth circuits have done, could make surviving this test difficult, Troutman said.

"The Supreme Court is under a lot of pressure to not strike down the statute in its entirety ... and the autodialer provision has to be interpreted narrowly [as the Seventh and Eleventh circuits have done] to survive strict scrutiny and stay on the books," Troutman said.

Reilly added that if the justices elect to exercise the "nuclear option" and get rid of the entire autodialer ban, that would also put to rest the statutory interpretation debate. However, such a move would also be highly likely to spur Congress to draft a replacement, raising new concerns about what those restrictions might look like, according to Reilly.

"Every year, there's a discussion about whether the TCPA's autodialer ban is going to go away, and it just doesn't happen," Reilly said. "This case marks the first time that a question about the statute itself and the language that's in there is in front of the Supreme Court, so we're all interested to see how that goes."

The political groups challenging the statute are represented by Roman Martinez, Andy Clubok, Susan Engel, Tyce Walters, Samir Deger-Sen and Greg in den Berken of Latham & Watkins LLP and William E. Raney and Kellie Mitchell Buber of Copilevitz Lam & Raney PC.

Attorney General William Barr and the FCC are represented by U.S. Solicitor General Noel J. Francisco and Malcolm L. Stewart and Frederick Liu of the Solicitor General's Office and Joseph H. Hunt, Mark B. Stern, Michael S. Raab and Lindsey Powell of the U.S. Department of Justice's Civil Division.

The case is William P. Barr et al. v. American Association of Political Consultants et al., case number 19-631, in the Supreme Court of the United States.

--Editing by Jill Coffey and Philip Shea.