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## Justices Set To Rattle TCPA Landscape With Autodialer Case

By Allison Grande

Law360 (July 9, 2020, 2:08 PM EDT) -- The U.S. Supreme Court on Thursday jumped into the raging debate over what qualifies as an autodialer under the Telephone Consumer Protection Act, a move that's widely expected to determine whether robocall and text message litigation that exposes companies to hefty statutory penalties dries up or continues to boom.

Nearly nine months after Facebook Inc. **asked the justices** to review the revival of a proposed class action accusing the social media giant of blasting consumers with unsolicited security notification texts, the high court granted the request in its final order list of the term. That sets the stage for the justices to clear up the growing circuit split over what types of dialing equipment trigger liability under the decades-old statute.

"This changes everything," said Eric J. Troutman, a Squire Patton Boggs LLP partner who specializes in TCPA litigation but isn't involved in the Facebook case. "The stakes have never been higher for the fate of the TCPA. The Supreme Court now has a clear path to determine whether the TCPA applies only to random-fired calls or to all calls dialed automatically."

"This will be the biggest ruling ever for the TCPA," he said.

Attorneys on both sides of the TCPA bar have been anxiously awaiting more clarity on the autodialer issue, given that the bulk of class litigation under the TCPA centers on whether the company being sued used an automatic telephone dialing system, or ATDS, as defined by the statute to place the disputed calls or texts.

"The Supreme Court definitely needed to wade into this mess and resolve the question of what equipment is restricted by the almost 30-year-old statute," said Becca Wahlquist, a partner at Snell & Wilmer LLP. "There are thousands of TCPA litigations and arbitrations pending throughout the country, where claims of illegal use of an ATDS are at issue, when the question of 'what is an ATDS' has no definitive answer from federal courts."

Several federal appellate courts have tackled the issue in recent years but have not produced a uniform result.

In decisions issued within weeks of each other at the beginning of this year, the Seventh and Eleventh circuits **narrowly interpreted** the term ATDS to cover only devices that send messages or make calls to randomly or sequentially generated phone numbers. On the other side of the divide, the Second Circuit in April **became the first** to join the Ninth Circuit's broad reading of autodialer to encompass all devices with the capacity to store and automatically dial numbers.

The D.C. and Third circuits have also weighed in with more limited rulings that embraced a narrow construction of the disputed term.

As a result, class counsel have shifted their attention to circuits with the broadest definition of ATDS, flooding those courts with new filings while pulling out of circuits that have found that dialing from a preexisting list of numbers doesn't trigger liability under the statute.

"The circuit split clearly had reached a breaking point," said Mark Eisen, a TCPA defense attorney at Benesch Friedlander Coplan & Aronoff LLP. "There are places in the country where identical cases can succeed or fail just depending on what circuit they're in, and that's become sort of untenable."

With its decision to consider the Facebook dispute, the Supreme Court is set to level the playing field and establish a uniform definition that companies can look to in order to avoid engaging in conduct that could subject them to uncapped statutory damages of between \$500 and \$1,500 per violation.

If the justices side with Facebook and strike down the Ninth Circuit's broad reading of ATDS, that "could spell the end of consumer-driven litigation that has flooded the courts over the last decade," said Richard Perr, chair of the consumer financial services practice at Kaufman Dolowich & Voluck LLP.

On the other hand, if the high court affirms the Ninth Circuit, businesses will lose the gains that they achieved with the recent favorable rulings in the Seventh and Eleventh circuits, said Christine Reilly, a Manatt Phelps & Phillips LLP partner who heads the firm's TCPA compliance and class action defense practice group.

"Either way, a decision is going to have a far-reaching impact in TCPA cases across the country," Reilly said.

In response to the Supreme Court agreeing to take up the case Thursday, Sergei Lemberg of Lemberg Law LLC, who's representing plaintiff Noah Duguid in the dispute, said that his side had "confidence we will prevail."

Facebook didn't respond to a request for comment.

The justices' decision to grant the petition comes after the court, in [Barr v. American Association of Political Consultants](#), **on Monday upheld** the TCPA's sweeping ban on autodialed calls to cellphones while striking down what the court found to be an unconstitutional exemption that permitted such calls to be made to collect federally backed debts.

"This one-two punch from the U.S. Supreme Court, all in the same week, has gotten the attention of every TCPA lawyer, plaintiff and defendant in the country," Reilly said.

The move has also left attorneys wondering whether the justices' deeply divided ruling in Barr will have any effect on the outcome of next term's dispute.

"Could TCPA defendants have lost the battle in Barr, but won the war in Facebook?" Reilly said. "The court may be signaling that the automated calling provision, other than the federal debt exception, is constitutional, but there is something seriously amiss with the interpretation of this provision."

In the controlling opinion in the Barr dispute, Justice Brett Kavanaugh kicked off his opinion by noting American's "disdain" for robocalls and repeatedly pointed to the power and purpose of the TCPA to deter these annoying and invasive communications.

Some defense attorneys have argued that the Ninth and Second circuits' readings have unfairly expanded the statute to cover messages that Congress never intended for it to reach, and that the Facebook case presents the justices with a prime opportunity to restore the statute to its original intent.

"Because of the expansive, atextual interpretation of an ATDS in outlier jurisdictions, namely the Ninth and Second circuits, the plaintiffs' bar continues to exploit the TCPA, and its accompanying damages provision, to challenge legitimate customer communications that are not robocalls," Mike McTigue and Meredith Slawe, who co-chair the class actions group at Cozen O'Connor, said in a joint email. "It is time for much-needed clarity so that the TCPA can be reined in to apply as it was intended: to combat true robocalling activities."

Eisen said the type of security notification texts that Facebook is accused of sending to the plaintiff without permission provides "an easy example for the Supreme Court of the TCPA gone wrong and what the TCPA was never meant to cover."

"These messages (allegedly sent by Facebook) are ones that consumers would want if it was their account and someone was trying to access it," he said. "If defendants could have chosen the case to have the Supreme Court look at, this is just about as close to the case they would have chosen, because it's the most sympathetic and easy to understand example of why the Ninth Circuit's interpretation is so difficult to square with the statute."

Unlike the other circuit court rulings on the issue, which all reviewed summary judgment decisions, the Facebook case is coming to the justices in the context of a motion to dismiss, meaning that the justices can focus squarely on interpreting the statute rather than grappling with issues about the nature of the dialing equipment that arise when the record is more developed, Eisen said.

"It makes the decision a lot cleaner and a strict matter of statutory interpretation, which TCPA litigants have been craving for more than a decade," Eisen said.

Attorneys say they expect Thursday's grant of certiorari to prompt an immediate wave of motions across the country requesting to put pending TCPA disputes on hold while the Supreme Court decides the autodialer issue.

The move could also prompt plaintiffs to delay the filing of new cases, which "might help slow the huge explosion of TCPA litigation that was expected following the Barr v. AAPC ruling," Troutman said.

Additionally, the Federal Communications Commission is likely to continue to put off issuing its long-awaited ruling on the scope of ATDS, which has been expected since the D.C. Circuit in 2018 nixed an earlier commission order that broadly construed the term, according to attorneys.

"Why issue a decision when the Supreme Court plans to settle the question?" Reilly said, adding that the commission and its chairman, Ajit Pai, have "a history of deferring to the courts."

The justices are expected to hear oral arguments in the Facebook dispute at the beginning of the next term, which starts in October, and issue a decision before it concludes next summer.

"The fight is far from over," Reilly said. "And like they say in any good movie sequel: 'To be continued.'"

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, 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.

--Editing by Abbie Sarfo and Aaron Pelc.

*Update: This article has been updated to add reaction to and analysis of the Supreme Court taking up the dispute.*