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Ginsburg's Successor Likely To Back Narrow TCPA Reading

By **Allison Grande**

Law360 (September 24, 2020, 8:35 PM EDT) -- Justice Ruth Bader Ginsburg's absence on the U.S. Supreme Court is likely to swing a heated dispute over what qualifies as an autodialer under the Telephone Consumer Protection Act in businesses' favor, especially if she is succeeded by a front-runner from the Seventh Circuit who authored a key opinion on the issue.

After Justice Ginsburg's **death Sept. 18**, attorneys on both sides of the bar reflected on her legacy as a strong proponent of preserving consumers' rights to press class actions both inside and outside the TCPA context. Given her history, the long-tenured justice most likely would have favored a broad reading of the TCPA's autodialer provision in a dispute over Facebook's allegedly unsolicited security notification text messages that the high court is slated to hear in December, court watchers say.

"In stark contrast, a Trump appointee is more likely to adopt a much narrower reading of the TCPA's automatic telephone dialing system definition," Baker McKenzie partner Perrie M. Weiner predicted. "The appointment of a conservative to replace Justice Ginsburg is likely to herald a new era in which consumer class action litigation will be reined in."

That's expected to be especially true if President Donald Trump nominates Amy Coney Barrett, a Seventh Circuit judge **who has emerged** as a top candidate for the high court. Judge Barrett authored the Seventh Circuit's **February ruling** in **Gadelhak v. AT&T Services Inc.**  that addressed the exact question about the scope of the disputed autodialer term that is before the justices in the Facebook case, which is scheduled to be heard Dec. 8.

"If she were to be nominated and confirmed prior to oral argument, she'd be the only justice that we would actually know how she felt coming into it," said Mark Eisen, a TCPA defense attorney at Benesch Friedlander Coplan & Aronoff LLP. "And it would be a pretty significant weight in favor of defendants."

In the AT&T decision, Judge Barrett and her colleagues joined the Eleventh Circuit in adopting a narrow reading of what types of dialing equipment trigger liability under the 1991 statute. They concluded that equipment must have the capacity to generate random or sequential numbers in order to be considered an autodialer, rejecting the Ninth Circuit's broad interpretation — which Facebook has asked the high court to overturn — that all devices with the mere capacity to automatically dial numbers are covered.

As with previous rulings on the issue, Judge Barrett's decision hinged on the meaning of an "automatic telephone dialing system," or ATDS, that the statute prohibits companies from using to call or text consumers without their consent. The statute defines the term 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."

The debate over the precise phrasing of the term turns on whether both the verbs "store" and "produce" are modified by the words "using a random or sequential number generator." Those in favor of a narrower reading that would drastically cut down on class actions under the statute argue that the phrase modifies both verbs, while those backing a broader reading that would keep the TCPA litigation machine churning contend that the phrase only limits "produce," meaning the definition

captures any equipment that can simply store and dial numbers.

Writing that the wording of the disputed provision "is enough to make a grammarian throw down her pen," Judge Barrett and her Seventh Circuit colleagues concluded that the superior and "most natural" interpretation "based on sentence construction and grammar" was that the disputed phrase modified both "store" and "produce."

"[This interpretation] is admittedly imperfect," Judge Barrett wrote. "But it lacks the more significant problems of the other ... interpretations and is thus our best reading of a thorny statutory provision."

On the other hand, the "ungrammatical interpretation" of the term advanced by the plaintiff in the AT&T dispute and embraced by the Ninth Circuit would operate to "create liability for every text message sent from an iPhone," a result that would be "inconsistent" with the TCPA's overall narrower focus, according to Judge Barrett.

It's hardly surprising that Judge Barrett — who clerked for the late Supreme Court Justice Antonin Scalia, a well-known champion of the conservative judicial doctrines of originalism and textualism — would focus on the meaning of what Congress wrote rather than its legislative intent. And attorneys say the conservative justices already on the bench, in addition to any successor named by the current president, would likely take a similar approach.

"A court that's full of conservatives who are textualists are probably going to side with Facebook and find the clear language of the statute requires random or sequential number generation to be used, while Justice Ginsburg would have been more likely to have delved into the legislative intent, which is clearly to protect the privacy interests of Americans who receive unsolicited calls and text messages," said Amy Brantly, a founding partner of Kesselman Brantly Stockinger LLP.

Some attorneys expressed doubt that how the court would vote on these issues was that straightforward or predictable.

"I would like to believe that the Supreme Court can stay above the partisan fray and will give the issue the analysis it deserves," said Frank Kerney, an attorney with plaintiffs firm Morgan & Morgan.

"As a consumer advocate, my concern is that the likely vacancy heading into the election makes ticket splitting less likely, increasing the odds that Republicans hold the Senate," Kerney said. "That's where I worry we could see anti-consumer and pro-business sentiment that allows for callers to continue using robocalls."

Jay Edelson, founder of plaintiffs firm Edelson PC, said he expects the looming shift to "living under the most conservative court in our lifetimes" would play out in a range of consumer protection issues, from who has standing to bring such lawsuits to how privacy harms are viewed.


"With that being said, we anticipate that the court may well be receptive to the types of arguments the firm cares passionately about, including making sure that class actions truly benefit the people whose claims are being litigated," Edelson said.

Troutman Pepper partner David Anthony noted that Justice Brett Kavanaugh has previously expressed dissatisfaction with robocalls and that Chief Justice John Roberts "has proven himself unpredictable in the past," making a 4-4 tie that preserves the Ninth Circuit's broad ruling in the Facebook case a real possibility if a new justice isn't confirmed before the case is heard.

However, if the court's full roster is restored by then and "a newly minted conservative wing wants to make the point that what matters is the statutory text, Facebook could be a good case to do it," Anthony added.

During her time on the court, Justice Ginsburg authored a pair of notable TCPA decisions that gave some insight into how she might have ruled on Facebook v. Duguid, the autodialer dispute currently before her colleagues.

In 2012, Justice Ginsburg penned the **court's unanimous decision** in **Mims v. Arrow Financial Services** , which struck down a ruling that had confined TCPA suits to state court and paved the

way for consumers to press their unwanted call and text claims in federal court. And in 2016, she wrote the majority opinion in **Gomez v Campbell-Ewald** , where the court **held 6-3** that companies can't cut off sweeping TCPA class action claims by making an unaccepted offer of full relief to individual plaintiffs.

The statute was also the topic of one of the last opinions the Supreme Court issued with Justice Ginsburg on the bench, **a July 6 ruling** that upheld the TCPA's sweeping ban on autodialed calls to cellphones but found that an exemption to that prohibition for calls made to collect federally backed debts violated the First Amendment and must be severed from the statute.

Justice Ginsburg joined two of her colleagues in a partial dissent, authored by Justice Stephen Breyer, that disagreed with the conclusion that the exemption for government-backed debt was constitutionally deficient, but conceded that the correct move was to sever the provision given the majority's contrary view.

"She appeared to favor a broadly applicable and privately enforceable TCPA, and felt the statute was subject to only intermediate scrutiny where it laid down content-specific exemptions," said Eric J. Troutman, a Squire Patton Boggs LLP partner who specializes in TCPA litigation.

But while speculation is high that a more conservative justice would take a more textualist approach to the statute and issue a business-friendly decision on the autodialer issue, Jaszczuk PC founder Martin Jaszczuk cautioned, "The issue is not that simple."

"To begin with, justices and judges are not automatons and, accordingly, there is a significant danger in extending a jurist's general ideological leanings to a specific decision in a specific case," he said. "Recent Supreme Court cases have made that abundantly clear."

Additionally, the issues generally involved in TCPA cases "are nuanced and not always easy to correlate with general political viewpoints," according to Jaszczuk, who cited the justices' highly fragmented July ruling on the TCPA's constitutionality as a strong example.

"As a result, instead of counting on a friendly bench, Facebook's attorneys would be well advised to focus on the merits of their position, namely, that an expansive reading of ATDS is not contemplated by the definition that Congress enacted and would have absurd results in the real world," he said.

Faegre Drinker Biddle & Reath LLP partner Michael Daly called Facebook's arguments in favor of narrowing the autodialer definition — a stance that has also **won support from** the federal government — "particularly persuasive."

"I expect that they will resonate with many of the justices, and may well have resonated with Justice Ginsburg," Daly said. He added that it would "be hard to see" how Judge Barrett, if confirmed, would rule against the narrow reading that Facebook and the government are advocating for, given "how exhaustive her analysis was" in the AT&T case earlier this year.

But that prior work could also lead to calls for Judge Barrett to sit out the Facebook case. Progressive groups have already asked Justice Kavanaugh **to recuse himself** from the dispute, citing his close friendship with Joel Kaplan, Facebook's vice president of global public policy, who played a supportive behind-the-scenes role in the justice's confirmation hearings.

"Given the unresolved issues as to whether Justice Kavanaugh must be recused because of his close relationship with Facebook Vice President Joel Kaplan, the most prudent step for the court would be not to decide the matter this term," said Daniel M. Hutchinson, a partner at Lieff Cabraser Heimann & Bernstein LLP who represents consumers in TCPA class actions.

Sergei Lemberg of Lemberg Law LLC, who's representing plaintiff Noah Duguid in the autodialer dispute before the high court, told Law360 Thursday that his client's case "remains the same" despite the change in the court's composition.

"If Facebook prevails, any company, legitimate or not, will be able to robocall or robotext every consumer any number of times per day, with or without consent," he said. "If plaintiff prevails, consent for robocalls will continue to be required."

Counsel for Facebook didn't respond to a request for comment on the impact of Justice Ginsburg's passing on the case.

Aside from the TCPA dispute, privacy attorneys say they will also be closely watching the impact of the loss of Justice Ginsburg on consumer class actions more broadly, particularly in similar statutory privacy disputes and the circuit-splitting debate over what type of harm plaintiffs need to allege to have Article III standing to bring data breach class actions.

Daly, the Faegre Drinker partner, said the suggestion that Justice Ginsburg's death will usher in a more "pro-business" court and the end of class actions "is unfair and unhelpful."

"The justices approach issues from different perspectives, to be sure," he said. "But it is wrong to suggest that their opinions are driven by whether the result will favor a business or a consumer."

At the same time, Justice Ginsburg was clearly passionate about protecting the class action vehicle. In the Supreme Court's landmark Spokeo decision from 2016, which held that plaintiffs must allege concrete harm to prop up statutory privacy claims, Justice Ginsburg penned a dissent in which she asserted that there was no reason to waste judicial resources and remand the dispute, since it was clear that the plaintiff in the case had alleged such concrete injuries due to Spokeo's alleged spread of misinformation about him.

"When legal issues became almost academic at the appellate level, Justice Ginsburg appreciated how these issues affected people's lives," said plaintiffs attorney Amy Keller of DiCello Levitt Gutzler LLC. "I think that's why so many of us are mourning the loss of such a great legal scholar."

Given this legacy, Justice Ginsburg's absence will undoubtedly be felt in such disputes moving forward, according to Troutman, the Squire Patton partner.

"In the wake of Justice Ginsburg's passing, we can expect a continuing shift toward the narrower application of consumer protection statutes by the Supreme Court — and the likely impact on the TCPA's ATDS definition in Facebook will be just the beginning," he said.

Facebook is represented before the high court by Andrew B. Clubok, Roman Martinez, Susan E. Engel, Samir Deger-Sen and Gregory B. in den Berken of Latham & Watkins LLP and by 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 by 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 Supreme Court of the United States.

--Editing by Jill Coffey and Kelly Duncan.