


Focus Turns To Congress As Justices Narrow TCPA Liability

By **Allison Grande**

Law360 (April 2, 2021, 7:02 PM EDT) -- The U.S. Supreme Court's decision to narrowly define the types of dialing equipment covered by the Telephone Consumer Protection Act is set to eviscerate the swell of litigation that has emerged under the statute, but it could also provide ammunition for Congress to craft even broader robocall restrictions.

In the wake of the high court's **unanimous ruling Thursday** in **Facebook v. Duguid**  that the TCPA narrowly covers only random-fired calls and texts to cellphones, attorneys on both sides of the bar forecast an immediate and drastic drop in class action litigation under the statute, which in recent years has been primarily focused on callers that are using dialing equipment to automatically contact customer-provided numbers that aren't randomly or sequentially generated.

"This is a critical ruling that might finally put the TCPA litigation genie back in the bottle, once and for all," said Eric J. Troutman, a Squire Patton Boggs LLP partner who specializes in TCPA defense work. "Without question, the Facebook ruling is a clear-cut victory for TCPA defendants and callers and a real vindication for those who have long argued the TCPA was being misapplied to modern dialers."

Abbas Kazerounian, a founding partner at plaintiffs firm Kazerouni Law Group APC, told Law360 that anyone who didn't view the high court's backing of Facebook's narrow reading of the statute's autodialer restriction as a loss at least in the short term for the plaintiffs bar was "delusional."

"This narrow reading of the TCPA eviscerates arguably probably 80% of the TCPA cases out there," Kazerounian said. "Even though robocalls are the No. 1 formal complaint to [federal regulators] on an annual basis, this decision arguably gives carte blanche to a lot of marketing and debt collection companies to make calls with absolute impunity."

However, some attorneys warned that while Thursday's ruling appeared to be a clear-cut win for companies looking for an automated way to contact numbers they've been provided, these disputes were unlikely to evaporate without a fight from plaintiffs and consumer advocates.

"I'm celebrating today's victory in favor of Facebook and celebrating some clarity in the TCPA, but I'm also cautiously waiting to see how this shakes out in the lower court and what happens in Congress," said Christine Reilly, a Manatt Phelps & Phillips LLP partner who heads the firm's TCPA compliance and class action defense practice group.

"The TCPA has taken a hit, but it's not quite dead," Reilly said.

Kazerounian said he and his colleagues had already started "roundtabling a few ideas" of ways to use "a couple of footnotes in the ruling that may give us a little wiggle room" to craft creative arguments to keep these suits afloat.

And Aaron Weiss, a partner at Carlton Fields who heads his firm's national TCPA defense practice, noted that by the end of the day Thursday he had heard from several colleagues on the plaintiffs side "that they will take up the question" left unresolved by the high court's ruling "of whether the random or sequential numbers generating function has to be used for the calls at issue — or is just the inchoate capacity sufficient."

The plaintiffs bar and consumer advocates have also already begun putting pressure on Congress to step in to reduce or reverse the blow of Thursday's ruling.

"Many robocallers and would-be robocallers will interpret the court's decision today as essentially abrogating the autodialer restriction, which will likely lead to a surge in unwanted automated calls to cellphones," the Electronic Privacy Information Center, or EPIC, said in a statement. "Congress must update the autodialer restriction to protect Americans from the coming onslaught of unwanted automated calls."

EPIC filed an amicus brief in the high court dispute backing the broad autodialer reading being pressed by plaintiff Noah Duguid.

Sen. Ed Markey, a Massachusetts Democrat who co-authored the TCPA when he was a member of the U.S. House of Representatives in 1991, and Rep. Anna G. Eshoo, D-Calif., quickly responded to this push Thursday, issuing a joint statement vowing "to soon introduce legislation to amend the TCPA, fix the court's error, and protect consumers."

"Today, the Supreme Court tossed aside years of precedent, clear legislative history, and essential consumer protection to issue a ruling that is disastrous for everyone who has a mobile phone in the United States," said the lawmakers, who had spearheaded an amicus brief from 21 members of Congress in support of Duguid. "Fortunately, we can and will act to make right what the Supreme Court got wrong."

"If the Justices find their private mobile phones ringing non-stop from now until our legislation becomes law, they'll only have themselves to blame," the lawmakers added.

Justice Sonia Sotomayor, who authored Thursday's decision, squarely put the ball in Congress' court. She wrote that, "Duguid's quarrel is with Congress, which did not define an autodialer as malleably as he would have liked," while stressing that the high court's role was merely to "interpret what Congress wrote."

"This decision gives fuel to and a vehicle for consumer advocates to reach back out to Congress and argue that we need to strengthen the TCPA to make sure that consumers aren't flooded with unwanted robocalls," said Reilly, the Manatt partner. "There's definitely a part two to this fight."

Congress has recently demonstrated an appetite for tackling these issues, **enacting the TRACED Act** at the end of 2019 to crack down on unwanted robocalls. The latest push to further strengthen the TCPA's restrictions in the wake of Thursday's decision is likely to have a receptive audience as well in the now Democrat-controlled Congress.

"If this decision becomes the impetus for Congress amending the TCPA [in a way that would cancel out the latest ruling], the famous words of Obi-Wan Kenobi could come true: 'If you strike me down, I shall become more powerful than you can possibly imagine,'" said Weiss, the Carlton Fields partner.

The high court's ruling hinged on the relatively narrow but vital issue of what qualifies as an automatic telephone dialing system, often referred to as an autodialer or ATDS, under the TCPA. 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."

Those like Facebook that have favored a narrow reading have argued that the phrase "using a random or sequential number generator" modifies both "store" and "produce." On the other hand, those that have backed a broader reading have contended that the phrase only limits "produce," meaning the definition captures any equipment that can simply store and dial numbers.

"For far too long, litigants have pursued TCPA claims as though an [autodialer] was a given in connection with any modern calling or text messaging activity," Meredith Slawe and Mike McTigue, co-chairs of the class action group at Cozen O'Connor, said in a joint email. "This decision offers much needed clarity and rejects the notion that the 'autodialer' definition is 'malleable' and sweeps in

technology that does not actually use a random or sequential number generator."

The issue has divided appellate courts across the country. The Second and Sixth circuits have sided with the broad reading put forth by the Ninth Circuit in the Facebook dispute, which centers on allegedly unwanted security notification texts disseminated by the social media giant. The Seventh and Eleventh circuits, meanwhile, have found the disputed statutory term narrowly covers only devices that send messages or make calls to randomly or sequentially generated phone numbers.

"The court's well-reasoned decision recognizes that [Duguid's] interpretation would have potentially made TCPA violators out of all U.S. citizens who carry cellphones," said Jaszczuk PC founder Martin Jaszczuk. "The court's opinion properly acknowledges that if a change to the [autodialer] definition is to be made, it must be made by Congress."

Attorneys had been anxiously awaiting more clarity on the subject, given that the bulk of class litigation under the TCPA hinges on whether the company being sued used what the law defines as an ATDS to place the disputed calls or texts. Defense attorneys said Thursday's 12-page ruling that equipment must use a random or sequential number generator to be considered an autodialer delivered on this request.

"When you consider how many words have been spent debating this issue and how many hundreds of millions of dollars have been spent fighting and settling these cases, to have a short, clean, crisp opinion where grammar and common sense prevails is a wonderful result," said Becca Wahlquist, a partner at Kelley Drye & Warren LLP.

Attorneys on both sides of the aisle expressed surprise that no justice accepted Duguid's argument that the autodialer ban should be read broadly in order to further Congress' overall goal to protect consumers from unwanted calls and texts.

"This decision is significant to those of us that have been practicing under the TCPA, but to the Supreme Court it seemed to be an issue of literally interpreting what a sentence meant grammatically and that was it," said Mark Eisen, partner and co-chair of the class action practice at Benesch Friedlander Coplan & Aronoff. "The Supreme Court didn't dwell on the significance of the circuit split or what impact its ruling could have on TCPA cases, and that clarity and simplicity became the most helpful part of the decision."

The opinion also shed significant light on the debate raised during the confirmation hearings for the court's three newest conservative justices about whether they "should apply a purely textualist approach to statutory interpretation, or rather should overlook textual issues to achieve what appears to be the underlying aim of Congress," according to Stephen Newman, a partner at Stroock & Stroock & Lavan LLP.

"That Justice Sotomayor wrote the opinion and that it was unanimous suggests an overwhelming dominance for the textualist approach within the court as a whole," Newman said.

The ruling is expected to have an "immediate impact" on pending TCPA cases alleging that a company used an autodialer to call or text consumers without their permission, many of which have been stayed pending the high court ruling, noted Troutman Pepper partners David Anthony and Misha Tseytlin.

"This ruling effectively undermines the TCPA portion of many of those cases, as random or sequential dialing is virtually unheard of today," the partners said in a joint email.

The decision will also likely "decrease the sheer amount of TCPA litigation" overall, according to Anthony and Tseytlin, who predicted that "while a truly determined plaintiff's counsel might still try to press an [autodialer] claim through discovery, the minimal chance of prevailing under Facebook's standard will lead most to seek their fortunes elsewhere."

Frank Kerney, an attorney with plaintiffs firm Morgan & Morgan, said that he was anticipating TCPA cases becoming "a fraction of what they once were."

At its height, the TCPA docket was stuffed with roughly 5,000 cases seeking uncapped statutory

damages of between \$500 and \$1,500 per violation, according to Kerney. Now, it wouldn't be surprising to see that number fall to "500 or less in the coming weeks" and for members of the plaintiffs bar to shift away from TCPA litigation altogether, Kerney noted.

"After this ruling, it will likely be really difficult for anyone to earn a living simply from handling TCPA cases as they have in the past," he said.

Kerney said Thursday's ruling ushered in "a disappointing day for American consumers," who he noted brought the "vast majority" of these lawsuits against financial institutions who bombard debtors with automated calls and texts and are now likely excluded from the autodialer ban, and joined the call for Congress to take action.

"There's an opportunity here for Congress to make a hybrid statute that makes the defense and plaintiffs bar happy, by capping statutory damages so you don't have runaway damages while still allowing everyone to have control over their cellphones again," he said.

But while the Facebook ruling "deals a significant blow to TCPA plaintiffs and is likely to curtail the volume of TCPA litigation ... it by no means eliminates TCPA litigation or the potential class action risks for certain types of calls," according to Scott D. Goldsmith, a class action defense partner at FisherBroyles LLP.

"It is important for businesses to understand that the TCPA is not gone," Goldsmith said.

Plaintiffs counsel are expected to continue to push litigation challenging calls using "an artificial or prerecorded voice" to residential and cellphones as well as calls made to consumers on the National Do Not Call Registry, both of which aren't covered by Thursday's ruling.

Creative arguments for preserving these disputes are also likely to surface based on a few "very important" and "strategically placed" footnotes in the Facebook decision, noted Reilly, the Manatt partner.

These include the second footnote, which touched on the level of "human intervention" necessary for a device to fall outside the autodialer realm and leaves the door open for plaintiffs to argue that such intervention doesn't doom their claims. Also notable is footnote seven, which suggests that using a random number generator to determine the order in which numbers from a preproduced list are dialed could fit the statutory definition.

Given these lingering litigation risks and the potential for new legislation to again restrict their ability to send automated calls and texts, companies would generally be wise to take a measured approach to Thursday's ruling and not unleash the robocall barrage that consumer advocates have warned about, defense attorneys say.

"If industry participants behave themselves and self-regulate they might avoid legislative blowback," said Troutman, the Squire Patton partner. "But if marketers, collectors, charitable organizations and others really crank up their dialers, they may see a sweeping, piecemeal legislative response that will make them yearn for the days of the TCPA."

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, Scott L. Nelson and Allison M. Zieve of Public Citizen Litigation Group and Bryan A. Garner and Karolyne H.C. Garner of Garner & Garner LLP.

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

--Editing by Kelly Duncan and Michael Watanabe.

