The Supreme Court Acts Twice on the TCPA: What It Means for Automated Callers, the First Amendment, and Statutory Challengers

July 10, 2020

On July 6, 2020, the Supreme Court issued a decision in *Barr v. American Association of Political Consultants Inc.* ("AAPC")[1] that provides insight into the Justices' views of the Telephone Consumer Protection Act ("TCPA"), regulation of commercial speech, and severability. A plurality opinion delivered by Justice Kavanaugh, in combination with concurrences by other Justices, determined that an exception to the TCPA for calls concerning the collection of debts owed to or backed by the federal government violated the First Amendment. The Court determined that the appropriate remedy was to sever the invalid exception, thereby making the TCPA's restrictions uniformly applicable to all subject entities.

On July 9, 2020, the Supreme Court acted again, granting *certiorari* in *Facebook, Inc. v. Duguid*[2] to resolve a debate which should determine whether the TCPA applies broadly to calls made on many types of dialing equipment or is limited to calls made on equipment from the early 1990s—at the time of the TCPA's enactment—and is generally no longer in use. The Supreme Court likely will not issue an opinion for about one year.

THE SUPREME COURT'S OPINION IN *BARR V. AAPC*

The Supreme Court's decision was issued in response to efforts by political consultants to invalidate the TCPA so that they could use automated dialing for fundraising and campaigning. Enacted in 1991, the TCPA prohibits placing calls[3] with an ATDS or prerecorded voice—but calls made with prior express consent are permissible. An ATDS is defined by the statute as "equipment that meets the statutory definition of an ATDS (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." In 2015, Congress inserted an exception into the TCPA for calls placed to collect debts to, or guaranteed by, the United States (the "government debt exception").

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1 No. 19-631 (July 6, 2020).

2 No. 19-511.

3 The TCPA has been interpreted to apply not only to voice calls but text messages.

In recent years, entities that call large numbers of consumers—including for telemarketing purposes or debt collection—have been frequent targets of TCPA suits. The petitioner's challenge to the TCPA raised only two issues: (i) whether the government debt exception violated the First Amendment by favoring certain speech based on its content and (ii) if so, whether the exception should be severed from the rest of the TCPA or, alternatively, whether the TCPA should be invalidated in its entirety.

On the constitutional question, six Justices determined that the exception violated the First Amendment but for different reasons explained in a plurality opinion by Justice Kavanaugh (joined by Chief Justice Roberts, and Justices Alito and Thomas) and separate concurrences by Justices Sotomayor and Gorsuch. The plurality and Justice Gorsuch, constituting a majority of the Court, agreed that the most stringent test under the First Amendment, strict scrutiny, should apply to limitations on commercial speech imposed by the TCPA, but disagreed on the application of the test to this case. Justice Breyer, joined by Justices Ginsburg and Kagan, dissented on the grounds that strict scrutiny was not applicable to limits on commercial speech and would have upheld the government debt exception. Justice Sotomayor agreed with the dissent that strict scrutiny would not apply, but nonetheless concurred with the plurality because the exception failed a more lenient test that she believed was the appropriate standard.

The plurality found that the government debt exception violated the First Amendment because it discriminates on the basis of the content of speech. In a nutshell, if a caller says, "please pay your government debt," the call is lawful but if a caller says "please donate to our political campaign," the call could be unlawful (if other TCPA criteria are satisfied). Under longstanding jurisprudence, such a content-based restriction very rarely survives strict scrutiny—and even the government conceded it could not meet this standard.

The Court recognized the unconstitutionality of the exception could be cured either by invalidating the TCPA, thereby extending the benefit of the exception to all callers subject to the TCPA, or nullifying the government debt collection exemption, thereby making all forms of speech subject to the TCPA. On this issue, seven Justices agreed that the government debt exception could be severed from the rest of the TCPA, leaving the current regime in place for everyone. The Court explained that when a statute contains a clause addressing severability, a court should follow the text of such a clause "absent extraordinary circumstances." If a statute is silent on severability, there has been a longstanding "strong presumption" that unconstitutional portions can be severed while leaving the rest of the statute intact. Here, the government debt exception could be severed both because (i) the TCPA was included in the Communications Act, which has had an express severability provision since 1934 and (ii) the presumption of severability alone would require severability (as "the tail (one unconstitutional provision) does not wag the dog (the rest of the codified statute or the Act as passed by Congress)").

The plurality opinion confirms the uncontroversial proposition that content-based speech restrictions are subject to strict scrutiny review, and on that basis the government debt exception was invalidated because it failed the test. Plaintiffs mounting First Amendment and other challenges to statutory provisions, however, should carefully consider the ultimate outcome of the case. Seven justices had little difficulty severing an unconstitutional provision—with the outcome that more, not less, speech was prohibited. As Justice Gorsuch recognized, "the prize for winning [in this case] is no relief at all."

Any parties considering impact litigation need to consider not only whether a statutory provision that they seek to challenge is unconstitutional, but also whether the severability analysis yields the result that they seek. The latest challenge to the Affordable Care Act ("ACA"), which will be before the Supreme Court in the next term, presents this question (among others). The ACA's challengers argue in this round of litigation that once Congress set the mandate to zero in 2017, it became unconstitutional because it no longer operates as a "tax," and the rest of the ACA falls with it. The Supreme Court's opinion here suggests that the Court may not be receptive to this type of attempt to nullify a complex statute on the basis that one small part is unconstitutional.

THE SUPREME COURT'S GRANT OF *CERTIORARI*

The Supreme Court granted a petition for *certiorari* to resolve a split between appellate courts regarding what dialing equipment meets the definition of an ATDS. The petition was filed by Facebook, which is appealing the Ninth Circuit's determination (which was largely followed by the Second Circuit) that an ATDS should be defined to include "devices with the capacity to dial stored numbers automatically." By contrast, the Third, Seventh, Eleventh and arguably the D.C. Circuit have all determined that a device constitutes an ATDS, among other things, only if it dials randomly or sequentially generated telephone numbers.

At the Supreme Court, the TCPA plaintiff is likely to point to sweeping but imprecise language of the plurality opinion in *AAPC* about the TCPA's supposed purpose, such as "[i]n plain English, the TCPA prohibited almost all robocalls to cell phones." Facebook will likely argue that this statement is irrelevant dicta because the interpretation of ATDS was not before the Court—a fact confirmed by the Court's grant of *certiorari* on this very issue four days later. Moreover, the decision is not precedential because Justice Kavanaugh did not write for five Justices.

Regardless, Justice Kavanaugh's statement is not correct. The TCPA did not bar "robocalls"; it barred calls placed with an ATDS, without prior express consent. The Second and Ninth Circuit's interpretation of an ATDS cannot be squared with the plain statutory language, which makes clear that an ATDS is dialing equipment with a "random or sequential number generator." Automated dialers that are now widely used by legitimate businesses, by contrast, are used to place calls to selected lists of consenting consumers and do not randomly or sequentially generate numbers.

The Supreme Court's decision on this matter will be of great significance to entities that place high volumes of automated calls. If the Court agrees with Facebook, plaintiffs' ability to bring TCPA cases will be greatly curtailed. If the Court agrees with the TCPA plaintiff, the plaintiffs' bar is likely to continue suing businesses that make automated calls. Entities that place automated calls—or organizations acting on their behalf—may wish to consider submitting amicus briefs on Facebook's behalf.

TCPA STRATEGY

Until the Supreme Court rules in *Facebook, Inc. v. Duguid*, companies should continue to implement strategies designed to mitigate the risk of TCPA litigation. Companies should develop and implement robust practices designed to ensure that automated calls are made only to consumers who provide the required consent (which must be written in certain circumstances, including telemarketing calls). This evidence may include, among other things, (i) records of consent to receive calls or texts placed via ATDS or pre-recorded voice, (ii) recordings of calls with consumers,[4] and (iii) dialer logs.

Although every situation is different, a TCPA defendant may be able to secure early dismissal if it can prove that the plaintiff provided the required consent. And if circumstances in which the plaintiff is not the consumer (e.g., if a wrong number is inadvertently entered into a consumer's records), a company that has robust consent practices should have a strong argument that a class action cannot be certified because individualized inquiries are needed to determine whether each call recipient was called with or without consent.

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Please do not hesitate to contact us with any questions.

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[4] Companies should always notify consumers that calls are being recorded—preferably at the start of the call—so as to avoid potential litigation arising under statutes which preclude call recording without the consent of both parties.

NEW YORK

Jeremy Feigelson
jfeigelson@debevoise.com

Maura Kathleen Monaghan
mkmonaghan@debevoise.com

Jacob W. Stahl
jwstahl@debevoise.com

Harold W. Williford
hwwillif@debevoise.com

Jared I. Kagan
jikagan@debevoise.com