# U.S. Supreme Court to Address Major TCPA Issue Next Term, Resolving Circuit Split on Autodialer Standard

July 30, 2020 | Michael A. Goodman

Summer in Washington, D.C., is usually a quiet time. D.C.'s summer of 2020 has been anything but quiet, to put it mildly. While there are several existential pulls on our attention this season, we should still take a moment to recognize that the U.S. Supreme Court has agreed to resolve the confounding question of what counts as an autodialer under the Telephone Consumer Protection Act. There surely will be other unresolved issues keeping us up at night, but, by this time next year, we should have the benefit of one consistent autodialer standard applicable nationwide, now that the Court has granted the petition for writ of certiorari to the U.S. Court of Appeals for the Ninth Circuit in *Facebook, Inc. v. Duguid*.

The statutory definition of an autodialer under the TCPA is nearly 30 years old. It refers to equipment that has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator and to dial such numbers. The Federal Communications Commission, which is responsible for issuing regulations interpreting the TCPA, has never revised this definition in its rules, but it has issued formal guidance over the years, gradually expanding the definition. Recognizing that businesses no longer used the technology that prompted the original statutory definition, the FCC brought within its reach predictive dialers and equipment capable of operating without human intervention. In 2015, the FCC boldly excluded rotary phones from the TCPA's autodialer standard, but it declined to extend that same protective treatment to smartphones.

Ultimately, the FCC's mishmash of autodialer guidance proved unacceptable to the U.S. Court of Appeals for the District of Columbia Circuit. In 2018, that court, in its decision in *ACA International v. Federal Communications Commission*, invalidated years of FCC guidance as "unreasonably, and impermissibly, expansive." As TCPA watchers know, this decision has created two years of autodialer litigation chaos.

At this point, there are two schools of thought regarding the TCPA's autodialer standard, as established by federal appellate courts. The Ninth Circuit created the expansive standard in *Marks v. Crunch San Diego, LLC*, finding that equipment could be regulated as a TCPA autodialer if it could store numbers to be called and dial such numbers automatically, even if it could not generate numbers randomly or sequentially. Earlier this year, the Second Circuit adopted this interpretation as well. The narrow standard for the TCPA's autodialer definition is limited to equipment with the capacity to store or produce telephone numbers using a random or sequential number generator and has been adopted by the D.C. Circuit, as well as the Third and Seventh Circuits.

The TCPA's autodialer standard triggers a consent requirement, which comes with a private right of action with a substantial statutory damages penalty structure. Over 100 million consumers (that is, over

100 million potential TCPA plaintiffs) live in the circuits with these wildly divergent autodialer standards. Even companies that put a high priority on compliance with this TCPA provision have been unable to determine what is regulated and what isn't, and the cost of being wrong can be ruinous.

One of these companies struggling to identify the proper autodialer standard is Facebook. Noah Duguid filed a putative class action complaint against Facebook, claiming that the company used an autodialer to send him text messages without the consent required by the TCPA. Duguid filed his complaint in the Ninth Circuit, so the expansive autodialer interpretation applied, and the appellate court ruled in Duguid's favor, allowing him to proceed with his case against Facebook. In response, Facebook asked the Supreme Court to address the untenable confusion that comes from having different federal appellate courts giving different answers to the same question. On July 9, 2020, the Court agreed to do so during its 2020-2021 term.

In making this announcement, the Court also opted not to consider the second question Facebook posed in its petition, which asked the Court to consider the constitutionality of the relatively new TCPA exception for calls and texts sent to collect debts owed to or guaranteed by the federal government. The Court declined to address this question because it resolved the issue in an opinion released on July 6, 2020. In *Barr v. American Association of Political Consultants, Inc.*, the Court found that this exception was an unconstitutional infringement on free speech. Specifically, the provision restricted speech based on content without a compelling reason. Somewhat strangely, the Court's remedy was to sever the unconstitutional exception for government debts, meaning that the AAPC, which does not place calls to collect government debts, won its case without getting any benefit from the victory. Facebook raised a similar issue in its petition, but the argument was rendered obsolete by the decision in *Barr v. AAPC*.

The AAPC and Facebook were hoping that the exception's unconstitutionality would prompt the Court to invalidate the TCPA's consent requirement for almost all autodialed calls and texts. Justice Kavanaugh's opinion in *Barr v. AAPC* begins as follows: "Americans passionately disagree about many things. But they are largely united in their disdain for robocalls." In this unusual, trying summer, even a divided Supreme Court recognized the hazards of leaving Americans unprotected from autodialers. In the next several months, the Court will tell us how much protection we are actually going to get.

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