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4 Questions That May Signal The End Of TCPA Class Actions

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The Telephone Consumer Protection Act has long been a favorite of the plaintiffs privacy bar, as the act provides up to $1,500 in damages per unwanted call.[1] That adds up very quickly in even the most modestly sized class actions.

Since the TCPA was enacted in 1991, the Federal Communications Commission has for years essentially updated the law through its own orders. These orders have applied the TCPA to technology like text messages and app-to-text messaging, none of which was even a glimmer in the eyes of those who passed the law decades ago.

Similarly, although the TCPA was passed during a time where an automatic telephone dialing system, or autodialer, was limited to a machine that would randomly generate 10 digits to be called, the FCC determined that an autodialer is not limited to those systems. Moving beyond the plain language of the statute, the FCC said that a predictive dialer would constitute an autodialer so long as the system stores numbers and automatically dials them.

Several of the circuit courts across the country then essentially inoculated the FCC's interpretations from being questioned in TCPA litigation. These courts, adopting a narrow reading of the Hobbs Act's mandate that courts of appeals have "exclusive jurisdiction to ... determine the validity of all final orders of the [FCC]," held that they were not able to upset the FCC's determinations because they were prohibited from reviewing the FCC's orders in private TCPA litigation.[2]

But the times are changing. As explained below, the tide is now moving toward limiting the reach of the TCPA and the FCC's expansive interpretations. Moreover, the viability of the entire statute will be questioned by the U.S. Supreme Court. The end of the TCPA class action frenzy may be near.

1. What's an autodialer, anyway?

As all of our English teachers have reminded us, sometimes, punctuation can make all the difference. The TCPA defines an autodialer as any "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."[3]

One perennial point of consternation that has divided courts is whether the language of the statute requires that the equipment use a "random or sequential number generator" in order to qualify as an autodialer.

If the language is read using conventional rules of grammar, then the equipment must always have the capacity to randomly or sequentially generate numbers before it can be an autodialer. This is because the modifying clause ("using a random or sequential number generator") would modify both preceding verbs ("to store or produce") — a meaning reinforced by the comma separating the phrase "to store or produce telephone numbers to be called" from the phrase "using a random or sequential number generator."[4]

But despite this grammatical meaning, some plaintiffs have nonetheless prevailed with an argument that the random or sequential number generation requirement only modifies the act of producing telephone numbers. Therefore (the argument goes), equipment can qualify as an autodialer so long as it can store telephone numbers to be called, and then call those numbers.

Under this reading, the TCPA would extend to the smartphone in your pocket. Calls that target a preexisting list of recipients — even if the recipients were not randomly or sequentially identified — would be subject to the TCPA under this expansive reading.

The dispute over the proper grammatical construction of the TCPA was exacerbated by the U.S. Court of Appeals for the Ninth Circuit's opinion in Marks v. Crunch San Diego LLC, in which the Ninth Circuit interpreted the autodialer definition so as to dispense with any requirement for random or sequential number generation. The court's conclusion in Marks was that so long as a device can dial from a stored list, then the company using that device to place calls or send texts could be subject to the TCPA's steep statutory damages.[5]

In the wake of Marks, lower courts and litigants alike have searched for clarity, and the U.S. Court of Appeals for the Eleventh Circuit and U.S.Court of Appeals for the Eleventh Circuit — influential courts that have been magnets for TCPA litigation — very recently provided some.

In Glasser v. Hilton Grand Vacations Co. LLC, the Eleventh Circuit expressly disagreed with Marks, applied conventional rules of grammar and punctuation, and concluded that the TCPA's random or sequential number generation requirement applied to both the storing and producing of numbers.[6]

Similarly, the Seventh Circuit reached the same conclusion recently in Gadelhak v. AT&T Services Inc., reasoning it "is certainly the most natural one based on sentence construction and grammar."[7] Both courts also expressed concern about a contrary interpretation of the TCPA that "would create liability for every text message sent from an iPhone."[8] As the Eleventh Circuit explained, that result would be "a G too far."[9]

Despite the clear holdings of Glasser and Gadelhak, uncertainty remains. One judge on the Glasser panel issued a dissenting opinion, underscoring that not all judges are from the same school of grammatical construction.[10] Furthermore, Marks remains the law in the Ninth Circuit, and district courts in other circuits are still in the dark about what technology qualifies as an autodialer. Given the stark split, we

predict that the Supreme Court will need to weigh in, and all indications are that this will likely happen soon.

2. Will the government's desire to collect its debts upend the TCPA?

The Supreme Court recently picked up the phone on another hot-button TCPA issue. On Jan. 10, the Supreme Court agreed to review (1) whether the TCPA's "government-debt exemption" to the restriction on the use of autodialer or prerecorded voice calls violates the First Amendment and, if so, (2) whether the unconstitutional exemption may be severed from the TCPA, or if the whole law must be thrown out.

Under the First Amendment, laws restricting free speech cannot be based upon the speech's "message, its ideas, its subject matter, or its content" unless the purpose for the restriction meets strict scrutiny review.[11] The TCPA exemption before the Supreme Court allows the government to use autodialers and prerecorded calls only when the purpose of the call is to collect a debt owed to the United States. That is a classic content-based restriction prohibited by the free speech clause.

As the U.S. Court of Appeals for the Fourth Circuit held in AAPC v. FCC in April, the government debt exemption "distinguishes between phone calls on the basis of their content": If the autodialed calls were made to cellphones "solely to collect a debt owed to or guaranteed by the United States" they are "legally permissible," but not if the calls "deal with other subjects."[12] The Ninth Circuit agreed less than two months later.[13]

However, the Fourth and Ninth Circuits determined that the government-debt exemption was severable from the automated call ban, meaning that the TCPA's bans remain intact, and the effect is simply to remove this exemption from existence.[14] In choosing to sever, rather than kill the law entirely, the Fourth Circuit deferred to both an "explicit directive of Congress and … controlling Supreme Court precedent," noting "the Supreme Court's strong preference for a severance in these circumstances" and "Congress['] explicit[] mandate[] that, if a TCPA provision is determined to be constitutionally infirm, severance is the appropriate remedy."[15]

The AAPC disagreed with this aspect of the Fourth and Ninth Circuits' rulings, contending the proper remedy for a First Amendment violation that legalizes too little speech — as now no one can use an autodialer to call to collect a debt — is to invalidate the whole law; otherwise, a bizarre result occurs where less speech is legal than before the unlawful exemption was invalidated.[16]

Now the Supreme Court will weigh in, after agreeing to review the Fourth Circuit's decision.[17] There seems to be little question that the court will agree that the government-debt exemption violates the First Amendment. The more interesting question will be what to do with the automated call ban — and the rest of the TCPA — as a result. The current court, which strongly favors the protection of free speech, could potentially conclude that the proper way to address the unconstitutionality of the government-debt exception is the strong medicine of nixing the TCPA altogether.

3. No more superpowers for the FCC?

The Supreme Court also recently chimed in on another TCPA issue, considering whether the Hobbs Act really means that district courts must follow the orders of the FCC, no matter how erroneous those orders may be. Unfortunately, the court could not reach a majority conclusion on the issue, and the waters remain muddy.

In the closely watched case of PDR Network LLC v. Carlton & Harris Chiropractic Inc., the Supreme Court held that it could not decide "whether the Hobbs Act's vesting of 'exclusive jurisdiction' in the courts of appeals to 'enjoin, set aside, suspend,' or 'determine the validity' of FCC 'final orders' means that a district court must adopt, and consequently follow, the FCC's Order interpreting the term 'unsolicited advertisement' as including certain faxes that promote 'free' goods."[18]

According to the court, it needed to first know whether the FCC's 2006 order is a "legislative rule" or an "interpretative rule" and whether the defendant in the TCPA putative class action had "a prior and adequate opportunity to seek judicial review of the [2006] Order."[19] So, the majority of the court remanded the case back to the Fourth Circuit to answer that question.

Some justices of the court, however, had no trouble answering the question without further input from the Fourth Circuit. Justice Clarence Thomas, along with Justice Neil Gorsuch, argued that Congress could never inoculate from review an agency's rule, and doing so would violate Marbury v. Madison's edict that it is the "'province and duty of the judicial department to say what the law is.'"[20]

Justice Brett Kavanaugh also had no trouble answering the question on behalf of himself and Justices Samuel Alito, Thomas and Gorsuch, providing an analysis that he pointedly remarked "remains available to" the Fourth Circuit and "other courts in the future."[21]

Justice Kavanaugh explained that he "would conclude that the Hobbs Act does not bar a defendant in an enforcement action from arguing that the agency's interpretation of the statute is wrong" because the "Hobbs Act does not expressly preclude judicial review of an agency's statutory interpretation in an enforcement action."[22]

Justice Kavanaugh further explained that "[d]enying judicial review of an agency's interpretation of the statute in enforcement actions can be grossly inefficient and unfair," for "[i]t would be wholly impractical—and a huge waste of resources—to expect and require every potentially affected party to bring pre-enforcement Hobbs Act challenges against every agency order that might possibly affect them in the future."[23]

Whether the lower courts follow this analysis remains to be seen. But it does show how at least four members of the court would rule should the case return to the Supreme Court, and many commentators believe "it will likely only be a matter of time before the court confronts this question again."[24]

4. Does receiving a single message or call really cause an injury?

The final, and perhaps longest simmering, TCPA question that is calling out for Supreme Court review is what constitutes an injury for purposes of satisfying Article III standing under the TCPA. Previously, in Spokeo Inc. v. Robins, the Supreme Court narrowed the definition of "injury in fact" for Article III standing generally by requiring that a plaintiff show more than just a "bare procedural violation, divorced from any concrete harm."[25]

That ruling suggested that, under the TCPA, a single call was insufficient, absent some extraordinary circumstances. But in 2017, the Ninth Circuit held that a plaintiff who receives as few as two unsolicited telemarketing text messages has suffered more than a bare procedural violation, and thus has standing to sue under the TCPA.[26]

That ruling stood largely unquestioned, and indeed had been affirmed in similar TCPA contexts by the U. S. Court of Appeals for the Second Circuit,[27] U.S. Court of Appeals for the Third Circuit[28] and Fourth[29] Circuit, and most recently by the Seventh Circuit.[30]

But in August, the Eleventh Circuit reached the opposite conclusion. In Salcedo v. Hanna, the plaintiff received a single unwanted telemarketing text message from a law firm he had used in the past.[31] Applying Spokeo, the Eleventh Circuit held that the receipt of a single unwanted text message falls far short of violating privacy rights or causing some other articulable harm.[32]

While the Eleventh Circuit was careful to avoid the conclusion that a single violation of the TCPA could never constitute an injury in fact — confirming that "Article III standing is not a 'You must be this tall to ride' measuring stick"[33] — it held that the minor inconvenience of receiving a single text message does not rise to Article III's injury standards.

In October, Dish Network urged the Supreme Court to review the Fourth Circuit's decision that a class of plaintiffs who received two or more calls to their residential phone number after placing that number on the Do Not Call Registry had all suffered a concrete injury under the TCPA.[34] In its petition, Dish Network cited the "express[] split" between the Ninth and Eleventh Circuits on TCPA standing as a reason why the legal world needs the Supreme Court's input.[35]

However, the Supreme Court did not answer the call, declining to review the case.[36] With the recent Eleventh Circuit decision creating such a clear circuit split, it seems to only be a matter of time before the Supreme Court takes up this issue as well.

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[1] 47 U.S.C. § 227(b)(3).

[2] 28 U.S.C. § 2342(1).

[3] 47 U.S.C. § 227(a)(1).

[4] See, e.g., Pinkus v. Sirius XM Radio, Inc., 319 F. Supp. 3d 927, 938 (N.D. Ill. 2018) ("The comma separating 'using a random or sequential number generator' from the rest of subsection (a)(1)(A) makes it grammatically unlikely that the phrase modifies only 'produce' and not 'store.'").

[5] 904 F.3d 1041, 1053 (9th Cir. 2018).

[6] 948 F.3d 1301, 1306 (11th Cir. 2020).

[7] Gadelhak v. AT&T Servs., Inc., No. 19-1738, --- F.3d ----, 2020 WL 808270, at *4 (7th Cir. Feb. 19, 2020).

[8] Gadelhak, 2020 WL 808270, at *6

[9] Glasser, 948 F.3d at 1309–10.

[10] See id. at 1314 (Martin, J., dissenting in part).

[11] Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2226 (2015) (quotation omitted).

[12] Am. Ass'n of Political Consultants, Inc., et al. v. FCC, 923 F.3d 159, 167–68 (4th Cir. 2019) ("[T]he debt-collection exemption fails strict scrutiny review. It is fatally underinclusive for two related reasons. First, by authorizing many of the intrusive calls that the automated call ban was enacted to prohibit, the debt-collection exemption subverts the privacy protections underlying the ban. Second, the impact of the exemption deviates from the purpose of the automated call ban, and, as such, it is an outlier among the other statutory exemptions.").

[13] Duguid v. Facebook, Inc., 926 F.3d 1146, 1153–54 (9th Cir. 2019).

[14] Id. at 1156; Am. Ass'n of Political Consultants, 923 F.3d at 171.

[15] Am. Ass'n of Political Consultants, 923 F.3d at 171.

[16] See Allison Grande, TCPA Debt Call Carveout Is Unconstitutional, 4th Circ. Says, Law360 (Apr. 24, 2019), https://www.law360.com/articles/1153171/tcpa-debt-call-carveout-is-unconstitutional-4th-circ-says. Charter Communications, Inc., who filed an unsuccessful petition for writ of certiorari to the Supreme Court in November, agreed with the AAPC. See Petition for Writ of Certiorari at 1, Charter Commc'ns, Inc. v. Gallion, No. 19-575 (U.S. Nov. 1, 2019) ("[I]nstead of striking down the unconstitutional restrictions on speech, [the Ninth Circuit] invoked the extraordinary 'remedy' of severing the government-debt exception from the statute and thus expanding the statute's prohibitions on speech.").

[17] See Barr v. Am. Ass'n of Political Consultants, Inc., No. 19-631, 2020 WL 113070 (U.S. Jan. 10, 2020).

[18] 139 S. Ct. 2051, 2053 (2019).

[19] Id. at 2055 (internal quotation marks omitted).

[20] Id. at 2057 (Thomas, J., concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[21] Id. at 2058 (Kavanaugh, J., concurring).

[22] Id. (emphasis added).

[23] Id. at 2061.

[24] Christopher Walker, Opinion Analysis: Court Dodges Question (for Now) Whether the Hobbs Act Is Ordinary or Extraordinary Administrative Law, SCOTUSblog (June 21, 2019), https://www.scotusblog.com/2019/06/opinion-analysis-court-dodges-question-for-now-whether-the-hobbs-act-is-ordinary-or-extraordinary-administrative-law/.

[25] 136 S. Ct. 1540, 1549 (2015).

[26] See Van Patten v. Vertical Fitness Group, LLC, 847 F. 3d 1037, 1043 (9th Cir. 2017) (holding that "a violation of the TCPA is a concrete, de facto injury" and that "[u]nsolicited telemarking ... text messages, by their nature, invade the privacy and disturb the solitude of their recipients.").

[27] See Melito v. Experian Marketing Solutions, Inc., 923 F. 3d 85, 93–94 (2d Cir. 2019) (holding that the receipt of unsolicited text messages, standing alone, demonstrates injury-in-fact for Article III standing under TCPA). Note that the Second Circuit did not address the precise number of text messages required to suffer an injury-in-fact; the Court merely held that receiving unsolicited text messages was enough.

[28] See Susinno v. Work Out World Inc., 862 F. 3d 346, 351 (3d Cir. 2017) (holding that a single unsolicited call that left one prerecorded promotional voicemail caused constituted injury-in-fact for Article III standing to sue under TCPA).

[29] See Krakauer v. Dish Network, L.L.C., 925 F. 3d 643, 653 (4th Cir. 2019) (finding class of people who received two or more calls within one year to a residential phone number on Do Not Call registry sustained injury-in-fact for Article III standing for violation of TCPA).

[30] Gadelhak, 2020 WL 808270, at *3 (holding that "unwanted text messages can constitute a concrete injury-in-fact for Article III purposes").

[31] 936 F. 3d 1162, 1165 (11th Cir. 2019).

[32] Id. at 1167-72.

[33] Id. at 1172. The Eleventh Circuit conceded that, in some instances, the time wasted by having to deal with an unsolicited and unwanted telemarketer communication can constitute an injury-in-fact, but noted that cases where wasted time caused an injury involved more time than what is needed to review and delete an unwanted text message. See id. at 1173 ("The TCPA instructs the FCC to establish telemarketing standards that include releasing the called party's line within five seconds of a hang-up ... demonstrating that, on the margin, Congress does not view tying up a phone line for five seconds as a serious intrusion.").

[34] See Petition for Writ of Certiorari, DISH Network L.L.C. v. Krakauer, No. 19-496 (U.S. Oct. 15, 2019).

[35] Id. at 14.

[36] DISH Network L.L.C. v. Krakauer, 2019 WL 6833425 (U.S. Dec. 16, 2019).