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TCPA Litigation Review and Update

By David J. Fioccola, Adam J. Hunt and Lily Valentine Westergaard*

The authors of this article review recent decisions on the Telephone Consumer Protection Act. Although two of the decisions are considered landmarks, they have not fully resolved questions that have bedeviled the lower courts for years.

Last year marked another year of important developments in the Telephone Consumer Protection Act ("TCPA") landscape as lower courts issued conflicting interpretations of the ruling by the Supreme Court of the United States ("SCOTUS") in *Barr v. AAPC* ("*AAPC*") and began to apply the definition of "autodialer" that SCOTUS articulated in *Facebook, Inc. v. Duguid*. Although defendants swung for the fences in an attempt to argue that *AAPC* rendered the entirety of the TCPA unenforceable for a five-year period and had some initial success, the tide seems to be turning. Similarly, although *Duguid* provided a narrow definition of an "autodialer," factual disputes about what satisfies that new definition may still need to be resolved on summary judgment.

THE DUST HAS NOT SETTLED ON WHETHER DEFENDANTS CAN BE HELD LIABLE FOR ROBOCALLS MADE BETWEEN 2015 AND JULY 2020 FOLLOWING THE SUPREME COURT'S LANDMARK DECISION IN *AAPC*

In the wake of the Supreme Court's decision in *Barr v. American Association of Political Consultants, Inc.*,[1] lower courts have continued to grapple with the question of whether plaintiffs can assert TCPA claims for conduct occurring between 2015 and July 2020 – the time period between when the government-backed debt exception amendment to the TCPA was passed and the date that the Supreme Court declared it unconstitutional. A split among district courts quickly emerged. One line of cases followed an early decision by the U.S. District Court for the Eastern District of Louisiana, *Creasy v. Charter Communications, Inc.*,[2] in holding that there could be no liability imposed for calls occurring during the contested five-year time period.[3] But the majority of district

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1 140 S. Ct. 2335 (2020).

2 489 F. Supp. 3d 499 (E.D. La. Sept. 28, 2020).

3 *See, e.g.*, *Hussain v. Sullivan Buick-Cadillac-GMC Truck, Inc.*, No. 5:20-cv-38-Oc-30PRL (M.D. Fla. Dec. 11, 2020); *Cunningham v. Matrix Fin. Servs., LLC*, No. 4:29-cv-896 (E.D. Tex. Mar. 31, 2021).

courts declined to adopt *Creasy*'s reasoning, instead finding that *AAPC* did not negate the liability of parties that made robocalls during that time period.[4]

In September 2021, the U.S. Court of Appeals for the Sixth Circuit became the first federal appellate court to choose a side. In *Lindenbaum v. Realgy, LLC*, the Sixth Circuit ruled that *AAPC* did not free defendants from liability for placing unwanted robocalls to cellphones during the five-year period when the now-severed exception was in place.[5] Although no other federal court of appeals has addressed this issue yet, several district courts outside the Sixth Circuit recently have followed *Lindenbaum*'s lead.[6] On March 21, 2022, SCOTUS denied the *Lindenbaum* defendant's petition for certiorari, suggesting that *Lindenbaum*'s blow to defendants is here to stay.

SCOTUS FINALLY RESOLVES WHAT AN "AUTODIALER" IS UNDER THE TCPA

In a much-anticipated case concerning the statutory definition of an "autodialer" under the TCPA, the Supreme Court in *Facebook, Inc. v. Duguid* unanimously reversed the U.S. Court of Appeals for the Ninth Circuit and held that a "necessary feature of an autodialer . . . is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called."[7] The Court found that Facebook's text-notification system should not be considered an autodialer because it sent "targeted [or] individualized" texts to "numbers linked to specific accounts," instead of randomly or sequentially storing or producing those numbers.[8] The Court concluded that the phrase "using a random or sequential number generator" applies to both "store" and "produce" telephone numbers, rejecting a broad interpretation that the plaintiffs' bar has pushed for years (with some success).[9] Under the Court's interpretation of the TCPA, equipment cannot be considered an autodialer unless it has the capacity to either "produce" numbers "using a random or sequential number generator" or "store" numbers "using a random or sequential number generator."[10]

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[4] *See, e.g.*, *McCurley et al. v. Royal Sea Cruises, Inc.*, No. 17-cv-00986-BAS-AGS (S.D. Cal. Jan. 28, 2021); *Less v. Quest Diagnostics Inc.*, No. 3:20 CV 2546 (N.D. Ohio Jan. 26, 2021).

[5] 13 F.4th 524 (6th Cir. 2021), cert denied, --- S.Ct. --- (Mem) (U.S. Mar. 22, 2022)(No. 21-866).

[6] *See, e.g.*, *Poonja v. Kelly Servs., Inc.*, No. 20-cv-4388 (N.D. Ill. Sept. 29, 2021); *Hogans v. Charter Commc'ns, Inc.*, No. 5:20-CV-566-D (E.D.N.C. Sept. 24, 2021); *Pavelka v. Charter Commc'ns, Inc.*, No. 3:20-cv-01557 (MPS) (D. Conn. Nov. 29, 2021).

[7] 141 S. Ct. 1163, 1173 (2021).

[8] *Id*. at 1168.

[9] *Id*. at 1172.

[10] *Id*. at 1167.

Following *Duguid*, the U.S. District Court for the District of South Carolina became one of the first courts to rule that a defendant's dialing system was not an autodialer and therefore was exempt from TCPA liability. Granting summary judgment to the defendant, the court found that the defendant bank's equipment did not fit within the narrow definition of an automatic telephone dialing system ("ATDS") under *Duguid*. The court rejected plaintiff's argument that the system had the capacity to store or produce numbers using a random or sequential number generator. The court further rejected plaintiff's argument that, relying on footnote 7 in *Facebook*, a system could be an ATDS if it uses a pre-produced list of numbers and a random generator to determine the order.[11]

Although winning on summary judgment is better than going to trial, *Duguid* may not provide defendants with an easy out on a motion to dismiss. A July 2021 decision from the U.S. District Court for the Eastern District of Missouri clarified that "newly clarified definition of an ATDS is more relevant to a summary judgment motion than at the pleading stage."[12] The court denied defendant Medicredit's motion to dismiss, and it warned that "the issue presented by Medicredit's motion is whether [p]laintiff has plausibly alleged that Medicredit's dialer is an ATDS; whether he can prove his allegations at trial is a separate matter."[13]

The U.S. District Court for the District of Arizona later provided further hope to plaintiffs by allowing an autodialer claim to survive a motion to dismiss.[14] Relying on *Facebook* footnote 7, the court determined that a plaintiff stated a valid claim for relief under the TCPA in alleging that a "Power Dialer," that could automatically call an entire list of leads in sequential order, could qualify as an autodialer even after *Duguid*.[15] No appellate court has weighed in on *Facebook* footnote 7 as of yet.

TAKEAWAYS

Although *AAPC* and *Duguid* are landmark TCPA decisions, they have not fully resolved questions that have bedeviled the lower courts for years. Instead, these decisions have given both plaintiffs and defendants the opportunity to exploit ambiguities in the TCPA that lower courts will be forced to resolve. Issues about the enforceability of the TCPA and the correct procedural stage at which to make an autodialer determination remain. The lower courts are left to scramble, and circuit courts that weigh in early have the power to dictate precedent nationwide.

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[11] *Timms v. USAA Fed. Sav. Bank*, No. 3:18-cv-01495-SAL (D.S.C. June 9, 2021).

[12] *Miles v. Medicredit, Inc.*, No. 4:20-CV-01186 JAR (E.D. Mo. July 14, 2021) (quoting *Gross v. GG Homes, Inc.*, No. 3:32-cv-00271-DMS-BGS (S.D. Cal. July 8, 2021)).

[13] *Id.*

[14] *MacDonald v. Brian Gubernick PLLC*, No. CV-20-00138-PHX-SMB (D. Ariz. Nov. 9, 2021).

[15] *Id.*