TCPA Tracker - November 2020

November 16, 2020

Recent News

FCC Publishes Directions and Filing Information for Caller ID Exemptions

On November 9, 2020 the Wireline Competition Bureau released a Public Notice, providing instructions for voice service providers seeking exemption from caller ID authentication rules established by the TRACED Act. To qualify for an exemption, voice service providers will be required to submit certification affirming that the company meets the criteria for exemption, in addition to a detailed explanation for how exactly the company meets said criteria. Certifications must be filed electronically in WC Docket 20-68 in the ECFS by December 1, 2020.

Cin-Q Automobiles, Inc. File Application for Review of Akin Gump Order

On October 21, 2020 Cin-Q Automobiles, Inc. filed an Application for Review, asking the FCC to consider revising the Akin Gump Declaratory Ruling. In the Akin Gump Ruling, the FCC concluded that "a fax broadcaster is solely liable for TCPA violations when it engages in deception or fraud against the advertiser." According to Cin-Q, the Ruling does not adequately address the precedents established by the 2003 and 2006 Commission Orders, which found fax broadcasters to be "jointly and severally liable" for TCPA violations.

FCC Petitions Tracker

Kelley Drye's Communications group prepares a comprehensive summary of pending petitions and FCC actions relating to the scope and interpretation of the TCPA.

Number of Petitions Pending

- 29 petitions pending
- 1 petition for reconsideration of the rules to implement the government debt collection exemption
- 1 application for review of the decision to deny a request for an exemption of the prior express consent requirement of the TCPA for "mortgage servicing calls"
- 1 request for reconsideration of the 10/14/16 waiver of the prior express written consent rule granted to 7 petitioners

New Petitions Filed

- *None*

Upcoming Comments

- *None*

Decisions Released

- *None*

Click here to see the full FCC Petitions Tracker.

Cases of Note

Plaintiff and Government Amici Urge Supreme Court to Adopt Expansive Definition of ATDS In Facebook v. Duguid

On December 8, 2020, the US Supreme Court will hear argument in *Facebook, Inc. v. Duguid, et al*, Case No. 19-511 (2020), and is expected to remedy a Circuit split on the question of what qualifies as an automatic telephone dialing system (ATDS) under the TCPA. Petitioner Facebook filed its brief on September 4 and is discussed here. Over the past month, plaintiff Noah Duguid, thirty-seven states and the District of Columbia, and a group of twenty-one Democratic Members of the House and Senate have filed three separate briefs asking the Supreme Court to adopt an expansive ATDS definition.

In *Duguid*, the Supreme Court is going to consider the question: "Whether the definition of ATDS in the TCPA encompasses any device that can "store" and "automatically dial" telephone numbers, even if the device does not "us[e] a random or sequential generator"?" Our prior discussion of the case can be found here.

The TCPA defines an ATDS as equipment that 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." 47 U.S.C. § 227(a)(1).

Arguments of Plaintiff-Respondent Duguid

In the merits brief filed by plaintiff/respondent Noah Duguid, he argues for a broad definition of ATDS based on the statutory text and canons of construction that he alleges show the adverbial phrase "using a random or sequential number generator" modifies the verb "to produce" but not the verb "to store." Under that approach, the ATDS prohibition should include all technology which dials number from a targeted list.

According to Duguid, the distributive-phrasing canon provides that "[w]here a sentence contains several antecedents and several consequents," courts should "read them distributively and apply the words to the subjects which, by context, they seem most properly to relate." Essentially this canon requires courts to "carefully consider the fit between multiple verbs or nouns and modifiers that follow them rather than indiscriminately applying modifiers to terms to which they are not reasonably applicable."

Duguid asserted that "[c]ontemporaneous sources define a generator as "[o]ne that generates, causes, or produces." According to Duguid, the verb produce is so closely related to the noun generator that it is hard to find a definition of generator that does not include produce. In contrast,

Duguid argues that the word store describes a different activity: “to leave or deposit in a ... place for keeping, preservation or disposal and, even more relevant, to record (information) in an electronic device (as a computer) from which the data can be obtained as needed.” Therefore, when applying the distributive-phrasing canon, the phrase “using a random or sequential number generator” modifies “to produce” but “to store” since generator relates to “produce” but not “store.”

Similarly, Duguid argues that the last-antecedent canon leads to the same result. The last-antecedent canon provides that “when a statute include[s] a list of terms or phrases followed by a limiting clause,” that “limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows, unless context dictates otherwise.” This principle is especially relevant when “it is a ‘heavy lift to carry the modifier across’ all the entries in a list” and the statute to be interpreted “does not contain items that readers are used to seeing listed together or a concluding modifier that readers are accustomed to applying to each of them.” Duguid asserts that the ATDS definition requires application of this principle since it uses two verbs, store and produce, with distinct and unconnected meanings followed by a modifier that supposedly is applied by readers to the word produce but not store. Thus, applying the last-antecedent cannon, “using a random or sequential number generator” modifies “to produce” and not the other verb “to store.”

Duguid also argues that the legislative history of the TCPA indicates that Congress sought to broadly prohibit autodialed calls from both technology which relied on random number generators and stored lists. Duguid reasoned that Congress would not have included the affirmative defense of consent in the statute if it only intended to prohibit calls from technology which relied on random number generators because it is nearly impossible to have consent for those type of calls. Moreover, according to Duguid, limiting the ATDS prohibition to technology which relies on random number generators would render the TCPA toothless to prevent widespread robodialing by telemarketers because only few dialing technologies today still rely on random number generators.

Finally, Duguid argues that a broad interpretation of the TCPA’s ATDS prohibition will not (as Facebook and several amicus argue) create unintended negative repercussions and limitations on smart phones. Duguid asserts that smart phones lack the capacity to dial numbers automatically—that is, without substantial “human intervention”— so smart phones (used in the normal way) would not meet the second part of the ATDS definition regardless of their ability to store numbers.

Amicus of 21 Members of Congress

In the amicus brief filed by twenty-one Democratic Members of the House and Senate, they ask the Supreme Court to adopt a broad definition of an ATDS that includes technology which dials from a stored list. The Congressional amici echoes two arguments pushed by the Respondent in reasoning that the statutory context of the TCPA validates this interpretation.

First, the Congressional amici argued that the legislative history of the TCPA confirms that Congress was concerned with corporate America buying lists to make telemarketing calls and not just dialing randomly-generated numbers.

Second, the Congressional amici pointed out that the TCPA contains an affirmative defense for ATDS calls made to cellular telephone numbers when they are made with “the prior express consent of the called party.” They argued that this defense for ATDS calls serves little purpose if the ATDS provision only regulated technology which could dial telephone numbers generated out of thin air. The Congressional amici reasoned that the “only way for callers using automated systems to ensure they call telephone numbers with consent is to use a *targeted list* of telephone numbers believed to have consent.” However, according to the Congressional amici, if a caller does that, then they are

not using an ATDS (under a narrow interpretation of the term) and have no need for a consent defense.

Amicus of 37 States and the District of Columbia

Similarly in the amicus brief filed by the thirty seven states asks the Supreme Court to adopt a broad definition of an ATDS because they reason that Congress enacted the TCPA in part out of concern that state consumer-protection laws might prove ineffective to fully address interstate telephone fraud and abuse.

According to the states, by 1991, every state statute that defined the term automatic telephone dialing system understood that term to include devices with the capacity to store and dial numbers from a predetermined list, regardless of whether a random or sequential number generator was used. Consequently, "it would have made little sense for Congress to intentionally depart from these state laws by adopting a narrower definition of an autodialer device in the TCPA" since Congress intended to supplement and not supplant preexisting state law.

District Court Holds Severance of Unconstitutional Government-Debt Exception Applies Only Prospectively

Last month, we reported on *Creasy v. Charter Commc'ns, Inc.*, No. 20-cv-1199, 2020 WL 5761117, at *2 (E.D. La. Sept. 28, 2020), wherein the Court granted a motion to dismiss TCPA claims finding a lack of jurisdiction over any calls that were made during the period 2015-2020, when the unconstitutional government debt exception was part of the TCPA. Full discussion here. Now, a second court has followed that same logic and similarly dismissed a putative consumer class action.

A district court in the Northern District of Ohio has granted a defendant's motion to dismiss a putative class action brought under the TCPA, holding that it lacks subject matter jurisdiction over claims that arose under an unconstitutional statute. In 2015, Congress amended the TCPA to add an exception that precluded liability under the TCPA for calls placed in order to collect a debt owed to or guaranteed by the United States. The Supreme Court struck down this so-called "government debt exception" in *Barr v. American Association of Political Consultants ("AAPC")* earlier this year, finding that it was an impermissible content-based restriction that favored certain speech over other. Rather than invalidate the entire amended TCPA (rendered unconstitutional as a function of the government-debt exception) the Court severed the exception and left the rest of the statute in place. Further discussion of *AAPC* can be found here.

In *Lindenbaum v. Realgy, LLC*, plaintiff filed a putative class action suit against defendants for calls placed in violation of the TCPA between 2015 and the Supreme Court's decision in *APPC*. At the time placed, the calls did not fall under the exception. Nevertheless, defendants moved for dismissal of the suit, arguing that the Supreme Court's decision severing the government-debt exception and curing the TCPA's unconstitutionality was only prospective. Therefore, at the time the calls were placed, the TCPA was unconstitutional and void so the district court lacked subject matter jurisdiction.

The district court agreed, dismissing the Complaint. The Court observed that the Supreme Court failed to address the effect of severance on current pending cases, and highlighted the fact that the clearest statement that the decision should apply retroactively was made in a footnote joined by only three justices; thus, the District Court concluded that *AAPC* applied only prospectively. Citing other Supreme Court precedent that ruled severance of an unconstitutional provision applied only prospectively, the district court reasoned that at the time that the calls at issue in the lawsuit were

made, the statute could not have been enforced as written. Therefore, the court lacked jurisdiction over the matter.

Lindenbaum v. Realgy, LLC, No. 1:19-cv-2862, 2020 WL 6361915 (N.D. Ohio Oct. 29, 2020)

District Court Holds Single E-Fax Insufficient to Confer Standing

In September 2019, we reported on the Eleventh Circuit Court of Appeals' decision in *Salcedo v. Hanna*. There, the Eleventh Circuit ruled that a TCPA claim based on the receipt of a single unsolicited text message did not state a valid injury-in-fact because the receipt of one text message does not interfere with privacy in the home. In *Daisy, Inc. v. Mobile Mini, Inc.*, the Middle District of Florida extended that logic to the realm of e-faxes, entering summary judgment for defendant and dismissing the TCPA claims against it.

In *Daisy*, plaintiff filed a class action after it received an unsolicited fax advertising temporary dumpster products from defendant. However, plaintiff subscribed to an online service to receive faxes, meaning the fax was attached as a pdf delivered via email (rather than traditional delivery via printed hard copy document). Plaintiff did not and could not allege that he incurred any costs in receiving the fax – either in the form of ink and paper, or the time its lines were tied up during transmission of the fax. The court found that this rendered the purported injury suffered exactly in line with *Salcedo*: a few seconds spent reviewing the fax before deleting it.

In the absence of controlling precedent, the court turned to various other areas of law for guidance on the question of whether plaintiff suffered any harm. First, as in *Salcedo*, the court analogized to traditional torts. It found that the purported harm suffered was not similar to any of the injuries caused by common law causes of action (trespass, nuisance, or invasion of privacy). Second, the court determined that Congress had been silent on the issue e-faxes, and thus it was unlikely that it intended to protect such recipients. Finally, the court made reference to the FCC's interpretation that e-faxes are not covered by the TCPA. Therefore, the court concluded plaintiff alleged harm that was insufficient to establish standing, and dismissed the case without prejudice. Plaintiff filed an appeal with the Eleventh Circuit on October 26, 2020.

Daisy, Inc. v. Mobile Mini, Inc., No. 2:20-cv-17, 2020 WL 5701756 (M.D. Fla. Sept. 24, 2020)