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## TCPA Future Uncertain After A Tumultuous 2020

By **Scott Shaffer** (January 7, 2021, 5:59 PM EST)

If a movie was made about the Telephone Consumer Protection Act in 2020, the ending would be suspenseful but obviously designed to set up a bigger sequel in 2021.

While there were some very important legal developments over the past 12 months, including a U.S. Supreme Court ruling that one part of the TCPA was unconstitutional, the biggest TCPA plot twist lies ahead, as the result of a December Supreme Court hearing that saw the nine justices considering a ruling that could greatly limit the TCPA's ability to combat the omnipresent robocalls that threaten to overwhelm Americans' cellphones.



Scott Shaffer

On Dec. 8, the Supreme Court heard oral arguments in *Facebook v. Duguid*,<sup>[1]</sup> a case that will determine whether decades of judicial expansion of the TCPA will continue or end. The all-important ruling will be issued in the first half of 2021, requiring interested followers to return for the next installment of the ongoing TCPA legal battle.

Noah Duguid brought the lawsuit after Facebook Inc. sent him numerous automatic text messages without his consent. The TCPA, Title 47 of the U.S. Code, Section 227, treats text messages the same as automated telephone calls, but in order for the TCPA and its \$500 per-illegal-call penalty to apply in this situation, the texts must have been sent from an automatic telephone dialing system, or ATDS.

The issue is not as simple as it sounds. While Facebook sends out text messages in a manner that most people would agree is automatic, the case will turn on definition of the term ATDS, which was written when the TCPA became law in 1991.

The TCPA provides that an ATDS consists of "equipment which has the capacity to: (a) store or produce telephone numbers to be called, using a random or sequential number generator; and (b) to dial such numbers."

Current technologies no longer fit within that ancient statutory definition, and telemarketers are perfectly capable of blanketing the country with robocalls many times over without any need for equipment that can generate random or sequential numbers.

Telemarketers stopped randomly dialing years ago, and, perhaps out of a sense of practicality, courts over the years have responded by stretching the definition of an ATDS to cover an increasingly broad range of dialing activity in order to curb the flood of unwanted calls.

Facebook argued to the Supreme Court that the existing definition should be interpreted exactly as written by Congress, and based on oral arguments, the newly constituted Supreme Court seems poised to agree.

On the conservative end, Justices Clarence Thomas and Samuel Alito expressed concern that the statute had become obsolete, while on the liberal side, Justice Sonia Sotomayor considered the possibility that adopting a broad definition of ATDS would bring ordinary cellphones under the TCPA's coverage.

She asked the plaintiff's counsel that since almost all cellphones currently have the ability to store and dial telephone numbers, rather than increase the law's coverage through judicial rulings, shouldn't it be up to Congress to update the TCPA and bring it in line with the times?

While Justice Sotomayor did not indicate which way she was leaning, her question reveals a line of reasoning that may very well be adopted by at least five of her colleagues.

For those trying to guess how the 2021 year-end TCPA story will turn out, consider two more things.

First, the U.S. Department of Justice intervened in the case, taking Facebook's side by submitting an amicus brief that largely supported Facebook's position.

Second, the outcome might have been foretold by an unrelated but influential case that was decided by the U.S. Court of Appeals for the Seventh Circuit earlier last year, *Gadelhak v. AT&T Services Inc.* [2]

In that case, which was decided in February, the Seventh Circuit endorsed the narrow definition of ATDS. The court stated:

The [automatic telephone dialing] system at issue in this case ... neither stores nor produces numbers using a random or sequential number generator; instead, it exclusively dials numbers stored in a customer database. Thus, it is not an "automatic telephone dialing system" as defined by the Act — which means that AT&T did not violate the Act when it sent unwanted automated text messages to Ali Gadelhak.

The Seventh Circuit thus affirmed the dismissal of a putative class action in which AT&T sent text message surveys to customers who interacted with AT&T's customer service department.

So why is *Gadelhak* such an important ruling when it appears to be just one of several differing TCPA interpretations that the Supreme Court must sort out in *Duguid v. Facebook*? The answer is that *Gadelhak* was written in February by then-U.S. Circuit Judge Amy Coney Barrett, who now sits on the Supreme Court, and will cast one of the nine deciding votes in *Duguid*.

Before we leave the topic of *Facebook v. Duguid*, we must note that while a Facebook win would limit the effectiveness of the TCPA, it would not eviscerate it. Regardless of the Supreme Court's ruling, the TCPA will continue to prohibit calls using artificial or prerecorded voice technology unless the recipient has given his or her prior express written consent for such a call.

*Duguid v. Facebook* was the second case to reach the Supreme Court in 2020. The first was *Barr v. American Association of Political Consultants Inc.*[3] That case involved a constitutional challenge to a different part of the TCPA.

In 2015, President Barack Obama signed an amendment to the TCPA which granted an exception to the TCPA's robocall ban by allowing certain robocalls that were made to collect a debt owed to or guaranteed by the U.S. This was referred to as the government debt exception.

The constitutionality of the government debt exception was soon challenged on the basis that it violated the First Amendment because it impermissibly favored a certain type of speech — governmental — over other types — political and commercial.

On July 6, the Supreme Court agreed, holding that the government debt exception was unconstitutional. A plurality of six justices concurred in the result but did not agree on the reasons for doing so.

Where *Barr* got complicated was in determining the proper remedy.

The Supreme Court could have invalidated the entire TCPA, but that would have affected popular and useful provisions of the law such as do-not-call and junk fax rules that were not at issue.

It also could have stricken the ATDS section of the TCPA because that section contained the unconstitutional government debt exception. But that course of action would have effectively greenlighted robocalls on a going-forward basis. Instead, a divided Supreme Court chose to repair

the TCPA by invalidating only the government debt exception and letting the remainder stand.

This remedy, supported by a different combination of seven justices, certainly was supported by sound logic, but it had some unusual consequences that subsequent 2020 rulings had to consider.

The ruling meant that the TCPA's ban on ATDS or robocalls was unconstitutional from the date of the 2015 amendment through July 6, 2020. So, what should be done about all the pending lawsuits for robocalls made during that time period? Surely the courts could not enforce an unconstitutional statute?

The first reported decision to rule on this issue was *Creasy v. Charter Communications Inc.*, decided by U.S. District Judge Martin Feldman of the U.S. District Court for the Eastern District of Louisiana on Sept. 28, 2020.[4] In *Creasy*, defendant Charter Communications argued that because Barr found the robocall ban unconstitutional, it was now entirely unenforceable, and required dismissal of all robocall claims.

Judge Feldman agreed with Charter Communications and dismissed 129 of the 130 calls at issue in the suit. The 130th call was allegedly made on July 11, 2020, a few days after the AAPC decision was issued and therefore at a time when the constitutionality of the TCPA had been restored.

Judge Feldman's opinion stated that the Barr ruling:

deprives the Court of jurisdiction over much of this action ... any added likelihood that defendants may evade liability for robocalls that Congress would have preferred to ban from 2015 to 2020 is the unfortunate price of the Court's enforcement of a constitutionally dictated result.

There have been two decisions that follow the *Creasy* court's analysis.

One came out of the U.S. District Court for the Northern District of Ohio on Oct. 29 in a case styled *Lindenbaum v. Realgy LLC*. [5] *Lindenbaum* agreed that federal courts have no jurisdiction to enforce violations of an unconstitutional law, and therefore alleged violators of the TCPA during the time it was unconstitutional cannot be held liable for those calls.

Likewise, *Hussain v. Sullivan Buick-Cadillac-GMC Truck Inc.*, [6] out of the U.S. District Court for the Middle District of Florida, dismissed a TCPA claim, finding that "at the time Defendants engaged in the speech at issue in this case, Defendants were subject to an unconstitutional content-based restriction."

A day after the oral arguments were held in *Duguid v. Facebook*, the U.S. Court of Appeals for the Eleventh Circuit found that a relatively new telemarketing technique known as ringless voicemail was insufficient to invoke TCPA liability. [7]

Ringless voicemail is a technique in which a caller deposits a recorded advertisement directly into the recipient's voice mailbox. Because of the manner of delivery, the phone never rings and the recipient never has an opportunity to answer the call in real time.

In this case, the plaintiff received 15 ringless voicemails advertising an automobile. She did not give the advertiser prior express written consent and sued under the TCPA.

The Eleventh Circuit upheld the dismissal of the lawsuit on the basis that, even if the TCPA was violated, the plaintiff had not suffered a cognizable injury — she was not disturbed by a telephone call, the ringless voicemail did not tie up her phone and she did not incur any financial loss.

To the Eleventh Circuit, this was a deficient allegation of injury that was insufficient to satisfy the Article III injury-in-fact requirement. This decision may embolden telemarketers to increase their use of ringless voicemail.

Looking further back, the first big TCPA news of 2020 was the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, commonly known as the TRACED Act. [8]

It was actually signed by President Donald Trump in the waning days of 2019, and it gave the Federal

Communications Commission increased enforcement powers over unsolicited telemarketing calls. Among the provisions of the TRACED Act are civil penalties of up to \$10,000 per call and an extension of the statute of limitations to four years.

The statute also sought to prevent spoofed calls, designed to show an incorrect caller ID to shield the identity of the caller, usually a telemarketer. In this respect, the TRACED Act has been only partially successful. While some incoming cell phone calls are now flagged as potential spam, many, many others continue to be made with spoofing technology that hides the telemarketer's identity.

In the most notable attempt to exercise its new authority, the FCC in June 2020 issued a notice of apparent liability seeking a forfeiture of \$225 million against persons allegedly responsible for approximately one billion spoofed calls deceptively selling short-term health care plans. The FCC's actions were coordinated with a group of state attorneys general, who filed a concurrent complaint against the same alleged offenders.

Although based on violations of the Telemarketing Sales Rule and not the TCPA, a \$210 million settlement between DISH Network Corp. and the Department of Justice announced on Dec. 7 shows the muscle the government possesses when it seeks to enforce telemarketing violations.

Predictions about FCC enforcement behavior in 2021 are difficult because the current chair, Ajit Pai, will be stepping down on Jan. 20, concurrent with President-elect Joe Biden's inauguration. As of the date of publication of this article, Pai's successor has not been named. With the recent appointment of Nathan Simington to the commission, the remaining four commission members are split down party lines.


With the credits scrolling on the TCPA's 2020, the forthcoming decision in *Duguid v. Facebook* and the subsequent fallout will certainly make for a compelling sequel in 2021.

*Correction: A previous version of this article misstated the number of court decisions there have been on the Creasy issue. The error has been corrected.*

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[1] *Facebook, Inc. v. Duguid* , 926 F.3d 1146 (9th Cir. 2019), cert. granted, 2020 WL 3865252 (July 9, 2020). (Supreme Court case No. 19-511).


[2] *Gadelhak v. AT&T Svcs., Inc.* , 950 F.3d 458, 460 (7th Cir. 2020).

[3] *Barr v. Am. Ass'n of Political Consultants, Inc.* , 140 S. Ct. 2335 (2020).

[4] *Creasy v. Charter Communications, Inc.* , No. 20-1199, 2020 WL 5761117 (E.D. La. Sept. 28, 2020).

[5] *Lindenbaum v. Realgy, LLC* , No. 19-CV-2862, 2020 WL 6361915 (N.D. Ohio Oct. 29, 2020).

[6] *Hussain v. Sullivan Buick-Cadillac-GMC Truck, Inc.* , 20-cv-38, 2020 WL 7346536 (M.D. Fla. Dec. 11, 2020).

[7] *Grigorian v. FCA US, LLC* , No. 19-15026, 2020 WL 7238392 (11th Cir. Dec. 9, 2020).

[8] Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Pub. L. No. 116-105, 133 Stat. 3274 (2019).

