CARLTON FIELDS

What a Couple of TCPA Vets Are Watching Now That the High Court Has Saved the TCPA

TELEPHONE CONSUMER PROTECTION ACT | AUGUST 10, 2020

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On July 6, the U.S. Supreme Court issued its widely anticipated decision in *Barr v. American Association of Political Consultants*. As it turned out, the Telephone Consumer Protection Act-centric portion of the decision is largely a big snooze; the court made like the Queen of Hearts ("Off with their heads!") by axing a portion of the statute that gave government debt collectors a special exemption. The rest of the statute, however, survives. Given that the decision means the TCPA will live on, we provide our thoughts on what we are watching for in TCPA litigation.

Why us? In the famous words of the Eagles, we can't help but notice that there are many Johnny-come-latelies on both sides of the TCPA bar in South Florida. For better or worse, though, we've both been fighting TCPA fights for the last decade, and each of us has a fair assortment of battle scars and battle trophies on our walls.

So, without further ado, here are 10 things to track in TCPA litigation over the next few years in South Florida:

- **Watch what the Supreme Court has decided to decide.** Before the ink was dry on *Barr*, the Supreme Court agreed to hear the *Duguid v. Facebook* case to provide clarity on the deep circuit split over what constitutes an autodialer.
- **Watch the Supreme Court to see if it decides another issue altogether.** While Facebook's certiorari petition did not raise an Article III standing issue, watch to see if somebody (maybe an amicus) raises a question as to whether a federal court has jurisdiction at all to resolve a claim where the plaintiff's claimed injury is the mere receipt of an unwanted text message. Last year, the Eleventh Circuit ruled that a plaintiff did not have standing based on his receipt of a single text message. However, every other circuit court has ruled otherwise.
- **Watch the Senate, Election Day edition.** Congress spent a good chunk of time over the last two years addressing robocalls. What became the TRACED Act was hailed as a rare bipartisan victory. However, the Democrats had a more detailed proposal that did not pass. So, watch the Senate: if the Supreme Court issues a pro-defendant decision on the autodialer issue, a fully Democratic-controlled Congress may take another run at the TCPA during a potential Biden presidency.
- **Watch the Senate, Congressional Review Act edition.** Notwithstanding the pending Supreme Court review, the FCC still may rule on the autodialer issue or certain other significant TCPA issues in the next several months. If that happens, then watch to see if Joe Biden defeats Donald Trump and the Democrats win the Senate and hold the House. The Democrats will then be able to use the Congressional Review Act to overrule agency actions, including FCC actions, taken in the last 60 legislative days of the prior year.
- **Watch fax machines.** On May 15, the Third Circuit held in *Fischbein v. Olson Research Group*, 959 F.3d 559 (3d Cir. 2020), that the faxes at issue in that case were advertisements within the meaning of the TCPA even though the faxes did not contain explicit solicitations to sell anything, but rather offers to *buy* the recipients' services.
- **Watch what happens with the FCC's most recent rulings.** On June 25, the FCC issued a regulatory ruling that clarified the definition of Automatic Telephone Dialing System (ATDS), endorsing the approach that a calling platform is an autodialer if such equipment is capable of dialing random or sequential telephone numbers without human intervention; and reiterated that releasing a telephone number for a particular purpose constitutes an invitation or permission to be called at the number given for that purpose, absent instructions to the contrary.
- **Watch the Eleventh Circuit, ringless voicemail edition.** Late last year, U.S. District Judge Marcia Cooke ruled that a plaintiff who receives a ringless voicemail does not have Article III standing. That case is on appeal. The Eleventh Circuit's ruling will have big implications for TCPA cases in general.
- **Watch the Eleventh Circuit, refrigerators in motor homes edition.** (Didn't expect that one, we bet). The potentially single most important case to impact TCPA cases in Florida is actually a deceptive trade practices act case involving allegedly defective refrigerators in motor homes and has nothing to do with robocalls. Why is that, you ask? When it rules on the appeal of U.S. District Judge Robert Scola's decision from last year, denying class certification in *Papasan v. Dometic*, No. 1:18-cv-21039, 2019 WL 3317750 (S.D. Fla. July 24, 2019), the Eleventh

Circuit may finally issue a published decision on the question whether federal class actions are subject to an ascertainability requirement, meaning that at the class certification stage, the class plaintiff has to present a methodology for identifying the class members. This is often a contested issue in many TCPA cases.

- **Watch the states, legislation edition.** Remember that supercharged TCPA bill the Democrats were advocating for that we mentioned in item 3? Well, the California Assembly passed a bill that looks just like that. Watch to see what happens in California and other states.
- **Watch the states, courts edition.** While this has become more of an issue for other states (the Eleventh Circuit's "no standing for a single text message" case is an outlier), watch to see what happens with cases that are now going forward in other state courts that have different standing rules.

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