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Justices Keep TCPA Litigation Machine Churning For Now

By **Allison Grande**

Law360 (July 6, 2020, 11:15 PM EDT) -- The U.S. Supreme Court on Monday fueled the already booming Telephone Consumer Protection Act litigation landscape by expanding the universe of illegal robocalls, but the fragmented nature of the ruling and unanswered questions about a key statutory term leave the door open for companies to fight back.

In a deeply divided ruling, six of the high court's justices agreed with the Fourth Circuit that an exemption to the TCPA that allows automated calls to be made to collect federally backed debts violates the First Amendment. A different lineup of seven justices then proceeded to conclude that the appropriate remedy was to sever the constitutionally deficient provision from the statute rather than entirely strike down the law's autodialer ban, which prohibits automated calls or texts to consumers for almost any other purpose without consent.

For TCPA litigation going forward, the ruling means, "for plaintiffs' lawyers, business as usual, and even more business," said Baker McKenzie partner Perrie M. Weiner. "And, for companies, it means no reprieve from the onslaught of cases brought under the TCPA."

Those on the plaintiffs' side of the TCPA litigation bar applauded the ruling as a win for consumers seeking to avoid a barrage of invasive and annoying robocalls. They specifically seized on the opening lines of Justice Brett Kavanaugh's controlling opinion: "Americans passionately disagree about many things. But they are largely united in their disdain for robocalls."

"Justices Kavanaugh's and [Stephen] Breyer's respective opinions epitomize that consensus by agreeing that the TCPA prohibits 'almost all robocalls' to cellphones," said Daniel M. Hutchinson, a partner at Lieff Cabraser Heimann & Bernstein LLP who represents consumers in TCPA class actions. "So long as companies continue to place robocalls without prior express consent, there will continue to be a critical need for TCPA class action litigation."

While the defense bar was holding out hope for an upset victory on the issue, attorneys that represent companies fighting these suits say they weren't entirely surprised at the outcome.

"It would have been asking too much for the court to exercise the nuclear option and blow up the TCPA, especially given the 'disdain' for robocalls," said Christine Reilly, a Manatt Phelps & Phillips LLP partner who heads the firm's TCPA compliance and class action defense practice group.

Instead, Justice Kavanaugh homed in on the inequities that the debt collection exemption had introduced, concluding that while the political groups mounting the challenge to the autodialer ban's constitutionality still wouldn't be allowed to make political robocalls to cellphones, their speech would now be "treated equally with debt-collect speech."

The high court "acted like a parent where one sibling gets upset that her sister gets to go over to a friend's house but she can't," said Jason Stiehl, a Loeb & Loeb LLP partner. "The result: Neither one gets to go to her friend's house."

In doing so, the high court unleashed "a whole new First Amendment doctrine where the court essentially adopted an equal protection remedy to even the free speech playing field rather than striking down the statute to free the speech," said Squire Patton Boggs LLP partner Eric J. Troutman.

The ruling clears the way for TCPA plaintiffs, including those who may have been holding off on bringing claims until the Supreme Court issued its decision, to get back to business as usual, attorneys say.

"The plaintiffs bar is going to have a field day with this opinion," Troutman said, pointing to apparent reverence by the justices for the power and importance of the TCPA to curb robocalls generally.

The ruling is likely to have the biggest and most immediate impact on those who use autodialers to collect debts, such as student loans and mortgages, that are owed to or guaranteed by the federal government. Those callers have been insulated from liability under the TCPA since 2015, when Congress exempted these communications from the statute's general prohibition on placing autodialed calls to cellphones. But the Supreme Court's move to eliminate the carveout reopens that door, attorneys on both sides of the bar noted.

Following Monday's ruling, there will likely be "a wave of new cases filed against government debt collectors, whose potential liability for pre-opinion conduct now will be litigated intensely," predicted Stephen Newman, a partner at Stroock & Stroock & Lavan LLP.

Frank Kerney, an attorney with plaintiffs firm Morgan & Morgan, agreed that there's "many more of these lawsuits coming" and that the Supreme Court's ruling contains plenty of "dicta that plaintiffs lawyers will be citing" as they press to advance not only debt collection claims but also allegations against a range of other businesses that use autodialers to contact their customers.

"The TCPA lives to fight another fight," Kerney said.

Even with the debt collection exemption resolved, there will be plenty of battles for TCPA litigants to wage in the coming months, according to attorneys.

"The Supreme Court's highly fragmented opinion is indicative of the justices' struggle to find a one-size-fits-all solution to the problems inherent in the TCPA," said Jaszczuk PC founder Martin Jaszczuk, pointing to long-running disputes over statutory ambiguities that have "at times been applied to threaten and punish well-meaning businesses that were not the targets of the legislation."

"It will now be up to [the Federal Communications Commission] and the many courts that have aptly recognized the issues to craft a patchwork of solutions that protect Americans from the truly unwanted calls made by unscrupulous actors, but permit well-intentioned companies to conduct business free of the threat of draconian and potentially annihilating damages" of between $500 and $1,500 per allegedly

unlawful call or text, Jaszczuk said.

Given the narrow nature of the high court's latest ruling, ample room still exists for companies to challenge the constitutionality of other exemptions that both Congress and the FCC have allowed to the autodialer ban during the past three decades, including for alerting consumers about package deliveries and certain types of health care messages, attorneys say.

"Given the court's conclusion that the exception for government debt collection was unconstitutional because it 'single[d] out specific subject matter for deferential treatment,' some may argue that the other exceptions are also problematic," said Ezra Church, a partner at Morgan Lewis & Bockius LLP.

Mark Eisen, a TCPA defense attorney at Benesch Friedlander Coplan & Aronoff LLP, added that the Supreme Court on multiple occasions in its various opinions Monday stressed that its holding was a narrow one and that it was only addressing the exemption for government-backed debts and not other potentially controversial aspects of the statute, including its differential treatment of calls placed to landlines and the various carveouts that the FCC has created over the years.

"The fight certainly doesn't seem to be over," Eisen said. "Now that the Supreme Court has taken the First Amendment issue up as it relates to the debt collection, it seems like it will only be a matter of time before someone tries again in a more comprehensive fashion."

Mark Taticchi, a Faegre Drinker Biddle & Reath LLP partner, said it will be interesting to see how these disputes play out, since Monday's ruling didn't produce a "clear frame" for these issues.

"An alert that your life-saving medication is ready is likely to be viewed differently than one about your package being ready when it comes to talking about the importance of these exemptions," he said.

The justices also declined in their various opinions to provide any guidance on what exactly constitutes an "automatic telephone dialing system," or autodialer, under the TCPA, despite the issue being raised in some briefings filed with the court, noted Mark W. Brennan, tech and telecoms sector group lead at Hogan Lovells.

"As a result, attention turns back to the FCC to issue a clear autodialer decision after almost 30 years of muddling through the statute," Brennan said.

The FCC issued a notable ruling late last month concluding that systems that require the manual dialing of numbers don't qualify as autodialers.

But while that decision was "helpful" in shedding more light on the autodialer question and narrowing the controversial statutory definition, "further clarity would be useful," noted Behnam Dayanim, the head of Paul Hastings LLP's privacy and cybersecurity practice.

That clarity could now be on the horizon, as both sides of the bar have been waiting for more than two years for the commission to issue a more sweeping pronouncement of the exact contours of the autodialer definition in responding to the D.C. Circuit's invalidation in 2018 of an earlier FCC order that broadly construed the term.

"The FCC may have been hoping that the Supreme Court would just take care of the issue with its First Amendment decision, but now to the extent that the FCC may have been waiting to see what the

Supreme Court was going to say, hopefully having this ruling will allow the FCC to move a little bit faster knowing that its decision [on what constitutes an autodialer] is that much more important to parties involved in ongoing TCPA litigation," Eisen said.

The Supreme Court may also soon step into the fray on that front. A pair of pending certiorari petitions filed by Facebook and Charter Communications Inc. last year challenged the Ninth Circuit's broad reading of autodialer to encompass all devices with the capacity to automatically dial numbers.

Since the filing of those petitions, the circuit split on the autodialer issue has only grown, with the Seventh and Eleventh circuits having narrowly interpreted the term to cover only devices that send messages or make calls to randomly or sequentially generated phone numbers, and the Second Circuit recently becoming the first to join the Ninth Circuit's broad reading.

With the constitutionality issue now behind them, TCPA attorneys are hopeful that the justices will finally tackle this growing and litigation-fueling divide.

"Monday's decision affirms the status quo and is not the 'robocall revolution' that some predicted," Troutman Pepper partners David Anthony and Alan Wingfield said in a joint email. "It may have moved the needle for First Amendment jurisprudence, but not for the TCPA. This makes the grant or denial of certiorari in Duguid v. Facebook all the more important."

The political groups involved in Monday's case are represented by Roman Martinez, Andy Clubok, Susan Engel, Tyce Walters, Samir Deger-Sen and Greg in den Berken of Latham & Watkins LLP, and William E. Raney and Kellie Mitchell Bubeck of Copilevitz Lam & Raney LLC.

Attorney General William Barr and the FCC, who were named as defendants in the First Amendment case, are represented by Noel J. Francisco, Malcolm L. Stewart and Frederick Liu of the U.S. Solicitor General's Office, and Joseph H. Hunt, Mark B. Stern, Michael S. Raab and Lindsey Powell of the U.S. Department of Justice's Civil Division.

The case is William P. Barr et al. v. American Association of Political Consultants Inc. et al., case number 19-631, in the U.S. Supreme Court.

--Editing by Aaron Pelc and Emily Kokoll.