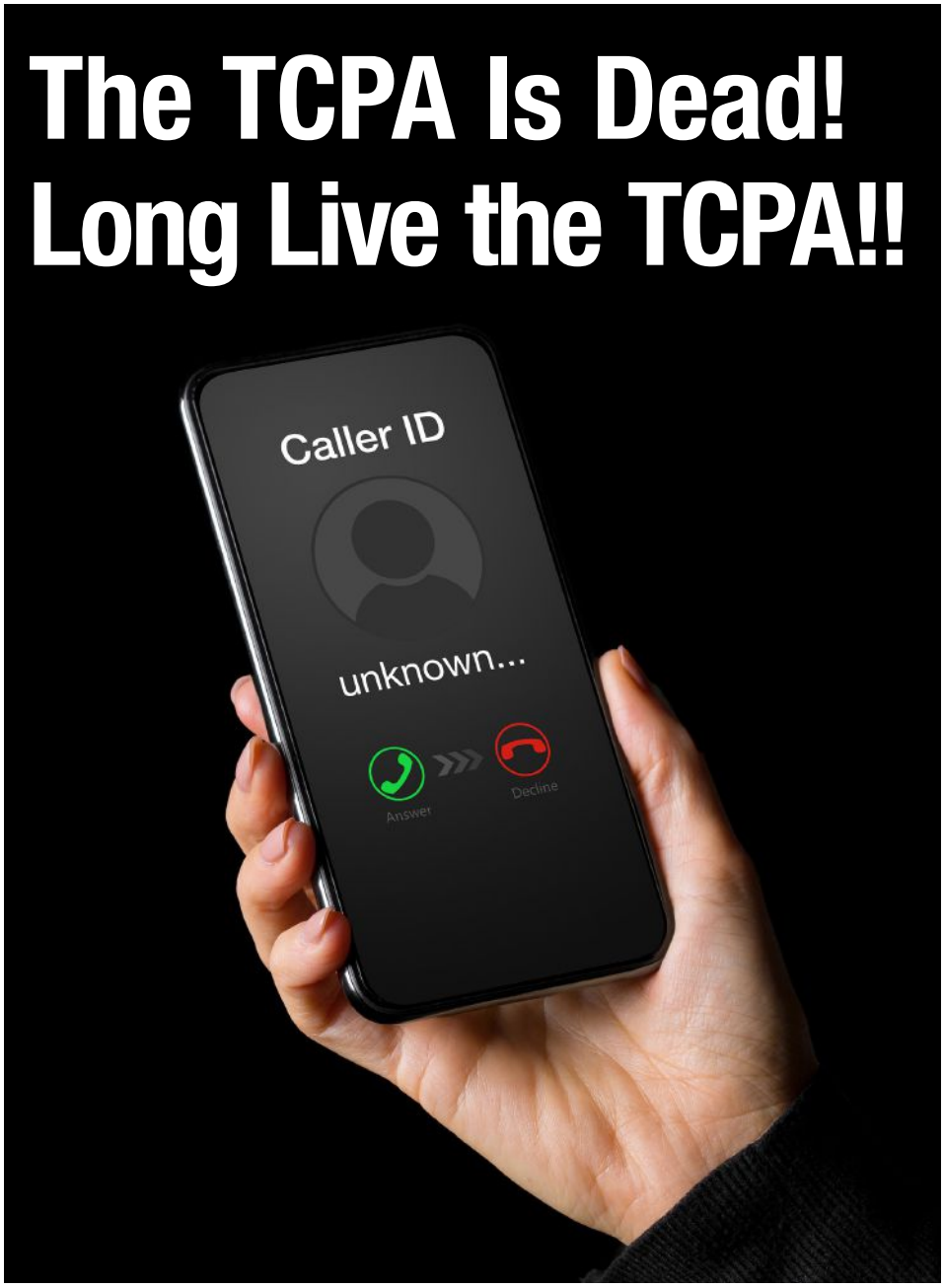
Recent Critical Decisions

The TCPA Is Dead! Long Live the TCPA!!



By Richik Sarkar

While specific, widely used technology is now exempt from the TCPA, plaintiffs will continue to challenge the nature of such dialers to coerce high-dollar capitulation.

The Telephone Consumer Protection Act, 47 U.S.C. §227, has a long and litigious history. Passed in 1991, it focuses upon restricting telephone solicitations and the use of automated telephone equipment, providing technical

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requirements for fax machines, autodialers, etc. However, because of the substantial penalties for calls made to cellular phones without consent—between $500 or $1,500, depending upon whether a violation of the TCPA is willful—a cottage industry quickly formed. Over the past few years, the reach of the TCPA has been modified by the courts. This article will focus on some of the critical decisions over the past few years.

Article III Standing

Standing to bring suit is a threshold requirement in all litigation. And in *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019), the Eleventh Circuit determined that a single, unsolicited text message sent in violation of the TCPA is not enough to establish standing. In this suit, Salcedo, a former client of Hanna and his law firm, received a multimedia text message from Hanna offering a discount on legal services. *Id.* at 1165. As a result, Salcedo sued as the representative of a class of former clients who had received unsolicited text messages from Hanna, alleging violations of the TCPA. *Id.* The district court found that Salcedo had standing but stayed its proceedings pending appeal. *Id.*

In evaluating standing, the appellate court looked for a concrete injury. *Id.* at 1167. Under Eleventh Circuit precedent, a plaintiff suffers a concrete injury from a fax sent in violation of the TCPA because, in the minute the fax was being transmitted, the plaintiff lost the use of his or her fax machine and the fax used up supplies. *Id.* at 1167–68 (citing *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1252 (11th Cir. 2015)). The court determined that a text is different from a fax because (1) it does not use supplies, and (2) a device is not rendered unavailable while receiving a text. *Id.* at 1168. Moreover, Congress' legislative findings about telemarketing show that it was concerned about something much more intrusive than a single text message. In enacting the TCPA, Congress was concerned primarily about intrusive invasions of privacy in the home. *Id.* at 1169. The ability to move outside of the home and silence a cell phone makes communication to that phone much less intrusive. *Id.* In addition, the court found that a single unwanted text message did not create the sorts of harm supporting common law torts such as intrusion upon seclusion, trespass, nuisance, conversion, and trespass to chattel. *Id.* at 1170–72. The court accordingly reversed the district court's decision. One judge concurred in the judgment to emphasize that in her view, a plaintiff who alleged receiving multiple unwanted text messages, rather than only one, might have standing to sue. *Id.* at 1174.

Vicarious Liability

Similar to standing, establishing direct or vicarious liability is crucial in TCPA cases. For example, in *Warciak v. Subway Restaurants, Inc.*, 949 F.3d 354 (7th Cir. 2020), a T-Mobile customer filed a TCPA claim (and related state claim) alleging that a text message advertising a deal at Subway was received as part of a T-Mobile marketing campaign violated the statute. The customer claimed that Subway was in a common-law agency relationship with T-Mobile and that Subway was vicariously liable for T-Mobile's alleged violation of the TCPA. *Id.* at 356. The district court dismissed the TCPA claim, and the Seventh Circuit affirmed. The court held that to be vicariously liable under the TCPA, an agent must have express or apparent authority. *Id.* at 357. In this case, the customer did not include enough facts to state a plausible claim for relief under the theory of vicarious liability. The customer only alleged that Subway entered into a contractual relationship with T-Mobile, and the customer's evidence focused on T-Mobile's conduct rather than Subway's. *Id.* Furthermore, the court ruled that there is no liability under the TCPA for customer calls by their wireless carriers if the customer is not charged for the calls. Accordingly, the customer's complaint was dismissed because he was not charged for the text. *Id.* at 357–58.

Invalidation of the Government Debt-Collection Exception

In 2015, Congress amended the TCPA to exempt federal government debt-collection efforts from the prohibition against using an automatic telephone dialing system (ATDS) to call a cell phone. Some defendants who were sued for violations of the TCPA argued that the 2015 amendment violated the First Amendment and sought on that ground to persuade courts to strike down the entire statute. Several lower courts agreed with the defendants that the exemption for government debt collection was unconstitutional. Still, they also held the provision was severable from the rest of the statute and declined to invalidate the statute as a whole. *See, e.g.*, *Rosenberg v. LoanDepot.com LLC*, 435 F. Supp. 3d 308 (D. Mass. 2020); *Perrong v. Liberty Power Corp.*, 411 F. Supp. 3d 258 (D. Del. 2019); *Hand v. ARB KC, LLC*, No. 4:19-CV-00108-NKL, 2019 U.S. Dist. LEXIS 207798 (W.D. Mo. Dec. 3, 2019).

Congress' legislative findings about telemarketing show that it was concerned about something much more intrusive than a single text message.

The U.S. Supreme Court granted certiorari in one of these cases and reached the same conclusion. In *Barr v. American Association of Political Consultants,* 140 S. Ct. 2335 (2020), the Court reviewed a decision by the Fourth Circuit holding that the government-debt exception to the TCPA violated the First Amendment but was severable from the rest of the statute. *Am. Ass'n of Political Consultants, Inc. v. FCC*, 923 F.3d 159 (4th Cir. 2019), *aff'd sub nom. Barr v. Am. Ass'n of Political Consultants, Inc.,* 140 S. Ct. 2335 (2020). The Supreme Court reached the same conclusion, but there was no majority rationale. The lead opinion, authored by Justice Kavanaugh, and joined by Chief Justice Roberts and Justices Thomas and Alito, held that the government-debt exception was a content-based restriction on speech and, as such, was subject to strict scrutiny for consistency with the First Amendment. *Id.* at 2346. The government conceded it could not justify the exception under that standard, and the plurality ruled it unconstitutional. Justice Sotomayor concurred in the judgment. *Id.* at 2356. She determined that the challenged provision was subject to intermediate scrutiny and found that the government's justifications for the

provision did not meet that more lenient standard. Justice Gorsuch, writing alone on this point, believed like the plurality that the provision was subject to strict scrutiny and could not meet that test, but offered his rationale for reaching that conclusion. *Id.* at 2364. Justice Breyer, joined by Justices Ginsburg and Kagan, dissented on the merits issue. *Id.* at 2358. In his view, the provision was subject to intermediate scrutiny, and the government succeeded in justifying it under that standard. Thus, six of the justices found the provision unconstitutional, but no majority agreed on the rationale.

The strategy was to convince the Court that the government-debt exception was invalid and that it could not be severed from the rest of the statute. However, the Court held that the clause was indeed severable.

Even though the respondents succeeded in demonstrating that the government-debt exception was invalid, they did not achieve their results. The respondents had not been subjected to a lawsuit under this invalidated provision—they could not have been since it offered an *exception* from liability. Instead, their goal was to obtain a declaratory judgment holding the TCPA as a whole unconstitutional so that they could make robocalls to cellphones as part of their political outreach activities. The strategy was to convince the Court that the government-debt exception was invalid *and* that it could not be severed from the rest of the statute. However, the Court held that the clause was indeed severable. Justice Kavanaugh reviewed the Court's precedents establishing a "strong presumption of severability." *Id.* at 2354. Focusing on the Communications Act's express severability clause, the Court determined the government-debt exception should be severed. *Id.* On this point, the justices were able to muster a 7–2 majority, with Justices Gorsuch and Thomas dissenting.

Since the *Barr* decision, there has been a split among district courts regarding whether courts can consider claims based upon the pre-severed Robocall Restriction because at that time, "§227(b)(1)(A)(iii) [was] an unconstitutional content-based restriction on speech." *Creasy v. Charter Communs., Inc.*, 489 F. Supp. 3d 499, 503 (E.D. La. 2020); see also, *Lindenbaum v. Realgy*, No. 1:19 CV 2862, 2020 U.S. Dist. LEXIS 201572, *1–2 (N.D. Ohio October 29, 2020). In such cases, courts have dismissed TCPA claims because the Robocall Restriction was unconstitutional—and unenforceable—between 2015 and its severance in *Barr.* However, the Sixth Circuit reversed in *Lindenbaum v. Realgy, LLC*, 2021 U.S. App. LEXIS 27159 (6th Cir Sep. 9, 2021), because severance is not a remedy, and prospective application could only happen through a legislative act, the *Barr* decision could not affect the plaintiff's already pending claim as the Supreme Court determined that the government-debt-collector exception was automatically displaced from the start and then interpreted what the statute has always meant in its absence. *Id.* at *8–9.

This Sixth Circuit decision was in line with other district courts decisions holding that the general rule that an unconstitutional statutory amendment is null and void when enacted has no effect on the original statute and its enforceability is unaffected. *LaGuardia v. Designer Brands, Inc.*, No. 2:20-cv-2311, 2021 U.S. Dist. LEXIS 97396, at *5 (S.D. Ohio May 24, 2021); see also, *Less v. Quest Diagnostics, Inc.,* ___ F.Supp.3d ___, No. 3:20 CV 2546, 2021 WL 266548 (N.D. Ohio Jan. 26, 2021); *Moody v. Synchrony Bank,* No. 5:20-CV-61 (MTT), 2021 WL 1153036 (M.D. Ga. Mar. 26, 2021); *Abramson v. Federal Insurance Co.,* Case No. 8:19-cv-02523-TPB-AAS, 2020 WL 7318953, at *2 (M.D. Fla. Dec. 11, 2020); *Buchanan v. Sullivan,* No. 8:20-CV-301, 2020 WL 6381563, at *3 (D. Neb. Oct. 30, 2020); *Schmidt v. AmerAssist A/R Sols. Inc.,* No. CV-20-00230-PHX-DWL, 2020 WL 6135181, at *4 n.2 (D. Ariz. Oct. 19, 2020); *Komaiko v. Baker Techs., Inc.,* No. 19-cv-03795-DMR, 2020 WL 5104041, at *2 (N.D. Cal. Aug. 11, 2020); *Burton v. Fundmerica, Inc.,* No. 8:19-CV-119, 2020 WL 4504303, at *1 n.2 (D. Neb. Aug. 5, 2020).

Definition of "Automatic Telephone Dialing System"

For calls to be actionable, an automatic telephone dialing system must have been used. And what constitutes an ATDS has been vigorously prosecuted, culminating in the Supreme Court's decision in *Facebook v. Duguid*. 141 S. Ct. 1163 (2021). However, before thoroughly examining *Facebook,* a brief review of prior decisions is useful.

Glasser v. Hilton Grand Vacations Co., L.L.C., 948 F.3d 1301 (11th Cir. 2020), combined two controversies. In the first, Glasser sued Hilton Grand Vacations Company over unsolicited phone calls related to timeshare sales. In the second, Evans sued a loan servicer for unsolicited calls about unpaid loans. *Id.* at 1305. The district court found for Evans and against Glasser, so Glasser and the loan servicer appealed. *Id.* The judgment turned on whether the phone systems were *automatic* telephone dialing systems. Because the systems used in both cases did not use randomly or sequentially generated numbers, the system was not an auto-dialer, and the Eleventh Circuit found the TCPA did not apply.

The court analyzed the phrase using conventional grammar rules, the plain meaning of the words, the legislative history, developments in technology, and the constitutional avoidance principle applied to the First Amendment. Specifically, the TCPA defines "automatic telephone dialing system" as "equipment which 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(b)(1)(A). Glasser and Evans argued that "using a random or sequential number generator" only applied to "to… produce," while the loan servicer and Hilton argued that the phrase applied to both producing and storing. 948 F.3d at 1306.

In *Gadelhak v. AT&T Servs,* the Seventh Circuit followed the Eleventh and found that a device that only dialed numbers stored in its database was not an ATDS. 950 F.3d 458 (7th Cir. 2020). In so doing, the court took four different approaches in reading the statute: (1) the phrase "using a random or sequential number generator" could modify both "store" and "produce," which would

mean that a device must be capable of performing at least one of those functions using a random or sequential number generator to qualify as an "automatic telephone dialing system"—as the Eleventh Circuit concluded; (2) the phrase might describe the telephone numbers themselves, specifying that the definition captures only equipment that dials randomly or sequentially generated numbers—which is how district court interpreted the provision; (3) the phrase might limit only the word "produce," which would cover not only equipment that can produce numbers randomly or sequentially, but also any equipment that can simply store and dial numbers; and (4) the phrase could describe how the telephone numbers are to be called, regardless of how they are stored, produced, or generated. 950 F.3d at 463–64. Ultimately, the court adopted the first method. 950 F.3d at 460.

Conversely, in *Duran v. La Boom Disco, Inc.*, 955 F.3d 279 (2d Cir. 2020), Duran claimed that he received at least 300 text messages from La Boom Disco ("LBD"), a New York nightclub, over 18 months after initially providing his phone number to get free admission. LBD countered that it did not use an automatic telephone dialing system to send the messages, so the TCPA did not cover it. *Id.* at 281–82. The district court agreed with the nightclub and granted summary judgment for LBD. *Id.* at 282. The Second Circuit disagreed. Contrary to the majority in *Glasser v. Hilton Grand Vacations*, the court held that the phrase "using a random or sequential number generator" only modified the word "produce." *Id.* at 284. The court relied on the surplusage that would be created if the phrase applied to both clauses. *Id.* at 284–85. In addition, the TCPA had a specific exception for collecting a debt owed to or guaranteed by the United States. *Id.* at 285. Given that debt calls would not be made from a randomly generated list, it made sense to the court that humans could generate the list of numbers and still have the system be automatic. *Id.* The court also relied upon a trio of F.C.C. interpretations of the TCPA, which found that the statute should be interpreted broadly to cover newer technologies that telemarketers employ to dial from stored lists of numbers rather than generating the numbers randomly or sequentially. *Id.* at 285–86.

Then, in *Allan v. Pa. Higher Educ. Assistance Agency*, the Sixth Circuit, in a 2–1 decision, also determined that the plain language of the TCPA covered devices that only dial from a stored list of numbers. 2020 U.S. App. LEXIS 23935, 2020 FED App. 0233P (6th Cir.) In that case, despite revoking consent, the plaintiffs received hundreds of unwanted calls regarding their student debt. *Id.* The plaintiff were granted summary judgment, and on appeal, the defendant argued that its device was not an ATDS. *Id.* at *5–6. (In addition, the defendant argued that the district court improperly considered voicemails it left related to the loan. The Sixth Circuit rejected that argument as well.) Recognizing the split in interpretation between the Ninth and Second Circuits versus those of Seventh and Eleventh, the Sixth Circuit sided with the Ninth and Second—specifically noting Judge Martin's dissent in Glasser. *Id.* at *14–15, 26 *citing to Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018), *Duran v. La Boom Disco, Inc.*, 955 F.3d 279, 2020 WL 1682773 (2d Cir. Apr. 7, 2020), *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 460 (7th Cir. 2020), and *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1304–05 (11th Cir. 2020). In dissent, Judge Nalbandian found that the method used by the Seventh and Eleventh Circuits was both grammatical and did not require a rewriting of the TCPA. *Id.* at *30. And such a reading also eliminated any problems with surplus language, was consistent with prior F.C.C. orders, and was consistent with congressional intent. *Id.* at *31–34.

In April 2021, the Supreme Court resolved these circuit differences in *Facebook v. Duguid,* 141 S. Ct. 1163 (2021), and clarified what kinds of automatic telephone dialing systems are subject to the TCPA. Duguid sued Facebook over text messages that he was receiving notifying him that someone was attempting to access his Facebook account from a different device. *Id.* at 1168. Duguid never had a Facebook account, so he sued Facebook as part of a putative class under the TCPA, alleging they stored users' phone numbers and automatically messaged them. *Id.* The District Court for the Northern District of California dismissed the suit, finding that Facebook did not send randomly or sequentially generated text messages. *Id.* The Ninth Circuit reversed and stated that automatic telephone dialers only needed to store and dial numbers automatically. *Id.*

The Supreme Court granted certiorari to resolve a circuit split on this issue, ultimately deciding to reverse the Ninth Circuit and hold that the statute required the use of a random or sequential number generator. *Id.* at 1168–69. After utilizing various canons of statutory construction, the Court concluded that the definition in the TCPA excluded any equipment that did not have this feature. *Id.* at 1170. The Court proceeded to reject Duguid's non-textual arguments that Congress had a goal of broad privacy protection when they passed the TCPA and that this decision would open the floodgates for organizations who used technology similar to Facebook. *Id.* at 1171–73.

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Conclusion

In light of recent decisions on standing, the Robocall Restriction, and ATDS limiting the scope of the TCPA, some have postulated that the TCPA is, if not dead, on death's door. While fewer suits may be brought and fewer still taken to judgment, burying the TCPA is premature. While specific, widely used technology is now exempt from the TCPA, TCPA plaintiffs will continue to challenge the nature of such dialers to coerce high-dollar capitulation. FD