The TCPA Is Unconstitutional—But in a Good Way

Attacks on the constitutionality of the Telephone Consumer Protection Act (TCPA) have been fairly common, but few have succeeded—until now. Recently, defendants in TCPA cases have begun arguing that the TCPA is unconstitutional because the 2015 “Budget Act” amendment creates a content-based restriction on speech. The Budget Act amendment, exempting robocalls made to collect federal student loans and other government debts from the requirement of prior express consent, can be found at 47 U.S.C. § 227(b)(1)(A)(iii), (B), (H).

Both the Fourth and Ninth Circuits have now agreed that the amendment creates unconstitutional distinctions based on the content of speech and is not sufficiently tailored to its objective. Am. Ass’n of Political Consultants, Inc. v. Fed. Communications Comm’n [1], 923 F.3d 159 (4th Cir. 2019); Duguid v. Facebook, Inc. [2], 926 F.3d 1146 (9th Cir. 2019).

Both Circuits held that the 2015 amendment is severable from the rest of the TCPA, however, frustrating the goals of the industry players who raised these arguments. They therefore invalidated the amendment but left the rest of the TCPA intact: a double win for consumers.

As a result, private debt collectors collecting on federal student loans and other government debts are now subject to the TCPA’s requirements in the Fourth and Ninth Circuits as if the Budget Act amendment had never been enacted. Those rulings are also strong precedent in other circuits such that the usual TCPA requirements now apply to collectors of government debts. See NCLC’s Federal Deception Law § 6.3.5 [3] for further discussion of this and other challenges to the constitutionality of the TCPA.

Supreme Court Punts on Weight Given to FCC Orders, but Watch Out

The Hobbs Act provides that the only way to challenge the validity of a final FCC order is through a petition filed in a U.S. Court of Appeals within sixty days after the entry of the FCC order. 28 U.S.C. §§ 2342, 2344, 2349; 42 U.S.C. § 402. Many courts—including the Second, Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits—hold that this means that, when consumers bring TCPA cases against callers, both the trial court and any appellate court are bound to follow and apply any relevant FCC orders. See NCLC’s Federal Deception Law § 6.2.4.3a [4]. Giving a high level of deference to FCC orders has often been helpful to consumers, for example where FCC orders expansively interpret the definition of an autodialer.

A 2019 Supreme Court decision suggests, however, that the Court may not be prepared to give such conclusive weight to FCC orders in litigation between private parties. In PDR Network v. Carlton & Harris Chiropractic, Inc. [5], 139 S. Ct. 2051 (2019), the Supreme Court accepted certiorari on the question of whether the Hobbs Act means that a district court must adopt and follow the FCC’s order interpreting the term “unsolicited advertisement” as including certain faxes that promote free goods.

Four Justices would rule that the Hobbs Act does not prevent courts from reviewing FCC orders that are at issue in private suits to enforce the TCPA. However, the five-Justice majority concluded that the record was insufficient for it to address the question, so remanded the case to the Fourth Circuit to resolve two questions that these five Justices thought might be relevant:

1. Was the FCC order at issue the equivalent of a “legislative rule,” which is issued by an agency pursuant to statutory authority and has the force and effect of law, or an “interpretive rule,” which simply advises the public of the agency’s construction of the statutes it administers and lacks the force and effect of law? The Court noted that, if the order was merely an interpretive rule, it might not be binding on a district court.

2. Did the litigant in the case before it have a prior and adequate opportunity to seek judicial review of the FCC’s order pursuant to the Hobbs Act? The Court noted that if not then the Administrative Procedure Act might permit the litigant to challenge the validity of the FCC’s order in district court even if the order amounted to a legislative rule.

Unlike the four Justices in the minority who would limit the Hobbs Act’s effect, the five Justices in the majority did not express any view about the merits of these questions, or even about whether these issues would be relevant to its ultimate decision once the case returns to it. Nevertheless, this breakdown of the vote suggests that, if the case goes back to the Supreme Court, there may be a majority to at least limit the rule that FCC orders are binding in private litigation, and possibly to reject it altogether.

Already an Eleventh Circuit panel has taken the position in dicta that the exclusive jurisdiction provided by the Hobbs Act...
should be confined to direct review of the agency orders and thus should not make FCC orders binding when the court is exercising its ordinary jurisdiction. *Gross Motels, Inc. v. Safemark Sys., L.P.* [6], 931 F.3d 1094 (11th Cir. 2019).

If the Hobbs Act does not make FCC orders binding in litigation between private parties, those orders may still be entitled to considerable deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Although *Chevron* sets forth a highly deferential standard that requires courts to defer to the agency’s interpretation of a silent or ambiguous statute whenever “the agency’s answer is based on a permissible construction of the statute,” it is a less strict standard than the Hobbs Act rule.

Given the uncertain future of the view that FCC orders are binding on federal courts in litigation between private parties, advocates should be prepared to defend the merits of any FCC order that supports a consumer’s claim. The reevaluation of the weight to be given FCC orders may also open opportunities to challenge long-standing FCC positions, such as the view that merely providing a cell phone number is prior express consent to be robocalled at that number. See NCLC’s *Federal Deception Law* § 6.2.4.a [4] for more detail on this topic.

## TCPA Restrictions Apply to Ringless Voicemail

The TCPA’s restrictions on robocalls apply to “any call.” 47 U.S.C. § 227(b)(1)(A). But what is a call? In 2017, a provider petitioned the FCC for a ruling that the TCPA’s robocall restrictions do not apply to “ringless voicemail,” a technology that inserts a message into the called party’s voicemail without causing the phone to ring. The provider withdrew the petition after consumers and public officials flooded the FCC with negative comments. See Kellie Mitchell Bubeck & Ross B. Hofherr, *Now Entering the Ring . . . Are “Ringless Voicemail” Calls Exempt from the TCPA?*, 60 DRI for the Def. 70, No. 2 (Feb. 2018).

Now courts have begun to weigh in and have had no difficulty applying the TCPA to ringless voicemail. *Picton v. Greenway Chrysler-Jeep-Dodge, Inc.* [7], 2019 WL 2567971 (M.D. Fla. June 21, 2019) (rejecting argument that ringless voicemails are not subject to the TCPA); *Somogyi v. Freedom Mortg. Corp.* [8], 2018 WL 3656158 (D.N.J. Aug. 2, 2018) (applying TCPA’s restrictions on autodialed and prerecorded calls to ringless voicemail, without identifying any issues that would complicate the application of the TCPA).

For one thing, the technology for delivering ringless voicemail messages to consumers’ cell phones is not materially different from that used to send SMS-based text messages to cellular subscribers *en masse*, which the FCC and many courts have held are “calls” to which the TCPA’s restrictions apply. See NCLC’s *Federal Deception Law* § 6.7.2 [9]. In addition, courts have consistently held that calls resulting in voicemail messages are subject to the TCPA, so ringless voicemail should be treated no differently. See *Soppet v. Enhanced Recovery Co., L.L.C.*, 679 F.3d 637, 638 (7th Cir. 2012).

### “Robot Calls” Are Prerecorded Calls Subject to the TCPA

Providers have petitioned the FCC to rule that “robot calls”—a particularly maddening type of call in which a live person plays prerecorded audio clips to the called party, choosing snippets that respond to whatever the called party says—are not governed by the TCPA’s restrictions on prerecorded calls. Callers have claimed that, since the system allows calls to be interactive and there is human involvement in selecting the snippets to be played, these calls escape the prohibition.

The first court to consider the question had no trouble concluding that calls in which a live caller plays prerecorded audio clips is one made “using ... [a] prerecorded voice.” *Braver v. Northstar Alarm Services, L.L.C.* [10], 2019 WL 3208651 (W.D. Okla. July 16, 2019). *Braver* [10] rejected the notion that the human intervention in the playing audio clips meant that the call did not use a prerecorded voice. It also rejected a strained argument that the consent requirement did not apply on the theory that such a call delivers multiple messages rather than a single message. See NCLC’s *Federal Deception Law* § 6.3.1a [11] for a detailed analysis of this question, including helpful legislative history.

## TCPA Restrictions Apply to Hybrid VoIP Calls

Callers argue that calls to a consumer who has VoIP service are not subject to the TCPA’s restrictions on calls to cell phones, because VoIP calls are not routed through a cellular network. However, where a consumer had a hybrid VoIP service, which would route calls through a cellular network whenever her phone was not connected to Wi-Fi, the First Circuit recently held that her telephone number was one “assigned to a cellular telephone service” within the meaning of 47 U.S.C. § 227(b)(1)(A)(ii). *See Breda v. Cellco P’ship* [12], 934 F.3d 1 (1st Cir. 2019).
The court refused to read into the TCPA a requirement that the number be exclusively assigned to a cellular service. It reached the conclusion that the consumer’s number was assigned to a cellular service even though the company from which the service provider had obtained the telephone number had classified it as a wireline number.

TCPA Restrictions Apply to Responsive Messaging Systems

Perhaps the worst kind of deluge of unwanted calls is the nightmare scenario where a responsive messaging system goes haywire and floods a phone with messages intended for someone else. In *Duguid v. Facebook, Inc.* [2], 926 F.3d 1146 (9th Cir. 2019), the consumer, who was not a Facebook customer, received a stream of text messages alerting him each time someone tried to log into another person’s Facebook account.

The Ninth Circuit held that, at least at the motion to dismiss stage, a system that sent a text message whenever someone tried to log into a particular Facebook account was an automatic telephone dialing system (ATDS). *Duguid* [2] rejected the defendant’s argument that *Marks v. Crunch San Diego, L.L.C.* [13], 904 F.3d 1041 (9th Cir. 2018), should not apply to messages that are sent solely in response to external stimuli that are outside of the sender’s control.

This decision is an important counterweight to *Domínguez v. Yahoo, Inc.* [14], 894 F.3d 116 (3d Cir. 2018), in which the person to whom the plaintiff’s cell phone number had previously been assigned had subscribed to a Yahoo! service that sent a text message to that phone number every time an email was sent to the person’s Yahoo! account. After receiving 27,809 unwanted text messages and failing to persuade Yahoo! to turn off this service, the new assignee of the cell phone number brought suit under the TCPA. In a superficial opinion that did not address many of the reasons why this system might be an ATDS, the Third Circuit affirmed summary judgment against the consumer.

New Case Law As to Whether a Predictive Dialer Is an ATDS

One of the most far-reaching issues in TCPA litigation is the definition of an “automatic telephone dialing system” (ATDS). Callers are pressing the FCC and the courts to interpret the term narrowly, so that they are free to use predictive dialers and other systems to bombard cell phones with unwanted calls. Predictive dialers make calls dialing numbers from a list, not numbers that were generated randomly or in numerical order.

Consumers have taken two main approaches to this issue. One, discussed in detail in NCLC’s *Federal Deception Law § 6.3.2.2* [15], is to rely on the FCC’s many orders saying that predictive dialers are ATDSs. Two recent decisions have joined the many decisions holding that these orders are still in effect and still binding. *Jiminez v. Credit One Bank* [16], 377 F. Supp. 3d 324 (S.D.N.Y. 2019); *Duran v. La Boom Disco, Inc.* [17], 369 F. Supp. 3d 476, 488 (E.D.N.Y. 2019).


Since the question of how much weight should be given to FCC rulings may be in flux due to the Supreme Court’s ruling in *PDF Network* discussed above, advocates should not rely solely on the FCC orders, but should also show the court why the statute itself should be interpreted to encompass a broad range of dialers. The leading decision on the statutory interpretation is *Marks v. Crunch San Diego, L.L.C.* [13], 904 F.3d 1041 (9th Cir. 2018), which, after a careful analysis, held that the statutory definition of ATDS encompasses predictive dialers.


Standing and Spokeo: Is Receipt of Unwanted Calls a Concrete Injury?

A fundamental issue affecting all TCPA litigation is whether receipt of unwanted calls or faxes amounts to a concrete injury sufficient for Article III standing. The Supreme Court’s 2016 decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), reaffirmed that an intangible injury can satisfy the concreteness requirement, but left many questions unanswered.

In the past few months, a number of new decisions have joined the many decisions holding that receipt of unwanted calls or text messages amounts to a concrete injury. The new decisions include ones from the Fourth Circuit, *Krakauer v. Dish Network, L.L.C.* [21], 925 F.3d 643 (4th Cir. 2019), the Second Circuit, *Melito v. Experian Marketing Solutions, Inc.* [22], 923 F.3d 85, 93–94 (2d Cir. 2019), and a number of district courts. See NCLC’s *Federal Deception Law § 6.10.3.5* [23].

Nonetheless, in *Salcedo v. Hanna* [24], 936 F.3d 1162 (11th Cir. 2019), the Eleventh Circuit held that the recipient of a single text message—part of a mass marketing campaign that involved thousands of consumers—had not suffered a concrete injury. Focusing on the uncodified congressional findings that are part of the TCPA, the court characterized Congress as being primarily concerned about calls to the home rather than calls or text messages to cell phones.

However, the court overlooked references in those findings to Congress’s general concerns about privacy and about calls to businesses, hospitals, and other non-home settings. In addition, the fact that the statute’s protections for calls to cell phones are stronger in several ways than its protections for calls to residential lines shows that Congress was particularly concerned—not less concerned—about the invasion of privacy caused by unwanted calls to cell phones.

The court also erred in portraying Congress as unconcerned about text messages when it enacted the TCPA, overlooking the statute’s specific limitations on pagers, which were an early, primitive type of text messaging system. These and other errors in the *Salcedo* decision are discussed in detail in NCLC’s *Federal Deception Law § 6.10.3.5* [23].

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Courts in 2019 Reshape the TCPA in 8 Ways—Mostly to the Good

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