

Bringing it All Together: SCOTUS/FCC/TRACED/RVM– Here's Everything You Need to Know About All the Big TCPA Stories Going RIGHT NOW

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Well 2020 has been a huge year for TCPAWorld so far, and as I start cracking on the big Mid-Year Review, let's pause and take stock of everything we have going on right now with the TCPA.

SCOTUS Finds the TCPA Unconstitutional–Enforces it Anyway:

The Supreme Court ruled two weeks ago in *AAPC v Barr* that the TCPA [is unconstitutional as written because it is a content-specific restriction on speech that does not survive strict scrutiny](#).

Nonetheless, it enforced the TCPA against the successful challenger of speech because–[it reasoned for the first time in history](#)–the TCPA does not actually protect speech, it only assure equal treatment. So the [government is free to take away all of our speech, so long as we're all treated equally and the First Amendment is now an ironing board. Cool beans.](#)

SCOTUS Finds the TCPA Does not Apply to the Government:

In *AAPC* the Court analyzed [whether the TCPA's government-backed debt exemption survived strict scrutiny and concluded it did not](#). Many news articles read this as the Supreme Court limiting the power of the federal government. Amusing. Not only did SCOTUS give more power to the government to restrict speech–I break [that down in this huge FREE webinar](#)– the *AAPC* opinion also [held that the TCPA does not apply to the government to begin with. \(See infamous footnote 1.\)](#) So now the question is how broadly to read *AAPC* in expanding the ability of the government–and its contractors?–to make calls. Might [the Supreme Court have just severed an exemption that authorized speech that was already authorized?](#) Probably.

The Supreme Court is Set to Review the TCPA–AGAIN. This Time to Resolve the ATDS Split:

The TCPA's ATDS definition is an absolute mess. Without question, the statute is void for vagueness, but courts simply are not accepting that reality. So [we're stuck with a fractured mess of a landscape that takes pages to adequately describe](#). SCOTUS has elected to [resolve this circuit split by granting a cert. petition brought by Facebook](#). Given the Supreme's take on the TCPA in *AAPC*,

however, it may actually be bad news that the statute will not be ruled on by the FCC in the first instance—[as I explain in this OTHER huge free webinar](#). Facebook’s [appeal will be resolved by next May, and we expect briefing due next month](#).

The FCC Clarifies the TCPA’s ATDS Definition—Sort of:

Speaking of the FCC, it has been going gang busters [with TCPA rulings on the heels of our big interview with Commissioner O’Rielly last month](#). (Coincidence?) As the Baron reported Friday the FCC has [adopted a new safe harbor for carriers and call blocking framework](#) that is sure to enhance [its already robust success in using technological solutions to stop unwanted calls](#). The Commission also recently [clarified that health care calls still need PRIOR consent](#). But the big news was the FCC’s Sphyxian ruling in P2P Alliance. If you squint hard enough at that ruling you might imagine the Commission has adopted the statutory ATDS definition. But it [definitely held that click-to-text platforms fall outside](#) of the TCPA. Probably. More analysis to come on this one.

TRACED Act Implementation Speeds Along:

The TRACED Act—[remember it?—was passed last year and amended the TCPA in some critical respects](#). Most importantly, it afforded more power to the FCC to go after willful TCPA violators. The big changes include enhanced penalties and longer statutes of limitations. [TRACED was to be implemented in phases and it is right on schedule](#).

Contractual Consent is Binding—Which Shouldn’t be Much of a Surprise:

After *Good Reyes* came down in 2017—holding contractual TCPA consent could not be revoked—many were shocked by the result. I wasn’t. Obviously a contract term cannot be unilaterally modified. Indeed, I had been making that argument long before *Good Reyes* was decided. In any event, exactly ZERO Circuit Courts of Appeal have held otherwise—although *Gager* and *Osorio* are often mis-cited by the Plaintiff’s bar on the subject. Well the Eleventh [Circuit just weighed in clarifying—hopefully once and for all—that contractual consent clauses cannot be unilaterally revoked](#). And so ends the endless TCPA revocation case treadmill.

The Identity of the “Called Party” Still Remains Elusive— But It Isn’t Looking Great for Defendants Right Now:

The TCPA requires callers to have the “express consent” of the “called party.” But who is the “called party”? Rather obviously it should be the person the caller is trying to reach—how else would the defense even work properly? Well, it doesn’t. The Ninth Circuit is the latest Court of Appeal to rule—joining the Seventh, Eleventh and the Third (Sort of)—that [the “called party” is not the intended recipient of the call and is at least the current subscriber to the phone](#). Since this result still makes absolutely no sense, I cannot call it “the law” I can only call it “the misguided majority position” for the moment.

Ringless Voicemail Users Continue to Face Rejection— and TCPA Risk:

For [those of you hoping VoApp’s big push into TCPA defense was going to yield results](#)—nope. Courts have continued to hold RVM technology is subject to the TCPA—[rejecting even the latest enhanced arguments supported by engineering declarations](#).

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