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SIXTH CIRCUIT APPEALS COURT COULD DETERMINE THE FATE OF TCPA LIABILITY FOR CALLS MADE BEFORE JULY 6, 2020

The Sixth Circuit Court of Appeals is set to opine on whether calls made to an individual using an automated telephone dialing system before July 6, 2020 relinquished the court's subject matter jurisdiction over the claims. *Lindenbaum v. Realgy, LLC*, No. 20-4252 (appellant's opening brief, filed Jan. 25, 2021). The Sixth Circuit must determine whether the entire Section 227(b)(1)(A)(iii) of the Telephone Consumer Protection Act ("TCPA") is unconstitutional after the Supreme Court's decision in *Barr v. American Association of Political Consultants* or the government-debt exception functions independently of the remaining robocall ban.

Prior Case Law

As we reported in July, in *AAPC* the U.S. Supreme Court determined that the government-debt exception for robocalls made to collect a debt owed to the United States under the TCPA violated the First Amendment because the exception was content-based, prioritizing government debt over political and other speech. See our prior ALERT dated July 9, 2020.

Following the *AAPC* decision, the U.S. District Court for the Eastern District of Louisiana determined in *Creasy v. Charter Communication* that the Section 227(b)(1)(A)(iii) of the TCPA is unconstitutional and does not apply to calls made during the time frame of November 2015 to July 6, 2020. The *Creasy* court reasoned that in the years preceding the government-debt exception and after the *AAPC* decision, Section 227(b)(1)(A)(iii) did not discriminate on the content of robocalls and was a constitutional time-place-manner restriction on speech. However, in the years in which Section 227(b)(1)(A)(iii) permitted robocalls of one category of content while prohibiting robocalls of all other categories of content, the entirety of the provision was unconstitutional. See our prior ALERT dated Oct. 7, 2020.

Since the *Creasy* decision, several other federal district courts have opined on whether the TCPA was unconstitutional during the November 2015 to July 6, 2020 timeframe. There have been three decisions, including the *Creasy* opinion, that have held the TCPA unconstitutional during the timeframe. However, there have been six federal court opinions that have held the TCPA was constitutional prior to July 6, 2020. Interestingly, two separate judges from the

Northern District of Ohio have issued rulings on either side of this issue.

Sixth Circuit Court of Appeals Case

In the initial *Lindenbaum* proceeding, the U.S. District Court for the Northern District of Ohio determined that it lacked subject matter jurisdiction over the case because the relevant provision of the TCPA was unconstitutional in light of the *AAPC* decision. See our prior ALERT dated Nov. 2, 2020. The plaintiff appealed to the Sixth Circuit and argued that the district court made two legal errors: (i) the court misread *AAPC* as holding the entire robocall restriction was unconstitutional, when *AAPC* held only that the government-debt exception was unconstitutional, and (ii) the court misunderstood the Supreme Court's decision to sever the government-debt exception as a purely prospective judicial fix.

The National Consumer Law center and the Electronic Privacy Information Center, as well as thirty-four state and the District of Columbia's attorneys general, have filed amicus briefs in support of the plaintiff's claim that the TCPA should not be ruled to be unconstitutional. The attorneys general brief argues, among other things, that because the Supreme Court held that the robocall ban can and did function independently from the government-debt exception, the unconstitutionality of the government-debt exception does not prevent enforcement of the remaining, constitutionally permissible provisions of the TCPA.

The defendant's brief is due later this month and amicus briefs in support of the defendant's position are due in March. We will continue to monitor and report on significant TCPA updates as they occur. If you have any questions related to telemarketing communications or the TCPA, please let us know. ☐

✧ *Mike Tomkies and Lindsay Valentine*

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