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TCPA – Sixth Circuit affirms enforceability of TCPA from 2015 to 2020

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Takeaway: In *Lindenbaum v. Realgy, LLC*, --- F.4th ----, 20-4252, 2021 WL 4097320 (6th Cir. Sept. 9, 2021), the Sixth Circuit rejected the defendant's argument that the Telephone Consumer Protection Act ("TCPA") had been unconstitutional and unenforceable from 2015 to 2020. The Court of Appeals found instead that the Supreme Court's severance of the government-debt exception applied retroactively and thus reversed the district court's dismissal of the plaintiffs' TCPA claims for lack of subject-matter jurisdiction. Subject to possible Supreme Court certiorari review, the *Lindenbaum* decision may put an end to the uncertainty arising out of the Supreme Court's determination that a narrow portion of the TCPA violated the Constitution.

In *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020) ("*AACP*"), the Supreme Court held an amendment exempting from the TCPA calls to collect government debt to be unconstitutional, as impermissible content discrimination. Seven Justices concluded that "the correct result in this case is to sever the 2015 government-debt exception and leave in place the longstanding robocall restriction." *Id*. at 2355. Most commentators understood *AACP* to invalidate the government-debt exception as unconstitutional while preserving the remainder of the TCPA. Although *AACP* did not directly address whether severance would apply retroactively, a footnote in a plurality opinion indicated that the decision "does not negate liability of parties who made robocalls covered by the robocall decision." *Id*. at 2355 n.12.

But in *Creasy v. Charter Communications, Inc.,* CV 20-1199, 2020 WL 5761117, at *1 (E.D. La. Sept. 28, 2020), the district court accepted Charter's argument that severance of the government-debt exception only permitted the automated-call ban to be enforced *prospectively*. The court found the entire robocalling restriction had been unconstitutional – and therefore unenforceable – during the time the government-debt exception remained in the statute (from 2015 to 2020).

Following *Creasy*, the district court in *Lindenbaum* granted the defendant's motion to dismiss for lack of subject-matter jurisdiction. The district court found the Supreme Court's severance of the government debt exception only applied prospectively and thus, at the time of the challenged robocalls, the TCPA contained an unconstitutional defect, meaning the court lacked subject-matter jurisdiction over the TCPA claims.

On appeal, the Sixth Circuit rejected the challenge to the constitutionality of the TCPA between 2015 and 2020, finding that AACP applies retroactively and that retroactive application of AACP raises no First Amendment concerns.

First, the court found the Supreme Court's severance of the government-debt exception could apply retroactively. 2021 WL 4097320, at *3. The court's ruling hinged on its conclusion that severance of the government-debt exception constituted mere statutory interpretation. *Id*. While a new remedy or new

legislation can only operate prospectively, judicial decisions operate retrospectively. In *AACP*, the Supreme Court "recognized only that the Constitution had 'automatically displace[d]' the government-debt-collector exception from the start, then interpreted what the statute has always meant in its absence." *Id*. at *4. Because *AACP* involved legal interpretation – and not (as the defendant claimed) the "elimination" of part of a statute – it applies retroactively.

Second, the court found that retroactive severance did not implicate the First Amendment. *Id*. at *5. The defendant argued that retroactive severability would result in either (a) imposing liability on government-debt collectors without fair notice of unlawfulness or (b) exempting government-debt collectors from liability, while imposing liability on private debt-collectors, recreating the content-discrimination the Supreme Court rejected. The court rejected this argument, finding that the potential for a governmental debt collector to assert a fair notice defense that was otherwise not available to private debt collectors did not constitute a restriction on speech.

Because the Sixth Circuit's opinion represents the first Court of Appeals ruling on the retroactivity issue, it will likely have persuasive force moving forward. It follows a number of district courts that have rejected *Creasy's* reasoning. *See, e.g., Thomas v. Life Protect 24/7, Inc.,* Civil Action No. 4:20-cv-03612, 2021 WL 4127144 (S.D. Tex. Sept. 10, 2021); *Miles v. Medicredit, Inc*., No. 4:20-cv-001186, 2021 WL 872678 (E.D. Mo. Mar. 9, 2021). But other district courts have agreed with *Creasy's* reasoning. *See, e.g., Cunningham v. Matrix Financial Services, LLC*, No. 4:29-cv-896 (E.D. Tex. Mar. 31, 2021); *Hussain v. Sullivan Buick Cadillac-GMC Truck,* No. 20-0038, 2020 WL 7346536 (M.D. Fla. Dec. 11, 2020). While *Lindenbaum* may be persuasive to future district courts, it does not preclude TCPA defendants from raising the enforceability argument outside of the Sixth Circuit.