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TCPA Class Actions – District Court Declares TCPA Robocalling Restriction Unconstitutional From 2015 to 2020

by Jeffrey H. Fisher

Takeaway: Most commentators (including this one) interpreted the U.S. Supreme Court's fractured plurality opinion in *Barr v. Am. Ass'n of Political Consultants, Inc* , 140 S. Ct. 2335, 2343 (2020) ("*AAPC*"), as invalidating the government-debt exception as unconstitutional but preserving the remainder of the TCPA. *See* TCPA *Class Actions – Supreme Court Severs Government Debt Collection Exception* (July 15, 2020). In *Creasy v. Charter Commc'ns, Inc* ., CV 20-1199, 2020 WL 5761117, at *1 (E.D. La. Sept. 28, 2020), however, the Eastern District of Louisiana adopted a divergent view, concluding that § 227(b)(1)(A)(iii) – which prohibits robocalling cellular telephones without consent – was unconstitutional from 2015 (when Congress added the government-debt exception) until July 6, 2020 (when the Supreme Court severed the exception). Although the novel order represents the view of one district court judge – but a view supported by Justice Gorsuch's concurrence in *AAPC* – its reasoning could result in the dismissal of thousands of pending TCPA cases. At a minimum, the order previews a bold, dispositive line of attack for TCPA defendants.

The fact pattern in *Creasy* is unremarkable. The putative class plaintiffs alleged that Charter Communications violated § 227(b)(1)(A)(iii) of the TCPA by sending at least 130 auto-dialed calls and texts without consent. All but one of the violations allegedly occurred between 2015 and July 6, 2020, when the government-debt exception remained in place. 2020 WL 5761117 at *2.

Charter moved to dismiss, arguing that the TCPA was unconstitutional until the Supreme Court severed the government debt exception, and that the court therefore lacked subject matter jurisdiction to enforce violations of an unconstitutional law. Charter recognized that a clear majority of the Supreme Court – 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." *AACP*, 140 S. Ct. at 2355. But Charter argued that severance of the government-debt exception only permitted the automated-call ban to be enforced *prospectively*. The entire robocalling restriction was unconstitutional – and therefore unenforceable – during the time the government-debt exception remained in force.

The plaintiffs asserted that Charter misrepresented *AAPC's* holding and ignored its severability analysis. According to the plaintiffs, the Supreme Court considered the issue and declined to find "the entire 1991 robocall restriction unconstitutional." 140 S. Ct. at 2348-49. Although six justices found the government-debt exception unconstitutional, seven Justices agreed that, especially given the TCPA's severability clause, the unconstitutional government-debt exception could be severed without invalidating the TCPA's automated-call ban. As further support, the plaintiffs pointed to a footnote in Justice Kavanaugh's concurrence (joined by Justices Alito and Roberts) stating that "no one should be

penalized or held liable for making robocalls to collect government debt" between the effective date of the exception and entry of final judgment, and "[o]n the other side of the ledger, our decision today does not negate the liability of parties who made robocalls covered by the robocall restriction."

Remarkably, the court agreed with Charter and became the first district court to find that the government-debt exception rendered the robocalling provision of the TCPA unconstitutional from 2015 to 2020. The court reasoned that *AAPC* contained two binding holdings: (1) the government-debt exception should be invalidated and (2) the entire robocall restriction should not be invalidated, but rather the government-debt exception must be invalidated and severed from the remainder of the statute. While the court acknowledged that Judge Kavanaugh's footnote "is extremely persuasive authority," it concluded it was neither binding nor persuasive. *Id*. at *5.

The court instead found Justice Gorsuch's concurrence more persuasive. Justice Grosuch directly addressed Justice Kavanaugh's concurrence, arguing that shielding " *only* government-debt collection callers from past liability" would "wind up enforcing the very same kind of content discrimination we say we are seeking to eliminate." *AAPC*, 140 S. Ct. at 2366 (emphasis in original). *Id*. Agreeing with Justice Gorsuch, the court rejected plaintiff's argument that the government-debt *exception* "has no bearing on the constitutionality of the rule." 2020 WL 5761117. Instead, it found that "the exception and the *rule* are in fact inextricably intertwined," and the addition of the government-debt exception fundamentally altered the *entire* provision. Id. Because the government-debt exception was an unconstitutional content-based restriction on speech, the addition of the government-debt exception to § 227(b)(1)(A)(iii), "converted a theretofore neutral speech restriction into an invalid content-discriminatory one." *Id*.

The court characterized the severability function as a remedy for the wrong "experienced by Charter and all other robocallers (or would-be robocallers) whose constitutionally protected speech was outlawed while Congress affirmatively blessed robocalls of other content in violation of the First Amendment." *Id*. at *6. While the court recognized the public policy consequences of its decision – potentially allowing Charter and other alleged robocallers to evade liability – it concluded that "[i]t is for the elected branches, and not this court, to determine whether that price is unduly high." *Id*. The court therefore granted Charter's motion to dismiss for lack of subject matter jurisdiction.

Conclusion: The court's conclusion in Creasy will undoubtedly be challenged on appeal. But given the potential impact of the ruling, the decision merits close monitoring.