Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

# 2 Decisions Reveal New Tool For TCPA Defense Litigators

By **Myriah Jaworski** (December 9, 2020, 5:24 PM EST)

Myriah Jaworski

2020 has been a blockbuster year for the Telephone Consumer Protection Act,[1] the statute aimed at addressing pernicious robocalls that over the last decade saw a tidal wave of class action lawsuits filed against businesses large and small.

While all eyes are on the U.S. Supreme Court's impending decision in Facebook Inc. v. Duguid,[2] a decision that will hopefully clarify a critical and divided standard in TCPA litigation — what is, and is not, an automated telephone dialing system — if not more, many have overlooked what may be an emerging trend among district courts who have recently dismissed TCPA lawsuits as unconstitutional.

In the last month, two U.S. district courts have ruled that the TCPA is unconstitutional as applied to phone calls and text messages made between 2015 and July 6, 2020. These recent district court decisions are the result of a split Supreme Court opinion from this summer, Barr v. American Association of Political Consultants,[3] and deal with the academic issue of the retroactive applicability of statutory severance.

**TCPA Background**

The TCPA was enacted in 1991 to address, according to the Supreme Court, the one thing Americans are largely united on: "their disdain for robocalls," which are made at a rate of millions of calls a year.[4]

To do this, the TCPA "generally prohibits robocalls to cell phones and home phones" without first obtaining express consent from the contacted party.[5] After its enactment, the TCPA was interpreted to apply to text messages, which many businesses use to market their products, and provide information to their clients and customers.

The TCPA has the potential for devastating penalties for violators: statutory damages of up to $1,500 per call or text message; and some of the more noteworthy TCPA settlements have reached hundreds of millions of dollars, plus the award of significant attorney fees. Even those who did not have a TCPA violation, but are alleged to have one, face significant attorney fees in defending such actions.

**AAPC Decision**

In 2015, Congress amended the TCPA to exclude from its robocall prohibition calls made solely to collect

a debt owed to or guaranteed by the U.S.[6] "In other words, Congress carved out a new government-debt exception to the general robocall restriction."[7]

To put it simply, if the government was making the call for purposes of collecting a debt, the TCPA did not apply to the call or text; but if a business made a call to collect a debt, the TCPA did apply to the call or text. A consortium of political organizations challenged the TCPA, and its government-debt exception, arguing the law violated the First Amendment's prohibition on the content-based regulation of speech.

In AAPC, the Supreme Court held in a plurality opinion that Congress' 2015 enactment of the TCPA government-debt exception rendered the government-debt exception to the TCPA unconstitutional as a content-based restriction on speech:

> Six Members of the Court today conclude that Congress has impermissibly favored debt-collection speech over political and other speech, in violation of the First Amendment. ... The initial First Amendment question is whether the robocall restriction, with the government-debt exception, is content-based. The answer is yes.").[8]

Rather than knock out the robocall ban in its entirety, the Supreme Court (then with Justice Ruth Bader Ginsburg on the bench) invalidated and severed the government debt exception to preserve the constitutionality of the TCPA in present day.[9]

**Can the TCPA Be Applied to Pre-AAPC Lawsuits?**

Can the TCPA be applied to lawsuits filed before the statute-saving severance of the APPC decision occurred? The question going forward for many lower courts will be whether the severance applies retroactively to lawsuits that allege noncompliance with the TCPA from the date of the government-debt exception and to the AAPC decision.

Indeed, this was the question posed to the U.S. District Court for the Eastern District of Louisiana and the U.S. District Court for the Northern District of Ohio, and ultimately answered in the negative.[10] The cases are Creasy v. Charter Communications Inc. and Lindenbaum v. Realgy LLC, respectively.

These courts both acknowledged that AAPC did not address whether severance of the unconstitutional government-debt exception applies retroactively.[11] The courts also acknowledged that AAPC contained a footnote stating that "our decision today does not negate liability of parties who made robocalls covered by the robocall restriction," but determined this language to be "passing Supreme Court dicta of no precedential force."[12]

But Creasy and Lindenbaum courts then concluded that the Supreme Court's severance of the government-debt exception applied prospectively only, rendering the statute unconstitutional and unenforceable prior to the July 6 AAPC decision back to the time of Congress' enactment of the government-debt exception in 2015.

The court in Lindenbaum explained:

> The fact remains that at the time the robocalls at issue in this lawsuit were made, the statute could not be enforced as written. ... Because the statute at issue was unconstitutional at the time of the alleged violations, this Court lacks jurisdiction over this matter.[13]

Likewise, the court in Creasy stated:

> The unconstitutional amended version of § 227(b)(1)(A)(iii) is what applied ... at the time of the challenged communications at issue, and that fact deprives the Court of subject matter jurisdiction to adjudicate Charter's liability with regard to such communications."[14]

These decisions seem to endorse a partial dissent by Justices Clarence Thomas and Neil Gorsuch, who argued in AAPC that to protect government-backed debt collectors from past TCPA liability, and not other types of callers, would "endors[e] the very same kind of content discrimination [the court said it was] seeking to eliminate" in the first place.

Finding the law unconstitutional, Justices Thomas and Gorsuch argued in favor of an injunction against enforcement of the statute at all, a view that was, of course, rejected by the majority.

The bulk of TCPA cases currently pending in the courts fall within the AAPC time frame: 2015 through July 6, 2020.

Thus, the potential for a circuit split on the issue of the retroactive severability of TCPA's unconstitutional government-debt exception is real, and was directly acknowledged by U.S. District Judge Martin L.C. Feldman in Creasy, who stated the Supreme Court's "failure to unite behind a sufficiently agreeable rationale does a disservice to litigants and lower courts."[15]

Judge Feldman continued:
Here, it has led the parties to wildly dissimilar understandings of AAPC's legal effect— all in the utmost good faith and preparation. In the future, it may engender a circuit split which confronts the court anew.

Facebook too, in its pending Supreme Court petition lodged a constitutional challenge to the TCPA, arguing that AAPC's holding makes the TCPA an unconstitutional content-based law that should be struck down entirely.[16]

With the passing of Justice Ginsburg and the addition of Justice Amy Coney Barrett to the Supreme Court it is certainly possible that the court's conservative bloc will take up the constitutional question this term in Duguid, which it declined to do over the summer in AAPC.

With TCPA class actions proliferating and many settlements in the multimillion dollar range, TCPA defense litigators now have another arrow in their quiver to aim at the TCPA, resulting in what is potentially a constitutional knock-out punch for a range of pending TCPA class actions.

And businesses now face the prospect of having to continue to defend costly pre-AAPC TCPA lawsuits in some jurisdictions, but not in others.

---

*Myriah V. Jaworski is a member at Beckage PLLC.*

[1] 42 U.S.C. § 227.

[2] Facebook, Inc. v. Duguid, -- S. Ct. --, 2020 WL 3865252 (Mem).

[3] 140 S. Ct. 2335 (2020).

[4] 14 S. Ct. at 2336.

[5] Id.

[6] 42 U.S.C. § 227(b)(1)(A)(iii).

[7] 14 S. Ct. at 2344.

[8] 140 S. Ct. at 2343, 2346.

[9] Id. at 2349.

[10] Creasy v. Charter Commc'ns, Inc., No. CV 20-1199, 2020 WL 5761117, at *2 (E.D. La. Sept. 28, 2020); Lindenbaum v. Realgy, LLC, No. 1:19 CV 2862, 2020 WL 6361915, at *5 (N.D. Ohio Oct. 29, 2020).

[11] Id.

[12] Lindenbaum, 2020 WL 6361915, at *4-5 (quoting AAPC, 140 S. Ct. at 2355 n.12); Creasy, 2020 WL 5761117, at *2 (same).

[13] 2020 WL 6361915, at *5-7.

[14] 2020 WL 5761117, at *6.

[15] Creasy, WL 5761117, at *1 n.1.

[16] Facebook, Inc. v. Duguid, -- S. Ct. --, 2020 WL 3865252 (Mem).