How 6th Circ. May Resolve District Court TCPA Exception Split

By **Arielle Katz** (August 27, 2021)

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Originally enacted in 1991, the Telephone Consumer Protection Act was intended to curb the proliferation of annoying telemarketing robocalls to residences. Among other things, the TCPA prohibited using automated dialing systems or artificial or prerecorded voice messages to make any call to wireless phones, as well as advertising via fax, absent prior express consent of the called party.

TCPA litigation has been happening across the U.S. on a multitude of issues, and, recently, the U.S. Court of Appeals for the Sixth Circuit heard argument in Lindenbaum v. Realgy LLC, a TCPA case that involved a 2015 government debt amendment to the TCPA that has ultimately been deemed a content-based restriction on free speech. The outcome of this case is important — it involves the first circuit court to address divergent views among district courts and has the potential to affect a great deal of TCPA class litigation.

But what is this government debt exception, and why does it matter?

In 2015, Congress amended the TCPA to create an exception to the TCPA's robocall restriction to allow such calls "made solely to collect a debt owed to or guaranteed by the United States."[1] This amendment applied to calls via autodialers and artificial/prerecorded calls.[2] However, the 2015 government debt exception was struck down in 2020 by the U.S. Supreme Court's plurality decision in Barr v. American Association of Political Consultants Inc.[3]

Because the law favored speech made for collecting government debt over political and other speech, the law was determined to be a content-based restriction on speech. While the Supreme Court struck down the portion of the statute dealing with calls for government debt, it left the rest intact.

Since the Supreme Court's ruling, district courts have been left to address the question of whether or not the striking of the portion of the provision made the entire provision unconstitutional during the years the provision was in play.

In other words, in cases that involved claims that an autodialer service was used, this was a violation of the statute both before and after the 2015 amendment. But if the government debt exception made the provision unconstitutional, the issue became whether the courts lacked jurisdiction, even though the claims had nothing to do with government debt.

Initially, it appeared that district courts were leaning toward determining that the entire provision was unconstitutional during the 2015-2020 time period. For example, in Lindenbaum,[4] the U.S. District Court for the Northern District of Ohio in October 2020 dismissed the plaintiff's robocall class action, determining it lacked subject matter jurisdiction.

There, the plaintiff alleged that she received two prerecorded calls, one to her cellphone and one to her landline, and had not provided express written consent to receive these calls. The plaintiff argued that the severance of the unconstitutional provision should be applied retroactively.

The defendants argued that the severance could be applied only prospectively and that they should not be punished for action "during a time when an unconstitutional content-based restriction existed." The Ohio district court agreed with the defendants and held that any calls made between 2015 and 2020 could not be considered violations, since the provision was unconstitutional at that time.

This ruling aligned with the U.S. District Court for the Eastern District of Louisiana's September 2020 holding in Creasy v. Charter Communications Inc.,[5] which similarly held that the TCPA class action could not proceed given the unconstitutional 2015 TCPA amendment allowing automated calls to collect government debts. Since Lindenbaum, the U.S. District Court for the Middle District of Florida, in Hussain v. Sullivan Buick-Cadillac-GMC Truck Inc. in December 2020,[6] also held that this provision was unconstitutional.

Lindenbaum is currently on appeal before the Sixth Circuit. On March 18, the American Civil Liberties Union joined the fight by filing an amicus brief in support of the defendant, arguing that the defendant could not be held "liable under a discriminatory statutory scheme that punishes only disfavored speakers."

But, just as it seemed that Lindenbaum, Creasy and Hussain were off and running, the district courts started to lean the other way heavily. For example, in the January McCurley v. Royal Sea Cruises Inc. decision in the U.S. District Court for the Northern District of California,[7] the defendant moved to dismiss based on lack of subject matter jurisdiction, alleging, as in the cases before it, that the provision was void between the years of 2015 and 2020. Unlike the courts in Creasy, Lindenbaum and Hussain, in which the motions to dismiss were granted, the McCurley court denied the motion.

In denying the motion, the McCurley court relied on language by Justice Brett Kavanaugh in American Association of Political Consultants that "no one should be penalized or held liable for making robocalls to collect government debt after the effective date of the 2015 government-debt exception" and that "our decision today does not negate the liability of parties who made robocalls covered by the robocalls restriction."

The McCurley court disagreed with the defendant's argument that this footnote was mere dicta and should be ignored because the decision was joined by six other justices. Even if the footnote were dicta, the court found that it "signal[ed] the intent of the Supreme Court and what it would hold in future cases and, as such, may not be cavalierly dismissed by a district court."

The McCurley court directly disagreed with Lindenbaum and Creasy, stating that both cases "ignore[d] the pronouncements in the plurality decision as articulated by Justice Kavanaugh and joined by six other justices and adopt[ed] the position of the two-justice dissent."

And it hasn't stopped with McCurley. The vast majority of district courts now hold that the TCPA provision did not make the entire TCPA unconstitutional — that, except for the 2015 amendment, the TCPA remains, and remained, in full effect.

These courts include the U.S. District Courts for the District of Maryland,[8] Southern District of Texas,[9] Central District of California,[10][11][12] Middle District of Georgia,[13] District of Arizona,[14] Southern District of Florida,[15][16] Eastern District of Michigan,[17] District of West Virginia,[18] Middle District of Florida,[19][20] Eastern District of California,[21][22] Southern District of California,[23] Northern District of Ohio,[24] District of South Carolina,[25] Northern District of Florida[26] and the list is still

growing.

It appears that these courts have chosen to overlook the jurisdictional flaws in favor of a result that is more practical, as Justice Kavanaugh's footnote suggested, i.e., severance of the offending government debt exception does not let TCPA violators off the hook, nor should it eliminate or excuse otherwise unlawful acts for placing robocalls via autodialer. And, in fact, the number of cases finding the provision not unconstitutional is so overwhelming that courts have begun to simply rely on this fact alone in reaching their decisions.

For example, in the Lerner v. AmeriFinancial Solutions LLC decision in May,[27] the Maryland district court found, regarding the district courts that had already addressed the issue, the "[t]he weight of th[ose] ... decisions ... augur against granting Defendants' motion." Specifically, the court found that "[t]aken together, the district courts that have adopted the Defendants' position are vastly outnumbered by those that have rejected it" and that the "sheer volume" of cases was "highly persuasive." This alone was reason to deny the defendants' motion.

While Creasy, Lindenbaum and Hussain initially had TCPA litigators seeking alternate means by which to bring their claims, or even thinking they were out of the game altogether, this shifting trend is a great indicator for plaintiffs counsel that their TCPA causes of action may have legs to stand on. Defense counsel will have to seek an alternative argument, other than a jurisdictional one, if they want their cases dismissed.

And, given that courts are now leaning heavily in favor of finding the provision constitutional at all times, it will be interesting to see how the appeal in Lindenbaum turns out. Will the Sixth Circuit reverse the Northern District of Ohio's ruling? Oral argument was held on July 29, and it is not initially clear from the judges' lines of questioning which way the three-judge panel will turn.[28]

Lindenbaum, as it stands now, is currently in the minority, but the trend suggests that the Sixth Circuit will reverse or remand. Since a plurality of the court approves of severing only the unconstitutional provision, it would not be unreasonable for the Sixth Circuit to find that the remaining constitutional provisions should be enforced.

If the Sixth Circuit does not overrule the lower court, defense counsel in the majority districts may have found a route by which to appeal their unfavorable rulings. But one thing is clear — counsel, on either side of the "v." will soon have more guidance on how to bring their claims or defenses to their TCPA robocall actions.

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[1] 47 U.S.C. § 227(b)(1)(A)(iii).

[2] 47 U.S.C. §227(b)(1)(A)(iii).

[3] Barr v. American Association of Political Consultants, Inc., 140 S. Ct. 2335; 207 L. Ed. 2d 784 (2020).

[4] Lindenbaum v. Realgy, 2020 U.S. Dist. LEXIS 201572 (N.D. Oh. Oct. 29, 2020).

[5] Creasy v. Charter Communications, Inc., 2020 U.S. Dist. LEXIS 177798 (E.D. La. Sept. 28, 2020).

[6] Hussain v. Sullivan Buick-Cadillac-GMC Truck, Inc., 2020 U.S. Dist. LEXIS 236577 (M.D. Fla. Dec. 11, 2020).

[7] McCurley v. Royal Sea Cruises, Inc., 2021 U.S. Dist. LEXIS 16403 (S.D. Cal. Jan. 28, 2021).

[8] Lerner v. AmeriFinancial Sols, LLC, 2021 U.S. Dist. LEXIS 86161 (D. Md. May 5, 2021).

[9] Pepper v. Life Protect 24/7, 2021 U.S. Dist. LEXIS 56568 (S.D. Tx. Mar. 1, 2021).

[10] Agbim v. Zip Capital Group, 2021 U.S. Dist. LEXIS 57056 (C.D. Ca. Feb. 2, 2021).

[11] Stephen v. Rite Aid Corp, 2021 U.S. Dist. LEXIS 68157 (C.D. Cal. Feb. 2, 2021).

[12] Trujilio v. Free Energy Sav. Co., LLC, 2020 U.S. Dist. LEXIS 239730 (C.D. Cal. Dec. 21, 2020).

[13] Moody v. Synchrony Bank, 2021 U.S. Dist. LEXIS 57853 (M.D. Ga. Mar. 26, 2021).

[14] Whittaker v. WinRed Tech. Servs. LLC, 2021 U.S. Dist. LEXIS 55036 (D. Az. Mar. 23, 2021).

[15] Hossfeld v. Am. Fin. Sec. Life Ins. Co., 2021 U.S. Dist. LEXIS 112608 (S.D. Fl. Jun. 16, 2021).

[16] Bonkuri v. Grand Caribbean Cruises, Inc., 2021 U.S. Dist. LEXIS 30940 (S.D. Gl. Jan. 19, 2021).

[17] Mich. Urgent Care & Primary Care Physicians, P.C. v. Med. Sec. Card Co., 2021 U.S. Dist. LEXIS 80823 (E.D. Mi. Apr. 28, 2021).

[18] Mey v. Medguard, 2021 U.S. Dist. LEXIS 80083 (N.D. W.V. Apr. 27, 2021).

[19] Boisvert v. Carnival Corp, 2021 U.S. Dist. LEXIS 47397 (M.D. Fl. Mar. 12, 2021).

[20] Abramson v. Fed. Ins. Co., 2020 U.S. Dist. LEXIS 232937 (M.D. Fl. Dec. 11, 2020).

[21] Miles v. Medicredit, Inc., 2021 U.S. Dist. LEXIS 55482 (E.D. Mo. Mar. 18, 2021).

[22] Shen v. Tricolor Cal. Auto Group, 2020 U.S. Dist. LEXIS 237582 (C.D. Cal. Dec. 17, 2020).

[23] Massaro v. Beyond Meat, Inc., 2021 U.S. Dist. LEXIS 46990 (S.D. Cal. Mar. 12, 2021).

[24] Less v. Quest Diagnostics, 2021 U.S. Dist. LEXIS 14320 (N.D. Oh. Jan. 25, 2021).

[25] Van Connor v. One Life Am., Inc., 2021 U.S. Dist. LEXIS 121008 (D. Sc. Jun. 29, 2021).

[26] Rieker v. Nat'l Car Cure, LLC, 2021 U.S. Dist. LEXIS 9122 (N.D. Fla. Jan. 5, 2021).

[27] Lerner v. AmeriFinancial Sols, 2021 U.S. Dist. LEXIS 86161.

[28] On August 17, 2021, the defendant in Lindenbaum filed a motion seeking recusal of Judge Stranch, one of the judges who heard oral argument on the appeal. The motion alleged that Judge Stranch could not be impartial, due to the fact that her husband and son worked at a law firm in the Sixth Circuit that handles TCPA robocall litigation.