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The Fourth Circuit Strikes TCPA's Government Debt Collection Exception

Late last month, we [warned](#) that pending litigation in the Fourth and Ninth Circuits seeking to have the Telephone Consumer Protection Act (TCPA) declared unconstitutional based on the statutory government debt collection exemption for automated calls and texts could result in elimination of the exemption, while the remainder of the TCPA remains intact. Entities seeking to collect debt owed to or guaranteed by the U.S. government would then once again find themselves fully exposed to TCPA litigation.

That is exactly what happened in the Fourth Circuit's April 24, 2019, decision in *American Association of Political Consultants, Inc. v. FCC*, [Civ. No. 18-1588](#). This clearly is not the desired result of parties using the debt collection exemption as a First Amendment cudgel to eliminate the TCPA's ban on using an automatic telephone dialing system (ATDS) or artificial or prerecorded voice to call cell phones without consent. Simply eliminating the government debt collection exemption leaves these parties no better off, but those calling to collect government debts are left in a considerably worse position.

The Fourth Circuit's Decision

As part of the 2015 Balanced Budget Act ("BBA"), Congress amended the TCPA to exempt from its automated calling restrictions calls made to collect debts owed to or guaranteed by the federal government. This prompted litigation arguing that the amendment rendered the TCPA a content-based restriction in violation of the First Amendment's Free Speech Clause. The Fourth Circuit is the first federal appellate court to render a judgment on this argument, and it agreed. It found that the debt collection exemption was a content-based restriction subject to traditional strict scrutiny review, a "rigorous standard of review" that requires the speech to advance a compelling government interest and be narrowly tailored. The Fourth Circuit found the exemption failed this review because the "the debt-collection exemption subverts the privacy protections underlying the [cell phone] ban." It also found that the "the impact of the exemption deviates from the purpose of the automated call ban" and as such was distinctly different than the two other statutory exemptions from the cell phone call ban: calls made with consent of the called party and calls relating to certain emergencies.

Having found the exemption violates the First Amendment, the court then considered the appropriate remedy. The plaintiffs argued that the exemption's constitutional infirmity renders the entire cell phone ban unconstitutional and should therefore be struck. The court disagreed. Accepting the government's argument regarding the

appropriate remedy, the court severed the debt-collection ban from the remainder of the TCPA, striking the exemption but otherwise leaving the cell phone ban intact. A key part of the court's consideration was the severability clause included in the original 1934 Communications Act, of which the TCPA became a part in 1991. The plaintiffs had reasonably argued that in situations such as this, courts typically would render the entire call ban invalid, because severance would actually ban *more* speech. As a result, at least in the Fourth Circuit, loan servicers and others seeking to collect a government debt are now no longer statutorily protected from TCPA liability should they make an automated call or text to a consumer's cell phone without consent and, thus, likely will be the target of renewed TCPA litigation.

What's Next

The Ninth Circuit is considering the identical issue in *Gallion v. Charter Communications Inc.*, No. 18-55667, and has heard oral argument. A decision is expected in the next month or two. Assuming that the Ninth Circuit also finds the government debt collection exemption a violation of the First Amendment, it could follow the Fourth Circuit and sever the provision, or it could create a circuit split—at least in terms of remedy—by striking the cell phone call ban. Of course, the court could also create a circuit split by finding that the exemption, even if content based, survives strict scrutiny and does not violate the First Amendment.

Meanwhile, the Federal Communications Commission (“FCC”) is expected to issue an order in the coming months that reviews a number of the TCPA's provisions, including the scope of the cell phone call ban. The FCC also sought comment on how to implement the government debt collection exemption now struck by the Fourth Circuit. Moreover, the FCC sought comment on a somewhat related issue of whether government contractors making calls on the government's behalf—including but in no way limited to those seeking to collect government debt—should be exempt from the TCPA because they are not “persons” for purposes of the act. The TCPA's call ban applies to “persons,” a specifically defined term under the Communications Act generally. The FCC previously ruled that the U.S. government and agents acting on its behalf are not “persons.” Commission Chairman Pai has questioned this ruling as it applies to government contractors, and has sought comment on whether to overturn the decision.

The Fourth Circuit's decision, while certainly an important development, is not the last word on this issue. Stay tuned.

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