Is the TCPA Constitutional?

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The Bullet Point is a biweekly update of recent, unique, and impactful cases in state and federal courts in the area of commercial litigation. We're pleased to expand the Bullet Point from its previous coverage of Ohio case law to include additional areas in McGlinchey's footprint.

Ohio

Cancel on Death Rider

Huntington Natl. Bank v. Hall, 10th Dist. Franklin No. 20AP-449, 2021-Ohio-3111

In this appeal, the Tenth Appellate District affirmed the trial court's decision, agreeing that as the debt cancellation protection terminated when the lender canceled the debt after the wife's death, the line of credit was in default after the husband's subsequent death.

The Bullet Point: In this foreclosure action, the lender asserted that a personal line of credit executed by the deceased borrowers was in default. The property owner, who was the daughter of the deceased borrowers, argued there was no default because a debt cancellation protection plan applied. Both the trial and appellate courts disagreed, finding that as the lender canceled the debt existing at the time of the wife's death in 2011, the debt cancellation protection was terminated and not applicable to cancel the debt existing when the husband died in 2015. In reaching this conclusion, the courts analyzed the language of the debt cancellation protection plan, the terms of which were set forth in the personal credit line agreement rider. The rider explained that upon a borrower's death, the lender would cancel the lesser of the outstanding credit line balance or $50,000.00. The rider further stated any outstanding balance above that amount would remain the obligation of the deceased borrower's estate and any surviving borrower. Notably, the rider specified that upon a borrower's death and debt cancellation protection being credited to the outstanding balance, the rider terminated. Simply stated, once the lender applied debt cancellation protection to the outstanding balance following a borrower's death, the protection rider automatically terminated and would not be applied to cancel any subsequent balance. Here, the lender canceled the existing debt upon the wife's death in 2011. The cancellation of that debt resulted in the automatic termination of the protection rider. As such, the lender was not required to cancel the outstanding balance upon the husband's death and the line of credit was in default.

Constitutionality of the TCPA

Lindenbaum v. Realgy, Ltd. Liab. Co., 6th Cir. No. 20-4252, 2021 U.S. App. LEXIS 27159 (Sep. 9, 2021)

In this appeal, the United States Court of Appeals for the Sixth Circuit reversed the District Court's decision, holding that the severability of the unconstitutional government-debt collector exception from the Telephone Consumer Protection Act (TCPA) applied retroactively and did not affect the general prohibition against robocalls.

The Bullet Point: At issue in this dispute is the impact of the unconstitutionality of the government-debt collector exception on the remainder of the restrictions in the TCPA. The TCPA prohibits almost all robocalls to cell phones and landlines. 47 U.S.C. § 227(b)(1)(B). In 2015, Congress attempted to enact an amendment to the TCPA's broad prohibitions to allow robocalls made "solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii), (b)(1)(B). In 2020, the Supreme Court found this amendment to be unconstitutional, as adding an exemption for government-debt robocalls would cause impermissible content discrimination under the First Amendment. *Barr v. Am. Ass'n of Pol. Consultants, Inc.* (*AAPC*), 140 S. Ct. 2335, 207 L. Ed. 2d 784 (2020) (plurality opinion). In making this finding, the Supreme Court conducted a severability analysis and determined the exception was severable from the rest of the restriction, leaving intact the general prohibition under the TCPA.

Subsequent to the ruling in *AAPC*, the plaintiff brought this suit alleging violations of the robocall restriction under the TCPA after she received robocalls from the defendant advertising its electricity services. The District Court granted the defendant's motion to dismiss, reasoning that severability is a remedy that operates only prospectively, so the robocall restriction was unconstitutional and therefore "void" for the period of time from when Congress enacted the amendment until the Supreme Court's ruling in *AAPC*. The Sixth Circuit disagreed, explaining that the Supreme Court's severance of the government-debt exception was not a remedy but was instead the exercise of disregarding unconstitutional enactments. To be clear, unconstitutional enactments are not law at all. Rather, the Constitution automatically displaces any unconstitutional enactments as they are a nullity and are "powerless to work any change in the existing statute." As such, "a court conducting severability analysis is interpreting what, if anything, the statute has meant from the start in the absence of the always-impermissible provision." Therefore, the severance of the government-debt exception from the TCPA was not a remedy in the form of eliminating the content-based restriction. Instead, the Supreme Court found the Constitution had "automatically displaced" the government-debt exception from the start, and interpreted what the statute has always meant in the absence of said exception. This legal determination applied retroactively, including to the period of time during which the defendant used robocalls to advertise its services to the plaintiff.

Standing to Sue under the FCRA

Krueger v. Experian Information Solutions, Inc., 6th Cir. No. 20-2060, 2021 U.S. App. LEXIS 27699 (Sep. 13, 2021)

In this appeal, the United States Court of Appeals for the Sixth Circuit reversed and remanded the District Court's decision, finding that as the debtor suffered a concrete harm, he had standing to sue his loan servicer under the Fair Credit Reporting Act (FCRA).

The Bullet Point: In this matter, a Chapter 13 debtor appealed the District Court's decision that he lacked standing to bring a claim against his mortgage loan servicer. A plaintiff has standing to bring a cause of action if "he suffered an injury in fact, fairly traceable to the defendant's alleged misconduct, which the relief he seeks would likely redress." Under the FCRA, a cause of action exists against a furnisher of credit information who willfully or negligently violates its procedural duties under the Act. 15 U.S.C. §§ 1681n, 1681o. Not every violation of the FCRA results in an injury in fact. Instead, "a plaintiff has standing to seek damages only if he can show that the defendant's alleged procedural violation caused him to suffer a concrete harm."

Here, the debtor alleged the servicer willfully and negligently violated its statutory duties as a "furnisher" of credit information when it furnished the credit agencies inaccurate reports about his mortgage loan's status. Although the servicer knew the bankruptcy court had discharged the debtor's mortgage loan, it continuously reported to the credit agencies that the debtor's account had "no status" and that it had a past-due balance for more than a year after the discharge. The debtor alleged that the servicer's inaccurate reports inflicted a concrete harm because his resulting low credit score caused him to abandon his plans to buy a new car, since a lower credit score meant that lenders would charge him a higher interest rate. In response, the servicer argued this harm was too abstract and that since the debtor himself chose not to apply for a car loan, he could not trace this harm back to the servicer's conduct – as opposed to the bankruptcy or to himself. The Court rejected the servicer's argument, stating that a plaintiff's role in his injury destroys traceability only when the injury is "so completely due to the plaintiff's own fault as to break the causal chain." The Court noted that when the servicer reported the mortgage loan as past due, the debtor's resulting credit score was only 515. Once the credit-reporting agencies removed the subject account from the debtor's report, his credit score increased by almost 100 points and the debtor promptly obtained a car loan to purchase a new vehicle. The Court explained that because the debtor chose not to obtain a loan with a higher interest rate than he could have obtained absent the servicer's error does not make him at "fault" for the harm of driving his old car. Consequently, the debtor had standing to assert his claims against the servicer under the FCRA.

Florida

Offers of Judgment

CCM Condominium Association, Inc. v. Petri Positive Pest Control, Inc, Case No. SC19-861 (Fla. 2021)

The Florida Supreme Court determined that pre-judgment interest that accrues after an offer of judgment is made is not counted in determining whether a plaintiff has met the threshold amount between an offer of judgment and the judgment entered.

The Bullet Point: Florida Statute § 768.79 provides that an offer of judgment is available in any civil action for damages filed in Florida's courts. Under Fla. Stat. § 768.79, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant is entitled to recover reasonable costs and attorney's fees from the date of filing of the offer if the judgment entered in the case is either in the defendant's favor or if the judgment obtained by the plaintiff is at least 25 percent less than the defendant's offer. Separately, Fla. R.

Civ. P. 1.442 provides rules for the use of "Proposals for Settlement," including their applicability, time for service, required elements, and other procedural considerations.

In *CCM Condominium Association, Inc.*, the Florida Supreme Court clarified that pre-judgment interest which accrues after an offer of judgment is made should not be included when determining whether a plaintiff has met the threshold amount of difference between the offer of judgment and the judgment that was entered.

Waiver of Arbitration

Garcia v. The Exchange of America Corporation, Case No. 3D21-387 (Fla. 3d DCA 2021)

The Third District affirmed the trial court's ruling that a party had waived its right to arbitration by participating in litigation concerning an arbitrable issue. Waiver of arbitration is determined not by the timing of the motion to compel arbitration but when the moving party has taken an inconsistent position prior to the filing of the motion to compel arbitration.

The Bullet Point: In Florida, a party is deemed to have waived its right to arbitration when it takes an inconsistent position prior to moving for arbitration. This may include engaging in motion practice or participating in discovery. *Garcia* confirmed that waiver of arbitration does not depend upon the timing of the motion to compel arbitration, but instead depends upon whether the moving party has taken an inconsistent position prior to the filing of the motion to compel arbitration.

In the case on appeal, the plaintiff filed suit against the defendant for an alleged violation of a covenant not to compete. After the plaintiff filed a motion for temporary injunction, the defendant filed a response in opposition that challenged the merits of the motion. The defendant's opposition did not raise the issue of arbitrability. However, prior to the trial court granting the motion for temporary injunction, the defendant filed a motion to compel arbitration. The Third District affirmed the trial court's order granting the temporary injunction, explaining "[a] party may waive its contractual right to arbitration by participating in litigation concerning an arbitrable issue."

Failure to Appear at Zoom Hearing

Burke v. Soles, 2021 Fla. App. LEXIS 112082 (Fla. 4th DCA August 18, 2021)

The Fourth District found that a defendant who was unable to attend an online hearing via Zoom due to technical problems may be able to meet the burden of demonstrating excusable neglect and therefore held that it was error for the trial court to deny the defendant's motion for relief from the final judgment without a hearing.

The Bullet Point: Under Florida law, a trial court is authorized to grant relief from a final judgment due to a party's excusable neglect. Fla.R.Civ.P. 1540(b). In addition, a trial court has the authority to grant a motion for rehearing or a new trial due to a party's excusable neglect. Fla.R.Civ.P. 1.530.

The case on appeal involved a plaintiff seeking an injunction for protection against violence. The trial court issued a temporary injunction and set the matter for a final hearing that was to be conducted via Zoom due to the ongoing COVID-19 pandemic. The *pro se* defendant did not attend the Zoom hearing, and the trial court issued a final judgment in her absence. The defendant filed a timely motion for rehearing and to vacate or set aside the final judgment, asserting that she was on the Zoom platform on the day of the hearing but a technological problem prevented her from appearing on screen. The trial court denied the motion for rehearing without conducting a hearing. This decision was reversed on appeal, with the Fourth District finding that "[a] claim that the failure to appear was caused by technological difficulties is the type of 'system gone awry' that may constitute excusable neglect," and therefore the trial court is required to "either conduct a limited evidentiary hearing on the motion or grant the requested relief."

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