

Podcast: Is the TCPA Unconstitutional?

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The Telephone Consumer Protection Act (TCPA) is always the subject of litigation. The United States Supreme Court recently ruled that the government debt exception, which was added to the statute in 2015, was unconstitutional. Can the Court's recent ruling be interpreted to mean the entirety of the TCPA has been unconstitutional since 2015?

Consumer Financial Services attorneys **Gregg Stevens** (Dallas), **Aaron Kouhoup** (Cleveland), and **Joe Apatov** (Fort Lauderdale) discuss the conflicts and themes in recent rulings, including one from the Supreme Court, and potential compliance implications in the latest episode of More with McGlinchey.

Gregg Stevens: Hi, I'm Gregg Stevens. I am in McGlinchey Stafford's Dallas office, where my practice focuses on litigation. I'm joined by Joe Apatov, who is an attorney in McGlinchey's Fort Lauderdale office, and his practice also focuses on litigation. And I'm also joined by Aaron Kouhoup, who is an attorney in McGlinchey's Cleveland office, where his practice focuses on compliance and regulatory issues. Before we get into the unconstitutionality of the TCPA (the recent rulings have held that it is unconstitutional, I know there are a bunch of rulings that have gone the other way), Aaron, how did we first get to this point?

Aaron Kouhoup: Yeah, thanks, Gregg. You know, as you mentioned, this all stemmed from an amendment that was made the TCPA back in 2015. In that amendment, Congress modified the robocall provision to specifically address section 227(b)(1)(A), which discusses calls or texts that are made to wireless numbers. And really the primary change exempted calls or texts that were made solely to collect a debt owed to or guaranteed by the United States. And that's commonly, as you referred to it earlier, known as the government debt exemption. And, you know, interestingly enough, a number of state Attorney Generals almost immediately submitted a letter after the amendment was passed in 2015, stating that the exemption was inappropriate. The Attorney Generals' letters used harsh language, indicating that it would allow debt collectors to harass people just because the debt had a nexus to the federal government and for no other reason. That led to the introduction of the HANGUP Act, which in part would have eliminated the exemption for government debt calls. But that Act has been defeated in Congress a number of times since 2015. And so Gregg and Joe, it looks to me like, you know, at a minimum, the Attorney Generals were talking about how this exemption was unfair almost from the

beginning. But the robocall provision has been around since 1991, and the constitutionality of it hasn't really been challenged in a significant way. So now the question really becomes, is it not just unfair, but is it also unconstitutional?

Gregg Stevens: Joe, shortly after the Supreme Court ruled striking down the government debt exception, there was a case out of the Eastern District of Louisiana called *Creasy v. Charter Communications* that held that the TCPA was unconstitutional, at least during the time period that the government debt exception was part of the statute. How did the court reach its ruling on that one?

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Joe Apatov: Yeah, so Judge Feldman initially grappled with the AAPC decision, trying to see whether you can glean the answer to this question from the decision. And he expresses frustration that I think a lot of people are experiencing right now. He explains that there's two holdings from that decision. Six members concluded that Congress had impermissibly favored debt collection speech, and seven concluded that the entire robocall restriction should not be invalidated. Judge Feldman said that beyond that, there's no guidance from the Supreme Court. Everything else is dicta at best. After that, he kind of grapples with the purpose of the decision, as well as what happened. So the purpose of the decision was to resolve an equal protection issue related to political speech and government debt collection speech being treated differently. His rationale was that, one, if you're going to treat those things as differently by saying that you can retroactively enforce it against everyone else, but not government debt collectors, there's going to be unequal treatment. In addition, one thing that he really focuses on is the fact that this is not a situation where page 25 of the TCPA is invalidated, but the rest of the [statute] holds. This is, the exact subsection that's trying to be enforced regarding the robocall restriction is where the unconstitutional discrimination existed. So under that rationale, you can't [enforce] it because the very provision you're enforcing is the one that was unconstitutional until the Supreme Court severed that provision.

Gregg Stevens: Now, shortly after that decision, there was another decision out of the Northern District of Ohio in *Lindenbaum vs. Realty*, where the court in that particular case said, you cannot make an unconstitutional provision constitutional just because you want it to be constitutional. And I know I'm paraphrasing a little bit, and I believe that case is on appeal to the Sixth Circuit. Joe, how did the judge come to that conclusion? And didn't the court discuss Judge Kavanaugh's footnote in the *Barr* opinion.

Joe Apatov: Yes. And this was the Chief Judge and the, kind of the great quote she has that "the court cannot wave a magic wand and make the constitutional violation disappear." And the focus, a big focus was on footnote 12 of the AAPC decision in which Justice Kavanaugh states that no one should be penalized or held liable for making robocalls to collect government debt after the effective date of the government debt exception. And at the same time, he also says that the decision today does not negate the liability of parties who made robocalls covered by the robocall restriction. And the way that the Judge focused on this was saying that if you treat the statute, the amendment to the TCPA robocall provision, as void ab initio, then you do have liability for people trying to collect government debt after the enactment of the statute, because it never existed. But if you treat it

as merely void, then you're treating unequally under the statute those that collected on behalf of the government debt and those that did not. And that's the constitutional violation that she says that you can't magically wave away simply because it's inconvenient.

If you treat the amendment to the TCPA robocall provision as void ab initio, then you do have liability for people trying to collect government debt after the enactment of the statute, because it never existed. But if you treat it as merely void, then you're treating unequally under the statute those that collected on behalf of the government debt and those that did not.

Gregg Stevens: Now, after that decision came down, and we know that's on appeal to currently to the Sixth Circuit, there were several cases, and I think mainly in California, that held the other way — that it was constitutional. And folks who were making calls using an automated telephone dialing system could not get off the hook, so to speak and no pun intended, for the time period from the enactment of the statute until the Supreme Court ruled the government debt exception was unconstitutional. And I believe that is the current majority opinion. And Joe, what was the logic with some of those courts that have held, no, it is constitutional. And just because a piece of it was severed, a piece of the statute was severed, it's still, if you violated the TCPA during this time period, you're not going to be able to, for lack of a better term, get out of jail free.

Joe Apatov: And the logic evolved throughout these decisions. And it's gotten into a much stronger footing than initially started with. Initially, it appeared to be based on kind of a misunderstanding of other decisions. But where it evolved into is an argument, and this is actually raised by the United States when they intervened in the current appeal in the Sixth Circuit on this issue, that footnote is not inconsistent because you're not negating liability of the parties who made the calls. And you're also not enforcing it against those collecting on behalf of the government, but that's not an issue of statutory interpretation. The reason that you're not creating liability for those collecting on behalf of the government debt is a due process issue, because they were operating under a statute that, on the face, appeared to permit their conduct. That's where it appears the cases are heading on this argument. And they are, for the most part, there's eight of them right now, six of them are from California — which actually raises an extra interesting component that there's a Ninth Circuit case that a lot of them cite to that seems to impact the decision that might not be applicable in other circuits.

So obviously it's difficult to read tea leaves on what's going to happen. We can say pretty clearly that this does not look like a strong argument to be made in California, beyond that it's a bit more difficult because actually two of the cases came out of Florida on the same day, one in favor of the *Creasy* argument, that it's unenforceable, and one saying that it was enforceable. So right now it's very difficult to predict where things are going, but there's a strong trend in California going against this argument.

Gregg Stevens: So from a litigation perspective, would you recommend filing a motion to dismiss for lack of subject matter jurisdiction? I'm not so sure I would. If I have a case in California, given where these courts, the California courts are going, I'm not so sure I would file that motion. If I'm in Florida or Texas or a Ohio, I may very well try to file that motion.

Joe Apatov: Yeah, I agree with that. And I think a lot of it depends. One nice thing with this is that it's a subject matter jurisdiction argument, which means that you cannot waive it. You can raise it for the first time on appeal, if you would like. That's actually occurring right now in the Ninth Circuit. There's an appeal from a, I think it's

about a \$400 million TCPA class action judgment, where they are raising for the first time this constitutional argument. So since it's something that cannot be waived, if you believe that you're going to lose below, then it may not be worth the cost in doing so. But ultimately there's no harm besides that cost because if you take it on appeal, you're going to have a fresh set of eyes on it. And really the circuits are going to decide how this shakes out ultimately.

Gregg Stevens: And currently here in Texas, I'm not aware of any cases that have addressed this issue. Aaron, from a compliance point of view, is there anything that folks in the industry can do better to avoid this problem or potentially raise this problem? How would you advise people with their compliance programs regarding this?

It's very unsettled and there's a significant difference of opinion, even within the same state sometimes. So to try and anticipate or take advantage of an argument that you might not be subject to would probably be ill-advised.

Aaron Kouhoup: Yeah. You know, from, from a regulatory perspective, I think it's, at a minimum it's too early to do anything or change any of your policies or practices for a couple of reasons. I mean, for one, you guys have been talking about how it's very unsettled and there's a significant difference of opinion, even within the same state sometimes. So to try and anticipate or take advantage of an argument that you might not be subject to would probably be ill-advised. I think from a compliance perspective, you just continue to treat your program the way you always did and make sure that you're getting appropriate consent before you make any sort of calls or robocalls that could subject to it. And just kind of sit back and wait and see where this argument goes. But I wouldn't recommend changing anything at this time.

Gregg Stevens: Joe, do you know the briefing timeline right now in the Sixth Circuit?

Joe Apatov: Yeah, so it's March 8th right now and the appellee's brief in the Sixth Circuit case is due on March 17th. The U.S. has just filed their brief, I believe a couple of weeks ago. And the Ninth Circuit is a few more weeks away, the reply brief is due March 29th. So the briefing in the Ninth Circuit is a bit ahead of the Sixth Circuit. And it ultimately will probably be close enough that there's no telling which circuit is going to reach the decision first.

Gregg Stevens: It looks like whatever decision's made, we're in for some interesting times still with the TCPA, which appears to be never-ending as still on March 8th, we're still awaiting the decision in Facebook. Well, Joe and Aaron, thank you for joining us today. I'm Gregg Stevens and on behalf of Joe Apatov and Aaron Kouhoup, I hope you enjoy this podcast, and we can always be reached at mcglinchey.com. Thank you.

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