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AAPC In Review

Client Bulletins

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In July of 2020, the Supreme Court issued its highly anticipated decision in *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020), known ever since as the *AAPC* decision. The Supreme Court set out to answer a question years in the making—whether the "robocall" provisions of the Telephone Consumer Protection Act, by exempting calls to collect a debt owed to the federal government through a 2015 amendment, violated the First Amendment of the Constitution by favoring a specific category of speech above all others.

The Supreme Court's opinion, severing the troublesome provision of the TCPA as unconstitutional, had seemingly little practical impact. While some had hoped that the Supreme Court would invalidate the entirety of the robocall provisions, oral argument revealed few takers from the Supreme Court on that position and only two justices would have signed on to do so. However, while the Court agreed that the "government debt" exception of the TCPA was unconstitutional, the opinion punted on a critical issue: what to do about calls placed during the time that the statute was, as a result of the 2015 exception, unconstitutional? That open question has led to a growing split of district court opinions.

1. The *AAPC* Opinion.

First Amendment challenges have been nothing new in the TCPA world, but caught some steam following Congress's November 2, 2015 amendment adding in the so-called government-debt exception, which carved out from the statute calls made to collect a debt owed to or guaranteed by the United States. While the "robocall" provision of the TCPA had previously applied to all calls regardless of the purpose, suddenly the TCPA, through the exemption, favored a specific category of speech over others. Unlike the past, courts immediately became more receptive to TCPA constitutionality challenges where a specific category of speech was being favored. After years of appeals, the Supreme Court took up the topic and evaluated, in effect, two questions: (i) whether the TCPA's robocall provisions (specifically, 47 U.S.C. § 227(b)(1)(A)(iii)), as a result of the government-debt exception, imposed an unconstitutional content-based restriction on speech and (ii) if so, what to do about it. The result was a highly-fractured opinion.

As to the first question, a six-member majority of the Court concluded that "Congress has impermissibly favored debt-collection speech over political and other speech, in violation of the First Amendment." The majority concluded that "the robocall restriction with the government-debt exception is content-based" and could not pass strict scrutiny. As to the second question, a seven-member majority determined that the proper outcome was to sever the government-debt exemption from the TCPA.

The Court, however, did not reach a resolution concerning what to do regarding calls placed in the 2015-2020 timeframe during which the government-debt exemption was in effect, thus rendering Section 227(b)(1)(A)(iii) unconstitutional. In other words, if the statute was unconstitutional between 2015-2020, how could an unconstitutional law be enforced to impose liability for calls made during

that time? While Justice Kavanaugh wrote for the majority as to the above holdings, certain aspects of his opinion garnered no majority. This includes a footnote in his opinion in which he indicated that otherwise actionable calls made while the government-debt exception was in effect should remain actionable, though government-debt calls made during that time period should remain excepted. In other words, Justice Kavanaugh's message to defendants was essentially: "Yes, the TCPA was unconstitutional, but I'm ok with enforcing an unconstitutional law against you and we've cured it moving forward." Only two other justices joint this portion of Justice Kavanaugh's decision, such that it is not a binding statement by the Supreme Court. Two other justices, Justices Gorsuch and Thomas, expressly disagreed with this outcome and, in fact, would have invalidated the entirety of the robocall provisions.

2. Post-*AAPC* Developments.

Following *AAPC*, defendants were quick to raise the issue that the Supreme Court left on the table: were calls placed between November 2, 2015 and the date of the *AAPC* opinion actionable if the statute was unconstitutional at that time?

The first decision issued on this question was *Creasy v. Charter Communications* out of the Eastern District of Louisiana, and it was a groundbreaking one. The Court engaged in a thorough review of the *AAPC* decision and constitutional law and determined that "the unconstitutional amended version of § 227(b)(1)(A)(iii) is what applied to Charter 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." The Court thus dismissed the case in large part, eliminating liability for all calls placed during the November 2, 2015 - July, 2020 timeframe.

The next such decision was *Lindenbaum v. Realgy, LLC*, out of the Northern District of Ohio. And it, too, was an overwhelming win for the defendant. Engaging in a similarly thorough analysis, the Court concluded: "[t]he Court cannot wave a magic wand and make that constitutional violation disappear. Because the statute at issue was unconstitutional at the time of the alleged violations, this Court lacks jurisdiction over this matter." The case was dismissed with prejudice.

To date, at least one other court has joined *Creasy* and *Lindenbaum*, and that was *Hussain v. Sullivan Buick-Cadillac-GMC Truck, Inc.*, out of the Middle District of Florida. The Court in *Hussain* found *Creasy* and *Lindenbaum* extremely persuasive, holding that "at the time Defendants engaged in the speech at issue in this case, Defendants were subject to an unconstitutional content-based restriction. Because the Court is without authority to enforce an unconstitutional statute, the Court lacks subject matter jurisdiction over this action."

This is not to say that all courts have been in accord. A handful of courts, predominantly in the Eastern and Central Districts of California, have reached contrary conclusions. And still other courts have brushed past the possible constitutionality impact and pointed simply to the severance of the government-debt exception as remedying all possible problems.

Nevertheless, this will inevitably have to be an issue resolved by the courts of appeal and, eventually, the Supreme Court. The first appellate court to reach this issue is likely to be the Sixth Circuit, which is evaluating the appeal of the *Lindenbaum* decision. It will be critical to watch in the coming months as courts across the country stake out sides of this issue, as plaintiffs continue their search for friendly courts.

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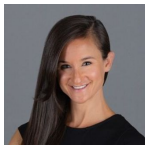

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