

TCPA Tracker - May 2020

May 20, 2020

Recent News

Supreme Court Hears Oral Argument on the Constitutionality of the TCPA's Calling Restrictions

On Wednesday, May 6, 2020, the TCPA came before the Supreme Court (via teleconference). When first enacted in 1991, the TCPA prohibited calls placed using an automatic dialer with certain, specific exceptions. In 2015, Congress enacted an amendment permitting such calls if they related to the collection of debts guaranteed by the U.S. government. The law does not permit the use of the same equipment for debts guaranteed by private lenders; thus, leading to claims that the exception rendered the statute unconstitutionally content-based in violation of the First Amendment. In 2019, the Fourth Circuit agreed, finding the exception failed strict scrutiny, was unconstitutional, and should be severed from the TCPA. In *William P. Barr et al. v. American Association of Political Consultants et al.*, Case No. 19-631 (2020) the Supreme Court granted certiorari to review that ruling.

The Court granted review of two questions: 1) Whether the government-debt exception violates the First Amendment; and 2) whether the proper remedy for any constitutional violation is to sever the exception from the remainder of the statute (rather than strike the entire TCPA).

Argument in the case lasted just over an hour. While the questions and comments during argument do not always foretell the outcome, certain trends did develop. Chief Justice Roberts, Justice Ginsburg, Justice Thomas, and Justice Kavanaugh each made comments suggesting that the exception was content-based. However, the nine Justices did not project alignment on which level of scrutiny should apply. Justice Kagan asked why strict scrutiny should apply when the exemption did not raise real concerns of government censorship, while Justice Breyer suggested that perhaps the exception was an economic regulation which should be reviewed under rational basis scrutiny, a framework in accord with his 2015 concurrence in *Reed v. Town of Gilbert*.

The Justices' questioning focused more on whether severance is the appropriate remedy, which presupposes that the exception is unconstitutional. A few Justices highlighted the irony of severing the exception on First Amendment grounds given that such a remedy would ultimately result in the suppression of more speech and would not provide AAPC with the relief it seeks. Several also struggled with how to address that the problematic exception was enacted so long after the initial restriction, and whether that sequence favored severability. Several of the Justices made negative comments about telemarketing calls and the practical or political implications of striking down a statute described by more than one Justice as extraordinarily "popular."

Under normal circumstances, the Court would be expected to issue its decision by the end of June. The Court's ongoing logistical adjustments and delayed argument schedule, caused by the coronavirus, may delay its release.

William P. Barr et al. v. American Association of Political Consultants et al., Case No. 19-631 (2020)

FCC Revises Enforcement Rules to Implement TRACED Act Provisions

On May 1, 2020, the FCC's Enforcement Bureau (EB) released an [order](#) adopting section 3 of the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act), which amends sections 227(b) and 227(e) of the TCPA. For section 227(b), the EB's order removes the requirement that the FCC issue a citation prior to a proposed monetary forfeiture, adds an additional monetary penalty for persons who violated the section "with the intent to cause such violation," and increases the statute of limitations for intentional violations to four years from one year. For section 227(e), the EB's order increases the statute of limitations for violations to four years from two years. There will be no notice and comment period, and the order will take effect 30 days after publication in the Federal Register.

FCC Issues NPRM Aimed at One-Ring Scam Phone Calls

On April 28, 2020, the FCC issued a [Notice of Proposed Rulemaking](#) (NPRM) in response to Section 12 of the TRACED Act, which directs the Commission to initiate a proceeding to protect called parties from one-ring scams. The FCC is seeking input from stakeholders on, among other things, how to coordinate with federal, state, and international authorities, how to educate consumers about one-ring scams, and how to work with voice providers and international gateway providers to block the calls. The Commission also seeks input on a proposal allowing voice service providers to block numbers from phone numbers associated with one-ring scams, which they define as "a scam in which a caller makes a call and allows the call to ring the called party for a short duration, in order to prompt the called party to return the call, thereby subjecting the called party to charges." Comments are due June 19, 2020 and reply comments are due July 6, 2020.

FCC Responds to District Court Inquiry Regarding Vincent Lucas' 2014 TCPA Petition

On May 1, 2020, the FCC responded to the U.S. District Court for the Southern District of Ohio's March 17, 2020 inquiry about the status of Vincent Lucas' 2014 petition for expedited declaratory ruling. The Commission told the Court that "the FCC does not have the resources to respond to all petitions," and "at this time we are unable to provide any reliable estimate of when the Commission might be able to rule on the petition, especially in light of the disruption caused by the current national emergency." The case no. 1:12-cv-630 in the U.S. District Court for the Southern District of Ohio Western Division.

Mr. Lucas' 2014 petition requests that the FCC find a person vicariously or contributorily liable if that person provides substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates 47 U.S.C. § 227(b) or (c). Mr. Lucas filed an [ex parte](#) on April 28, 2020 urging the Commission to respond to the U.S. District Court for the Southern District of Ohio and grant his petition.

FCC Petitions Tracker

Kelley Drye's Communications group prepares a comprehensive summary of pending petitions and FCC actions relating to the scope and interpretation of the TCPA.

Number of Petitions Pending

- 34 petitions pending

- 1 petition for review of the CGB order issued on 12/09/19 granting Amerifactors' petition for declaratory ruling that faxes sent and received over the Internet are not bound by the prohibitions on junk faxes that apply to telephone facsimile machines
- 1 petition for reconsideration of the rules to implement the government debt collection exemption
- 1 application for review of the decision to deny a request for an exemption of the prior express consent requirement of the TCPA for "mortgage servicing calls"
- 1 request for reconsideration of the 10/14/16 waiver of the prior express written consent rule granted to 7 petitioners

New Petitions Filed

- *None since March 2020.*

Upcoming Comments

- *American Bankers Association et al.* – Petition for expedited declaratory ruling, clarification, or waiver filed by financial services providers asking whether the providers' calls and text messages about COVID-19 that use an ATDS or prerecorded or artificial voice are made for emergency purposes and are thus exempt from the TCPA's consent requirements. (*Comments were due 05/06/2020, reply comments due 05/21/2020*)

Decisions Released

- *None since March 2020.*

[Click here](#) to see the full FCC Petitions Tracker.

Cases of Note

Supreme Court Hears Oral Argument on the Constitutionality of the TCPA's Calling Restrictions

See news story above.

11th Circuit Holds Consent Cannot be Unilaterally Revoked if Given as Part of Bargained-For Contract

In *Medley v. Dish Network, LLC*, the Eleventh Circuit has followed the Second Circuit to hold that consent to receive automatically-dialed telemarketing calls cannot be unilaterally revoked if given as part of a bargained-for contract.

In *Medley*, Plaintiff had entered into an agreement with Defendant for home satellite television services. As a part of that contract, Plaintiff gave her consent to be contacted by automated or predictive dialing systems. Approximately half way through her contract, Plaintiff filed for bankruptcy but failed to disclose the DISH contract as a part of her filing. After DISH contacted her to collect on her monthly fees, Plaintiff's bankruptcy attorneys gave notice that Plaintiff was revoking consent to be contacted by ATDS. Thereafter, DISH continued to make six automated calls to

Plaintiff. Plaintiff brought claims under the TCPA based on the revocation of consent.

Under common law theories of contract, the district court held, and the Eleventh Circuit affirmed, that Plaintiff could not unilaterally revoke one term of a bargained-for contract. “An agreement is a manifestation of mutual assent on the part of two or persons, and thus it is black-letter contract law that one party to an agreement cannot, without the other party’s consent, unilaterally modify the agreement once it has been executed.” (internal quotations omitted). The Eleventh Circuit stated that such holding aligned with the FCC’s 2015 Ruling implementing the TCPA, which was silent as to the question of contractual consent but nodded to common law notions of consent generally. Beyond the Second and Eleventh, no other Circuit courts have addressed this question. Importantly, this case addressed debt collection, which are considered informational, and not telemarketing, calls/texts under the TCPA.

Medley v. Dish Network, LLC, No. 18-13841, 2020 WL 2092594, (11th Cir. May 1, 2020)

District Court Tosses TCPA Claim Based on ATDS Definition

In *Thompson v. Portfolio Recovery Associates., LLC*, the Southern District of Florida granted summary judgment for Defendant dismissing Plaintiff’s TCPA claims on two grounds: first, Plaintiff could not be considered the party called, and second, the technology used did not qualify as an ATDS.

Plaintiff in *Thompson* had been contacted by the debt-collector defendant after his cousin, the actual recipient of the calls, had routed all calls placed to him to forward to different numbers, Plaintiff’s included. Under such circumstances, the Court reasoned, Plaintiff was not the “called party” and therefore had no standing to sue under the TCPA.

The Court also granted summary judgment on the independent ground that the Defendant’s dialing system, the Avaya Proactive Contact, did not have the capacity to produce or store telephone numbers using a random or sequential number generator, so it could not qualify as an ATDS. The Court, without elaborating the technical features of the system, took practical note of the fact that it would not make sense for a debt-collection company to contact random or sequential numbers as apparent support for its decision.

Thompson v. Portfolio Recovery Assocs., LLC, No. 19-cv-62220, 2020 WL 1986991 (S.D. Fla. Apr. 25, 2020)