C&G NEWS | cohen & grigsby a culture of performance

The Retroactivity of TCPA Regulations and Amendments

By Robert M. Linn, Ingrid A. Bohme and Cezanne S. Harrer[1]

On December 13, 2017, the United States Court of Appeals for the Ninth Circuit ruled that a 2012 amendment to the Telephone Consumer Protection Act ("TCPA") excluding liability for phone calls related to the collection of federally funded student loan accounts would not be given retroactive applicability. In *Silver v. Pennsylvania Higher Education Assistance Agency*, No. 16-15664, 2017 WL 6349153 (9th Cir. Dec. 13, 2017), the plaintiff, Neil Silver ("Silver"), appealed the district court's order granting summary judgment in favor of the Pennsylvania Higher Education Assistance Agency ("PHEAA") for alleged TCPA violations. Silver argued that the district court erred in retroactively applying the amendment, which was silent as to Congress's intent on retroactivity, and the Ninth Circuit agreed.

In its brief memorandum opinion, the Ninth Circuit specifically disagreed with the district court's finding that giving the amendment retroactive affect would not impair rights a party possessed when he acted, increase a party's liability for past conduct or impose new duties with respect to transactions already completed.[2] While the district court had noted that merely impairing a plaintiff's ability to bring a lawsuit did not provide a sufficient basis to bar retroactive application of a statute, the Court of Appeals disagreed, stating that retroactively extinguishing a personal claim that has already accrued implicates a strong presumption *against* retroactivity. Because PHEAA's telephone calls to Silver occurred before the TCPA was amended to permit such calls, the Ninth Circuit reversed the entry of summary judgment in favor of PHEAA and remanded for further proceedings.

The Ninth Circuit's decision is consistent with previous case law considering the retroactive applicability of amendments to the Federal Communications Commission's governing regulations. *See e.g.*, *Siding & Insulation Co. v. Alco Vending, Inc.*, 822 F.3d 886 (6th Cir. 2016) (amended version of the FCC's TCPA regulation governing the definition of a "sender" would not be applied retroactively); *Kesselman v. GC Servs. Ltd. P'ship*, 2016 WL 9185399, at *3 (C.D. Cal. Nov. 17, 2016) (noting that "the Supreme Court has held that congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires the result," and, accordingly, the 2016 FCC Order would likely not apply retroactively) (internal citations omitted); *Workman v. Navient Sols., Inc.*, 2016 WL 4088716, at *3 (S.D. Ind. July 27, 2016) (noting that the "FCC's Notice of Proposed Rulemaking does not say or imply that the anticipated rules will be retroactive"). Thus, any

[1] Mr. Linn and Ms. Bohme are directors in Cohen & Grigsby, P.C., a Pittsburgh-based law firm, and Mrs. Harrer is an associate at Cohen & Grigsby.

[2] In its opinion, the district court had noted that applying the amendment retroactively would actually *decrease* liability for past conduct by creating an exception for telephone calls made to collect a federal debt. *Silver v. Pennsylvania Higher Education Assistance Agency*, 2016 WL 1258629, at *3 (N.D. Cal. Mar. 31, 2016).

amendments to the statute or changes to FCC regulations that may follow the highly anticipated D.C. Circuit Court's decision in *ACA International v. FCC*, No. 15-1211 (D.C. Cir. filed Nov. 25, 2015), likely will not have retroactive effect in the absence of explicit language to the contrary.

If you have any questions about any of the above information, or wish to discuss a particular matter, please feel free to speak with Mr. Linn, Ms. Bohme or any other member of our Litigation Practice by calling us at 412-297-4900 or visiting https://www.cohenlaw.com/practices/litigation. To receive future news alerts, please send an e-mail to bulletins@cohenlaw.com.