

Charter TCPA Ruling May Benefit Cos. Facing Robocall Claims

By **Scott Shaffer** (October 21, 2020)

The U.S. District Court for the Eastern District of Louisiana has ruled that a very significant portion of the Telephone Consumer Protection Act is unenforceable for violations occurring between November 2015 and July 6, 2020. The ruling was issued by U.S. District Judge Martin L. Feldman on Sept. 28. in a case styled *Creasy v. Charter Communications Inc.*[1] If adopted by other federal courts, this ruling could be fatal to hundreds, if not thousands, of TCPA robocall class actions pending around the country.



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This article analyses the Creasy ruling and its potential benefits to the many businesses dealing with pending TCPA claims over robocalls made during that past five years or so. Any company facing such a claim should strongly consider challenging the court's jurisdiction to enforce the anti-robocall portion of the TCPA as soon as possible if the claims cover calls or text messages sent during the affected time period.

Barr v. AAPC Supreme Court Decision on the Government Debt Exception Amendment

The four-plus year period of unenforceability corresponds to the time that the TCPA contained a provision subsequently held to be unconstitutional by the U.S. Supreme Court.

In order to understand the Creasy ruling, a quick look back is necessary. The TCPA originally banned robocalls, which are defined as calls made with an automatic telephone dialing system, unless the called party consented in advance to receive such calls.

However, in 2015, Congress passed, and President Barack Obama signed, an amendment to the TCPA granting an exception that allowed robocalls if made "solely to collect a debt owed to or guaranteed by the United States." This was referred to as the government debt exception.

The constitutionality of the government debt exception was soon challenged, and on July 6, 2020, in *Barr v. American Association of Political Consultants Inc.*, the Supreme Court held that it violated the First Amendment.[2]

Rather than invalidate the entire TCPA, which contains other provisions such as do-not-call and junk fax rules that were not at issue, or even the unconstitutional portion of the TCPA, the Supreme Court repaired the statute by invalidating only the offending portion, namely the government debt exception, and letting the remainder stand.

So how does the Supreme Court's AAPC decision affect existing lawsuits alleging robocall violations during that nearly five-year time period when the TCPA was unconstitutional? As social media users often say, it's complicated.

The Creasy ruling is the first to attempt to apply the implications contained in the divided AAPC ruling.

On a going-forward basis, things are pretty clear: No robocalls or automated text messages are allowed absent prior express consent from the called party. But what to do about all

those violations that occurred during the period when the unconstitutional statute was in effect? That is where things get murky.

Barr was a fractured decision, with three additional opinions filed besides Justice Brett Kavanaugh's main opinion. Six justices agreed that the government debt exception had to go. Specifically, that exception "impermissibly favored debt-collection speech over political and other speech, in violation of the First Amendment."

A different combination of seven justices agreed that the best solution was not to invalidate the whole robocall ban, but instead to sever the government debt exception and let the remainder of the robocall ban remain in effect.

So what exactly does that mean for all those illegal robocalls that were made during the period from 2015 through July 2020?

Justice Kavanaugh's portion of the AAPC decision calls for continued legal liability for defendants who broke the robocall ban: "[O]ur decision today does not negate the liability of parties who made robocalls covered by the robocall restriction." However, that section of AAPC was signed by only three of the nine justices (Justice Kavanaugh, Chief Justice John Roberts and Justice Samuel Alito), so it does not have a controlling stare decisis effect on district courts.

Justice Neil Gorsuch, joined by Justice Clarence Thomas, took a different position from Justices Kavanaugh, Roberts and Alito. Clearly, those who made robocalls to collect government debt cannot be held responsible prior to July 6 because they were acting under the government debt exception.

In Gorsuch's view, the government debt exception should not have been severed and it would be unfair to all the other robocallers to hold them liable under an unconstitutional statute that discriminated against their speech. Gorsuch wrote that shielding "only government-debt collection callers from past liability under an admittedly unconstitutional law would wind up endorsing the very same kind of content discrimination we say we are seeking to eliminate."

Creasy v. Charter Communications Addresses the Five-Year TCPA Unconstitutionality Period

Judge Feldman's Creasy ruling was the first to take on the task of reconciling the above two views. The issue was presented to him when attorneys for Charter Communications filed a motion to dismiss on the basis that the district court lacked jurisdiction to enforce an unconstitutional law.

Charter Communications argued that:

[T]he automated-call ban has been unconstitutional, and thus entirely unenforceable, from the enactment of the government debt exception in 2015 until the Court severed it in AAPC. This inescapable conclusion, that Plaintiffs are suing based on violations of an unconstitutional statute, is fatal to this entire action.

Charter Communications pressed their view that the Supreme Court's finding of unconstitutionality requires the dismissal of all robocall claims covering November 2015 through the first half of 2020.

[C]onsistent with over two hundred years of constitutional jurisprudence, [Charter Communications] could not have violated a statutory provision that was unconstitutional at the time of the alleged violation. An example illustrates this point. If, instead of government debt collectors, Congress passed a carve-out for the Joe Biden campaign that was later held to be unconstitutional, the disfavored speakers (any other speaker, including an opposing campaign) could not then be punished for making calls during the period of time for which the Biden campaign was given a free pass. That is to say, the disfavored speakers could not be punished for violating a flagrantly unconstitutional and discriminatory speech restriction. The same exact result follows here: Charter cannot be penalized for making any calls (much less debt collection calls, which Plaintiff alleges here) that allegedly violated the automated-call ban during the period of time that favored speakers—government debt collectors making the same type of calls—were given a free pass.

Judge Feldman agreed with Charter Communications and dismissed 129 of the 130 calls at issue in Creasy. The 130th call was allegedly made on July 11, a few days after the AAPC decision was issued and therefore at a time when the constitutionality of the TCPA had been restored.

Judge Feldman concluded that as between the opinions of Justices Kavanaugh and Gorsuch, it was Gorsuch who had "the better argument as a matter of law and logic." Judge Feldman supplemented the Gorsuch argument with a trip in time back to an 1879 Supreme Court case. "Of particular significance here is the timeless principle that "[a]n unconstitutional law is void, and is as no law."^[3]

Judge Feldman wrote:

In the years in which § 227(b)(1)(A)(iii) [of the TCPA] permitted robocalls of one category of content (government-debt collection) while prohibiting robocalls of all other categories of content, the entirety of the provision was, indeed, unconstitutional. That fact deprives the Court of jurisdiction over much of this action ... any added likelihood that defendants may evade liability for robocalls that Congress would have preferred to ban from 2015 to 2020 is the unfortunate price of the Court's enforcement of a constitutionally dictated result.

Despite dismissing claims for 129 of the calls, the court did retain jurisdiction over the parties because "Charter falls one yard shy of the goal line in its effort" to dispose of the whole case. "With respect to the only improper communication they allege to have occurred after the Supreme Court's decision in AAPC, the plaintiffs do state a plausible claim upon which relief can be granted."

This leaves the value of the case at no more than \$1,500, because the TCPA lacks an attorneys fee shifting provision.

Supreme Court to Address TCPA Illegal Robocall Definitions in Facebook v. Duguid

With respect to call number 130, Judge Feldman temporarily stayed further proceedings in this case in order to allow the Supreme Court to decide yet another TCPA case, Facebook Inc. v. Duguid,^[4] in which Facebook is challenging the way federal courts have expanded the TCPA's definition of an illegal automatic telephone dialing system.

The Facebook case will be argued on Dec. 8, likely before a more conservative Supreme

Court poised to include current nominee Amy Coney Barrett and could result in an even further curtailing of the TCPA.

The question begged by the Creasy ruling is whether it will be followed by courts around the nation that are considering the many TCPA claims arising between November 2015 and July 2020. The chances of that happening in the short term look good. It seems likely that other jurisdictions will follow Creasy, given the Supreme Court's ending of the government debt exception was based on a constitutional shortcoming.

In order to ignore Creasy, a district court would essentially be enforcing an unconstitutional statute. How can a court enforce an unconstitutional statute?

A more definitive answer for many of the robocall cases is likely to come in early 2021 when the Supreme Court decides Facebook v. Duguid. It appears that in Facebook, another blow to the broad expanse of the TCPA is looming. With the recent passing of Justice Ruth Bader Ginsburg, the increasingly conservative Supreme Court will consider trimming the judicially expanded definition of an automatic dialing device down to the TCPA's exact wording and no further.

For now, if your business is facing a TCPA claim for the period from November 2015 through July 2020, the Creasy ruling presents the possibility for a get-out-of-jail-free card even in cases where the robocalls were clearly illegal.

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[1] Creasy v. Charter Communications, Inc., Civil Action No. 20-1199, --- F.Supp.3d. ----, 2020 WL 5761117 (E.D. La. Sept. 28, 2020).

[2] Barr v. Am. Ass'n of Political Consultants, --- U.S. ----, 140 S. Ct. 2335, 207 L.Ed.2d 784 (2020).

[3] Citing Ex Parte Siebold, 100 U.S. 371, 376 (1879).

[4] Facebook, Inc. v. Duguid, 926 F.3d 1146 (9th Cir. 2019), cert. granted, 2020 WL 3865252 (July 9, 2020).