

TCPA First Amendment Argument Could Eliminate Government Debt Collection Exemption

First Amendment challenges to the Telephone Consumer Protection Act (TCPA) are in the midst of a revival. The TCPA makes it unlawful to call or text a cell phone using an automatic telephone dialing system (ATDS) or artificial or prerecorded voice without the prior express consent of the called party. In 2015, Congress exempted from this restriction calls made by government officials or private entities to collect a debt owed to or guaranteed by the United States, such as a student loan. This exemption, coupled with a key Supreme Court ruling the same year, has prompted renewed claims that the TCPA violates the First Amendment because it restricts speech based on its content. Both the Fourth Circuit and the Ninth Circuit recently heard oral arguments on this issue. One possible outcome, based on the pleadings and the judge's questions, is to eliminate (or more technically sever) the allegedly unconstitutional federal debt collection exemption while leaving the rest of the TCPA intact. This would once again fully expose companies calling to collect federal debts to liability for statutory damages under the TCPA.

The First Amendment Argument

The TCPA has periodically been attacked as unconstitutional on grounds that it violates the First Amendment right to free speech. To date, those attacks have always failed. The courts historically have viewed the TCPA as a content-neutral restriction on speech. (Even commercial speech is subject to First Amendment protection.) Courts have instead found that different treatment of calls is based on the relationship between the caller and called party, which evidences implied consent to be called. As a content-neutral statute, the courts have reviewed the TCPA's constitutionality based on a more lenient standard called intermediate scrutiny, which asks whether the law is narrowly tailored to serve a significant government interest and leaves ample other means of communication available.

The Supreme Court's 2015 decision in [*Reed v. Town of Gilbert*](#) clarified that laws that require assessment of what is being communicated in the speech are, on their face, content-based restrictions, no matter the government's rationale or motive. As the court stated, "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." In essence, the Supreme Court made it easier to conclude that a restriction on speech is content-based. Parties have argued that the TCPA favors some speech, namely government debt collection, over other speech.

The distinction between content-based or content-neutral restrictions is critical. Content-based restrictions are presumptively unconstitutional and are subject to a much higher standard of review. This standard, called strict scrutiny, requires the restriction to be narrowly tailored to serve a compelling government interest. In practical terms, laws subject to strict scrutiny are almost always struck down while laws subject to intermediate scrutiny are often upheld.

Also in 2015, Congress created an exemption from the TCPA's autodialing restrictions for calls to collect a debt owed to or guaranteed by the United States. Along with the exemption, Congress authorized the Federal Communications Commission (FCC) to impose some limitations on those calls. The FCC initially adopted a set of highly controversial conditions on the exemption. For example, the FCC limited the number of calls that could be

March 26, 2019

made under the exemption to three per month. Those conditions, however, never became effective. As a result, the statutory exemption stands on its own, and courts have found that it precludes liability for calls to collect a federal debt.

Federal District Courts Now Conclude that the TCPA is a Content-Based Restriction on Speech But Find that It Is Still Constitutional

The combination of the Supreme Court's decision and the federal debt collection exemption have breathed new life into First Amendment challenges to the TCPA. In light of these events, to date at least six federal district courts have found that the TCPA's restriction on making ATDS calls to cell phones is, on its face, a content-based restriction on speech subject to strict scrutiny. The courts have rejected the government's arguments that the debt collection exemption is not wholly based on content, but on the relationship between the government and the debtor, and thus should continue to be subject to the less demanding intermediate scrutiny test. One reason the courts have rejected the relationship argument is that although there may be a relationship between the government and the debtor, the call may be made by a private third party that has no preexisting relationship with the debtor.

But in contrast to past practice in which strict scrutiny was a veritable death sentence, these courts have found that the TCPA survives the test. They have found that it serves a compelling government interest, namely privacy, and that the autodialing restriction is narrowly tailored to achieve that interest. The courts have reached this conclusion despite claims that the law is "underinclusive" in that it contains sweeping prohibitions on autodialed calls by private parties without consent but allows federal debt collection calls that ostensibly are equally invasive of privacy. In rebuffing the claim of underinclusivity, the courts have found that the federal debt collection exemption is itself a narrow one that furthers the government's interest in collecting debts owed to it. The courts also note that Congress authorized the FCC to further constrain the scope of the exception by limiting the number and duration of the calls.

The Appeals Courts Consider Striking the Debt-Collection Exemption

No appellate court has reviewed the TCPA's constitutionality since the Reed decision and the establishment of the federal debt collection exception, but the Fourth Circuit (*AAPC, Inc. v. Sessions*, No. 18-1588) and the Ninth Circuit (*Gallion v. Charter Comm. Inc.*, No. 18-55667) will likely render opinions in the coming months.

Three outcomes are possible. The courts could, like the federal district courts, uphold the TCPA, including the exemption, despite finding that the law is now content-based and subject to strict scrutiny. Alternatively, the appellate courts could reverse the district courts and conclude that the TCPA, or at least the cell phone autodialing provision, does not withstand strict scrutiny and should be struck down. This would, of course, be welcomed by many legitimate businesses that find themselves subject to TCPA lawsuits when seeking to communicate with customers. A third outcome, one in which at least some judges signaled strong interest during oral argument, would be to strike down the federal debt collection exemption while retaining the remainder of the TCPA. This result would not be satisfactory to those challenging the TCPA's constitutionality. It would be a worst-case scenario for entities calling to collect federal debts as it would remove an exception that courts are finding preclude liability for making these calls, and once again subject these companies to potentially substantial damages for inadvertently calling without consent.

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