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Novel TCPA Ruling Lays Groundwork For Fresh Circuit Split

By **Allison Grande**

Law360 (October 9, 2020, 5:08 PM EDT) -- A Louisiana federal judge's ruling erasing liability for autodialed calls and text messages made during the past five years sets the stage for another circuit split involving the Telephone Consumer Protection Act and, if more widely adopted, would mark the biggest boon yet to defendants attempting to crush a swell of litigation.

In a **first-of-its-kind ruling** issued Sept. 28, U.S. District Judge Martin Feldman agreed with Charter Communications' argument that the U.S. Supreme Court's July 6 ruling in Barr v. American Association of Political Consultants — which struck down as unconstitutional an exemption to the TCPA that allowed automated calls to be made to collect federally backed debts — meant that courts don't have the power to enforce robocall and text message violations that occurred between when Congress added the exemption in November 2015 and when the Supreme Court severed it in its July ruling.

Judge Feldman's ruling "highlights the monumental importance of AAPC that many may have overlooked," said Eric J. Troutman, a Squire Patton Boggs LLP partner. "The reasoning of the [Louisiana] case assures that callers simply cannot be sued for purported violations of the TCPA until very recently."

Driven by the potential for uncapped statutory damages of between $500 and $1,500 per violation and decisions from the Federal Communications Commission and multiple appellate courts that have broadly defined key statutory terms, plaintiffs have been flooding courts with TCPA class actions that target a wide range of industries, from tech and financial services to sports and cannabis.

Defense attorneys who specialize in TCPA litigation said there was no doubt that Judge Feldman's decision in Creasy v. Charter Communications would make a prominent appearance in bids to ax allegations that center on allegedly unsolicited automated calls and texts made between November 2015 and July 6 — a time frame that's likely to encompass the vast majority of pending litigation, given the statute's four-year window for filing claims.

"This is a welcome decision for defendants that have been plagued by abusive class action litigation under the TCPA," said Mark Brennan, tech and telecoms sector group lead at Hogan Lovells.

Now the big question becomes how willing other courts will be to follow the Louisiana court's lead, according to attorneys.

"While Creasy is undoubtedly correctly decided, I expect courts will split on this issue," Troutman said. "Courts have shown a willingness — time and again — to apply the TCPA to factual situations that are far outside the intended scope and reach of the statute and rarely concern themselves with the serious constitutional issues raised by the statute. It will simply be hard for some courts to accept that the TCPA is unenforceable, but that is the clear impact of the Supreme Court's AAPC ruling as Creasy explains."

Octavio "Tav" Gomez, the head of the consumer protection department at plaintiffs firm Morgan & Morgan, called Judge Feldman's ruling "somewhat of an odd type" of decision that he predicted other judges wouldn't necessarily be eager to follow.

"Even though the judge did a good job explaining his rationale, I believe that trying to go retroactive with the Supreme Court decision is not the right way," Gomez said. "The Supreme Court clearly found that the TCPA was constitutional and that severance was the proper remedy."

Judge Feldman explicitly acknowledged the potential for a circuit split in his ruling, which called out the Supreme Court justices for failing to "reach a clear majority" in its AAPC decision.

Justice Brett Kavanaugh, joined by two of his colleagues, wrote in the court's plurality opinion that while no one should be penalized for relying on the invalidated exemption to make calls to collect government debt, its decision didn't "negate the liability" of those who placed other types of robocalls during the time frame in which the flawed exemption was in place.

In a partial dissent joined by Justice Clarence Thomas, Justice Neil Gorsuch disagreed with this stance, writing that shielding only government-backed debt collection callers from past liability under an unconstitutional law would end up "endorsing the very same kind of content discrimination [the court said it was] seeking to eliminate."

"The court's failure to unite behind a sufficiently agreeable rationale does a disservice to litigants and lower courts," Judge Feldman wrote in a lengthy footnote in his ruling. "Here, it has led the parties to wildly dissimilar understandings of AAPC's legal effect — all in the utmost good faith and preparation. In the future, it may engender a circuit split which confronts the court anew."

But despite the "uncomfortable position" that Judge Feldman said he found himself in as a result of the Supreme Court's lack of uniform guidance, the judge ultimately concluded that Justice Gorsuch's reasoning was "the better argument as a matter of law and logic" and that letting companies off the hook for robocalls that Congress "would have preferred to ban" from 2015 through July 6 was "the unfortunate price of the court's enforcement of a constitutionally dictated result."

"It is for the elected branches, and not this court, to determine whether that price is unduly high," Judge Feldman added. "Legislative choices have consequences."

While Judge Feldman's ruling won't be binding on other federal courts, attorneys predicted that his careful and well-reasoned opinion will be hard for judges to ignore as the argument gains traction around the country.

"The issue is certainly not a one-off issue, and I do not think it is a one-off ruling," said Hinshaw & Culbertson LLP partner Justin Penn.

In striking down the debt collection exemption, a majority of Supreme Court justices agreed that the First Amendment doesn't allow the government to favor the speech of its own debt collectors over other callers.

By finding that these callers, like government-backed debt collectors, are immune from liability during the time that the exemption was operative, Judge Feldman reiterated the high court's rationale that such unequal treatment couldn't be tolerated, and a decision to the contrary would likely produce "dangerous consequences" that could dissuade other courts from departing from the Louisiana court's reasoning, according to Penn.

"As Charter correctly put the issue in its briefing, any conclusion other than the one reached by Judge Feldman would mean Congress could pass an unconstitutional exemption to favor the political party in power, and the resulting discriminatory statute could be used to penalize the opposing party until it was ultimately stricken from the statute by the Supreme Court years later," Penn said. "That result is untenable and it is fundamentally inconsistent with the First Amendment."

Still, there's no guarantee every court will embrace Judge Feldman's conclusion.

The Fourth Circuit **in the AAPC case** and the Ninth Circuit **in a dispute** involving Facebook — which is currently before the high court to resolve a separate statutory interpretation question — have already confronted the statute's constitutionality, with both electing to sever the debt collection exemption while refusing to wipe out liability for calls or texts made while the statute was

unconstitutional.

"It will be interesting to see what those courts do when faced with the Creasy line of reasoning," Squire Patton's Troutman said. "They may resist, or they may align with the clear and obvious analysis afforded by Creasy. Time will tell."

Plaintiffs are also expected to push back against Judge Feldman's ruling, with class counsel likely to highlight Justice Kavanaugh's stance that companies still have liability for autodialed calls and texts sent during the disputed time period, attorneys noted.

"You could also have courts say that this is too extreme, there were at least a few justices who said we shouldn't be tossing all these claims, and that's a pretty bold move that they're reluctant to do," said Becca Wahlquist, a partner at Snell & Wilmer LLP.

If how federal courts have dealt with other thorny issues under the 1991 statute is any indication, widespread agreement on whether consumers should be able to sue for unwanted calls and texts from the past five years is likely to remain elusive, attorneys predicted.

"As with most issues related to the TCPA, I would imagine we will see another split work its way into the courts and maybe even back to the Supreme Court to answer the question it left unanswered in Barr v. AAPC," said Mark Eisen, a TCPA defense attorney at Benesch Friedlander Coplan & Aronoff LLP.

The justices are already considering one such divide that took years to make its way through the appellate courts. Just three days after the Supreme Court handed down its AAPC decision, the justices on July 9 **agreed to hear** Facebook v. Duguid , a dispute over what qualifies as an automated telephone dialing system under the statute — a move that's resulted in many pending TCPA disputes being put on hold to await its resolution.

Eisen noted that the plaintiffs bar may point to the justices' decision to take up the Facebook case — which centers on allegedly unsolicited security notification text messages sent in 2014 — as evidence that they didn't intend for their AAPC decision to wipe out a sizeable chunk of pending litigation under the statute.

"What we may see is the plaintiffs arguing, 'Would the Supreme Court really have taken up the Facebook case if this question was left open?' and try to get the court to reach that conclusion by implication," Eisen said.

With the high court's conservative majority expanding with the passing last month of Justice Ruth Bader Ginsburg, **it's widely expected** that the justices, after hearing arguments in the Facebook case Dec. 8, will significantly pare down the TCPA litigation landscape by embracing a narrow reading of "autodialer" that will allow companies that are dialing from preexisting lists of numbers to escape liability.

But even if this outcome comes to fruition, wider adoption of Judge Feldman's ruling would likely have additional docket-slimming effects by cutting down both federal and state suits where the nature of the dialing equipment or calls at issue are still in dispute, attorneys say.

"The Louisiana court ruling is a really big decision that's sent shockwaves through both sides of the TCPA bar, and the argument that courts can't consider claims during the time that the statute was unconstitutional will absolutely become the first line of defense in ATDS litigation that covers claims from this time period," Wahlquist said.

Charter Communications is represented by Ryan D. Watstein and Paul A. Grammatico of Kabat Chapman & Ozmer LLP and David E. Redmann Jr. of Bradley Murchison & Kelly Shea LLC.

Creasy and the proposed class are represented by Aaron D. Radbil of Greenwald Davidson Radbil PLLC and Katherine Z. Crouch of Crouch Law LLC.

The case is Creasy v. Charter Communications Inc., case number 2:20-cv-01199, in the U.S. District Court for the Eastern District of Louisiana.

--Editing by Kelly Duncan and Emily Kokoll.