

Sixth Circuit Reverses *Lindenbaum*, Finds TCPA Government-Backed Debt Exemption Did Not Render Remainder of Statute Unconstitutional

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On Thursday, September 9, the U.S. Court of Appeals for the Sixth Circuit issued its opinion in *Lindenbaum v. Realgy LLC*, reversing a district court opinion that found the Telephone Consumer Protection Act was unconstitutional from 2015 to 2020. Specifically, the Sixth Circuit found that the government-backed debt exemption — added to the TCPA in 2015 and later struck down by the Supreme Court — was severable from the statute, and the statute did not implicate unfair restrictions on free speech.

Background

Since 1991, the TCPA has regulated calls to telephones using an automatic telephone dialing system or an artificial or prerecorded voice. Historically, the TCPA has included one major exemption: calls made for emergency purposes. In 2015, Congress enacted a second exemption for calls “made solely to collect a debt owed to or guaranteed by the United States,” a provision known as the “government-backed debt exemption.”

The Supreme Court struck down this provision in the much-anticipated *Barr v. American Association of Political Consultants* decision in 2020. The *Barr* decision featured a deeply fractured plurality opinion, where the Court concluded that the 2015 exception was content based, did not pass strict scrutiny, and was unconstitutional. Though many called for the Court to invalidate the TCPA, the Court instead found that the government-backed debt exemption could effectively be severed from the statute.

Following *Barr*, a handful of federal district courts interpreted the decision to find the TCPA unconstitutional during the lifespan of the government-backed debt exemption. The decisions began in the Eastern District of Louisiana’s decision in *Creasy v. Charter Communications*, where a district court concluded that the faulty exception rendered *all* provisions of the TCPA unconstitutional. The Northern District of Ohio quickly followed suit in *Lindenbaum v. Realgy LLC*, 497 F. Supp. 3d 290 (N.D. Ohio 2020). Specifically, the court found that the statute was unconstitutional from 2015 to 2020 and not enforceable as written. This fatal flaw deprived the court of subject matter jurisdiction.

The Sixth Circuit’s Opinion

Lindenbaum appealed her loss to the Sixth Circuit, which reversed the district court. In a brief opinion, the Sixth Circuit rejected *Realgy*’s argument that severability applied prospectively and pushed aside any First Amendment concerns. The court found that the Constitution “automatically displaces” any unconstitutional statute and that any

unconstitutional statute operates at “a nullity,” “powerless to work any change in the existing statute.” Further, the court construed narrowly the concept of severance, finding that “severance is interpretation, not legislation.”

Secondly, the court found no concerns over First Amendment issues. Realgy argued that government-backed debt collectors have a fair notice defense to TCPA claims from 2015 to 2020, and to prevent private debt collectors from raising the same defense would create a content-based restriction. The Sixth Circuit quickly dismissed this argument, finding that the presence of a government defense does not create a restriction on a private party. In so doing, the court reversed the district court’s opinion and set a new standard for TCPA claims in the Sixth Circuit.

Looking Forward

Fewer courts have followed the *Creasy* model in 2020, with a number of district courts rejecting the argument that the TCPA as a whole was unconstitutional during the life of the government-backed debt exemption. Though the Sixth Circuit is rarely a hotbed of TCPA decisions, lower courts will almost certainly look to the *Lindenbaum* decision as important authority since the Sixth Circuit remains the highest court to examine the issue to date. The news for TCPA defendants is not all bad, however, as the *Facebook v. Duguid* decision continues to result in positive decisions for consumer-facing companies.

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