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Why Time Warner's Attack Against The TCPA Is On The Ropes

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Attempting to win a constitutional battle that many before it have lost, Time Warner Cable has sought to invalidate the federal Telephone Consumer Protection Act of 1991 on grounds that its new exemption for government-sponsored debt collection calls creates an impermissible "content-based" distinction between categories of regulated speech. Many worthy adversaries have launched First Amendment attacks at the TCPA, however, and all have failed. Although companies subject to the TCPA's ever-expanding and draconian liability scheme understandably seek relief, it seems unlikely that this new offensive will succeed.

Background of the TCPA


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The TCPA, 47 U.S.C. § 227 et seq., was enacted as an attempt to limit unsolicited commercial intrusion into the privacy of the home. It creates a private right of action to sue for unsolicited commercial calls to cellphones and landlines using prerecorded voices, and also for unsolicited commercial faxes. Each TCPA violation (i.e., each unsolicited call) entails $500 in damages (id. § 227 (b)(3)(B)), subject to trebling to $1,500 for "willful and knowing" violations. Id. So for large corporations with marketing schemes that involve automated telephone outreach, the TCPA represents a massive potential litigation liability. A run-of-the-mill TCPA class action brought against a large corporation with sophisticated automatic dialing capabilities can easily involve millions of alleged violations and billions of dollars in potential damages. See, e.g., Motion for Settlement, Mark A. Arthur et al. v. SLM Corp. et al., No. 10-cv-00198 (W.D. Was. May 17, 2012) (settlement class involved nearly 8 million allegedly auto-dialed customers and $4 billion in potential damages). As a result, companies facing TCPA liability often agree to settlements in the tens of millions of dollars. Arthur settled for $24 million, for example. Order on Motion for Settlement, Mark A. Arthur et al. v. SLM Corp. et al., No. 10-cv-00198 (W.D. Was. Sept. 17, 2012); see also Order on Motion for Settlement, Craftwood Lumber Co. v. Interline Brands Inc., No. 11-cv-4462 (N.D. Ill. Mar. 23, 2015) (approving a $40 million TCPA class action settlement); Order on Motion for Settlement, James Bull v. US Coachways Inc., No. 14-cv-05789 (N.D. Ill. Nov. 9, 2016) (approving $50 million settlement involving text messaging blasts).

Congress has listened to corporate complaints about the law, and even held a hearing in September 2016 at which the American Bankers Association and other corporate representatives complained bitterly of the "risk of draconian liability" under the TCPA, but has not acted to limit the statute's reach. Modernizing the Telephone Consumer Protection Act: Hearing of the H. Committee on Energy and

Commerce Communications and Technology Subcommittee, 114th Cong. (2016) (statement of American Bankers Association et al.).

Enacted in the era of fax machines and landlines but still very relevant to commercial marketing, the pace of TCPA litigation is only picking up. The litigation tracking service WebRecon observed that there were 4,860 TCPA suits filed in 2016, up 30 percent from the previous year.
See https://webrecon.com/2016-year-in-review-fdcpa-down-fcra-tcpa-up/. And although the unsolicited fax provision may seem like a relic, private plaintiffs still successfully litigate cases based on the receipt of just a single fax. See, e.g., O.P. Schuman & Sons Inc. v. DJM Advisory Grp., LLC, No. CV 16-3563, 2017 WL 634069, at *1 (E.D. Pa. Feb. 16, 2017) (denying motion to dismiss TCPA claim based on a single unsolicited fax). Such limited instances of alleged TCPA violations can be the basis for massive nationwide class actions; one unsolicited fax per member of a large class can amount to bet-the-company liability.

The TCPA does include exemptions based on the content of the call for charitable solicitations (47 U.S.C. § 227(a)(4)) and emergencies (id. § 227(b)(1)(A)). As the government has argued successfully in multiple cases, these exceptions are in line with the congressional finding underlying the enactment of the TCPA, that "non-commercial calls ... are less intrusive to consumers because they are more expected." H.R. Rep. No. 102-317, at 16 (1991). Congress additionally added an exemption in 2015 for government-sponsored debt collection calls. 47 U.S.C. § 227(b)(1)(B). This exemption was the basis for Time Warner's recent challenge.

Constitutional Challenges to the TCPA Have Failed

Companies sued under the TCPA have long railed against its alleged burdening of First Amendment rights. See, e.g., Missouri ex rel. Nixon v. Am. Blast Fax Inc., 323 F.3d 649 (8th Cir. 2003), cert. denied sub nom, Fax.com Inc. v. Missouri ex rel. Nixon, 540 U.S. 1104 (2004). These challenges have all failed, with courts consistently finding that the statute's aim — limiting overly intrusive commercial solicitation in the home — is legitimate and well-articulated by Congress, and that the statute is appropriately tailored to further that interest. See id.; Gomez v. Campbell-Ewald, 768 F.3d 871, 876-77 (9th Cir. 2014), aff'd on other grounds, 136 S. Ct. 663 (2016); Moser v. FCC, 46 F.3d 970, 975 (9th Cir. 1995); Maryland v. Universal Elections Inc., 729 F.3d 370 (4th Cir. 2013).

The Supreme Court's decision in Spokeo v. Robinson, 136 S. Ct. 1540 (2016), gave some momentum to opponents who claimed that the mere fact of an unsolicited, autodialed commercial call or fax, without a showing of concrete harm, is insufficient to establish constitutional standing to sue in federal court. A few such non-First Amendment challenges to the ability of Plaintiffs to seek relief under the TCPA have succeeded. See, e.g., Romero v. Department Stores National Bank, et al., No. 15-cv-193 (S.D. Cal. Aug. 5, 2016) (plaintiff lacked standing to sue because she failed to put forth evidence that she suffered an injury in fact as to each individual call). But these challenges, unlike in Time Warner, and other constitutional challenges to the statute, are as-applied and not facial challenges to the constitutionality of the statute. Thus, their application is generally limited to the facts of the specific case.

Time Warner Challenges TCPA Constitutionality Based on Debt-Collection Exemption

Against this backdrop, Time Warner was sued in 2016 by two women alleging that Time Warner Cable called them using an auto-dialing system in violation of the TCPA. Amended Complaint, Raquel S. Mejia et al. v. Time Warner Cable Inc., No. 15-cv-06445 (S.D.N.Y. Mar. 25, 2016) (Time Warner Cable). One of the two women alleged that Time Warner called her cell phone 47 times beginning in June 2015. Id. at 9.

Time Warner defended itself in a December 2016 summary judgment motion by arguing that as to many of the calls it had prior consent of a customer to call the Plaintiff's number — just not the Plaintiff's consent (Time Warner argued that a different customer had given it the Plaintiff's number; this is another thorny TCPA issue that often recurs). Motion for Summary Judgment at 23-26, Time Warner Cable (S.D.N.Y. Dec. 15, 2016).

While the summary judgment motion is still pending, Time Warner has also made a constitutional argument. Motion for Judgment on the Pleadings, Time Warner Cable (S.D.N.Y. Oct. 21, 2016). Specifically, the company claimed that a 2015 amendment to the TCPA, which added an exemption for government-sponsored debt collection, was an impermissible content-based distinction among types of restricted speech, and that the statute is therefore facially invalid. Id. at 5-12. In response, the government filed an intervening brief opposing the constitutional challenge and relying on arguments that have consistently won the day in the past.

The core of the government's rebuttal of Time Warner's argument is that Time Warner's activity was unquestionably the kind of activity — unsolicited, invasive commercial solicitation — that the law sought to target. U.S. Memorandum of Law in Support of the Constitutionality of the TCPA 11-25, Time Warner Cable (S.D.N.Y. Mar. 3, 2017). The government cited congressional findings supporting passage of the TCPA that "all too frequently [unsolicited telemarketing] represents more of a nuisance than an aid to commerce." Id. at 20 (citing H.R. Rep. No. 102-317, at 18 (1991)). The government acknowledged that the law does carve out certain exemptions such as emergency calls and for government-debt collection, but argued that these are narrowly tailored, and consistent with the purpose of shielding consumers from commercially motivated telephone inquiries. Id. at 23-24. Further, the government argued, the government-debt collection exemption does not implicate First Amendment concerns because speech by the government is not subject to First Amendment scrutiny. Id. at 17 (citing Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 467-68 (2009) (holding that government speech is exempt from First Amendment scrutiny)). The government further explained that the challenged exemption could be severed if unconstitutional, thus leaving the remainder of the TCPA intact regardless. Id. at 5-8.

Given the ample adverse precedent, Time Warner's argument seems unlikely to succeed, and comes on the heels of yet another rejection of a First Amendment challenge to the statute that accounts for the government-debt collection exemption. See Brickman v. Facebook Inc., No. 16-cv-00751, 2017 WL 386238, at *5 (N.D. Cal. Jan. 27, 2017). There the court denied Facebook's motion to dismiss a suit about its use of text message birthday reminders on the basis of a challenge to the statute, which alleged — similar to Time Warner — that the TCPA is impermissibly content-based because "it's riddled with exceptions ... that 'draw['] distinctions based on the message a speaker conveys." Id. at *5. The Brickman court rejected this argument, finding that the government debt collection exception was narrow and also not problematic because the government's speech is exempt from First Amendment scrutiny in any case. Id. at *8.

Implications

Constitutional challenges to the TCPA on First Amendment grounds are an uphill battle, often fought and historically always lost. Litigants defending against TCPA claims must carefully consider whether their situation presents a novel application of the TCPA, such that — at most — a limited as-applied challenge might succeed. Relief is more likely to come in the form of legislative or regulatory change. The agency charged with rulemaking under the TCPA, the Federal Communications Commission, will soon have a majority of commissioners appointed by a Republican administration and — based on public statements by the new Chairman Ajit Pai — is expected to be more receptive to industry

concerns. In addition, the threat of a veto of congressional action aimed at providing industry with relief from the TCPA is diminished given the change in administration. Accordingly, telecommunications firms and other companies engaged in telephonic outreach to customers would be well-advised to step up their lobbying efforts — in addition to engaging experienced counsel to help navigate the statute — because this route is likely to be more fruitful than First Amendment challenges to the TCPA. Time Warner may learn this lesson the hard way soon.

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