HUGE NEWS: Regulation Banning Debt Collection Calls During COVID Struck Down as Unconstitutional– How Does that Play SCOTUS TCPA Review?

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So while everyone was looking at the big Supreme Court TCPA review, there was some unexpected and overshadowed news out of Massachusetts this week that is really a big deal. Turns out the state’s prohibition on debt collection activity—including phone calls—is illegal; at least according to one judge that issued an injunction preventing the AG’s office in that state from enforcing it. See Aca Int’l v. Healey, Case NO. 20-10767-RGS, 2020 U.S. Dist. LEXIS 79716 (D. Mass. May 6, 2020).

This is interesting stuff.

So here’s the backstory– the State AG in Massachusetts issued a regulation deeming it an unfair business practice to collect consumer debt in the state during the Covid pandemic. This included a complete ban on any collection phone calls, as well as other forms of collection activity-like suing people.

The big debt collection trade organization ACA, Int’l–yes that ACA, Int’l–filed an
action on behalf of its members challenging the regulation as unlawful and asked the Court to prevent enforcement of the regulation. The Court did just that—entering a preliminary order barring enforcement of the regulation. Translation: debt collectors can call debtors in Massachusetts again.

So let’s break this down a bit.

To succeed on the injunction, ACA Int’l had to convince the court that it had a likelihood of succeeding on the merits. In this context that meant that the debt collection organization had to prove the regulation was unconstitutional. (Notably, it also raised a bunch of state law issues—such as the idea that the AG’s office had exceeded authority and violated the state constitution—but the federal court hearing the case was not terribly interested in those arguments.) So just liked you’ve been reading about in connection with Barr v. AAPC, the constitutionality of the Mass. regulation too turns on whether this content-specific restriction on speech can survive the appropriate degree of constitutional scrutiny.

Not to get too in the weeds here, but commercial speech—such as collecting money—is generally less favored under the Constitution than core political speech—like a candidate calling you to collect money—because, democracy. But even under the lower test applicable to commercial speech, a government has no right to ban truthful speech designed to collect debts.

The Mass. AG’s office argued the regulation was, nonetheless, appropriate because debt collectors wield undue influence in view of the coronavirus pandemic and the tranquility of our homes is more important since we’re all trapped in them. Plus, the argument goes, consumer’s financial wellbeing during the coronavirus pandemic is super important. So no debt collection.

The Court was unimpressed. Noting that federal law already bars improper or fraudulent collection activity the court found that the impact of the regulation was to bar essentially only the good kind of debt collection—honest forthright reminder calls and those designed to offer deals or modifications during COVID. Noting that debt collection activity is unlikely to violate social distancing rules, the Court simply found no compelling interest in shutting down so many lawful calls:

it singles out one group debt collectors and imposes a blanket suppression order on their ability to use what they believe is their most effective means of communication, the telephone.

The Court also agreed that the ban on collection lawsuits violates the Constitution—debt collectors have the same right to petition the government for redress as anyone else, and that includes filing lawsuits. Further, the Court determined that the mere fact that Mass is in a state of emergency did not ameliorate these constitutional rights.

The Court concluded its analysis by determining barring enforcement of the regulation was in the best interest of society as a whole:

[A] capitalist society has a vested interest in the efficient functioning of the credit market which depends in no small degree on the ability to
collect debts.

Kind of makes me want to chant *U.S.A. U.S.A.* I’m kidding. Probably.

Bottom line: court strike down prohibition on debt collection in the name of freedom. Keep this in mind in other states where debt collection or marketing activity is on the fritz due to COVID-19. Indeed, this ruling could prove the thread that unravels most content-specific COVID-19 related regulations so expect the #ReopenAmerica set to cite this case with regularity.

**BONUS ANALYSIS:** Now, for further study–consider this. The statute in *this ACA, Int’l* case–oh man is that going to get confusing over time– was deemed unconstitutional because it was a content-specific restriction on speech. Because the restriction applied to debt collection ONLY it was content specific and deemed unenforceable. Perfect.

But what if the restriction had read: *it is illegal to make phone calls to Mass consumers except for purposes other than debt collection.*

Same thing right?

Wrong. Under the Petitioner’s argument in *Barr v. AAPC* the proper remedy there would be to strike the exemption and broaden the statute. That is–the restriction is content neutral. It is, the argument goes, only the exemption that is unconstitutional. So applying scrutiny to the exemption yields the choice was see in *Barr*: strike down the whole TCPA or sever only the exemption.

In the *ACA Int’l* example, applying the severance option would yield a statute reading: *it is illegal to make phone calls to Mass consumers.* Period. In that situation the court would not only deny ACA Int’l’s request for an injunction, it would declare–via judicial fiat–that *no one* can call consumers.

Makes no sense right?

**TCPA has got to be struck down folks.** But will it be? We’ll find out soon.

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