

Calling 7th Circuit: Robocalls And Federal Preemption

Law360, New York (January 13, 2014, 6:00 PM ET) -- In a recent decision, the U.S. Court of Appeals for the Seventh Circuit held that the federal Telephone Consumer Protection Act did not preempt an Indiana state law with more restrictive prohibitions on autodialed calls — known as robocalls — potentially shutting out, at least in that circuit, the defense that compliance with the TCPA protects companies from suits claiming violation of stricter state laws. But where the Seventh Circuit may have closed a door, it may also have opened a window with perhaps much more far-reaching implications. In addition to reversing the lower court's decision that the TCPA preempts Indiana's autodialer law, the appellate court also remanded the case back to the district court to consider whether the state statute violates the First Amendment by restricting noncommercial political speech. Allowing this argument not only may impact the validity of the Indiana state law and perhaps other similar state laws, a successful First Amendment challenge in the *Patriotic Veterans Inc. v. State of Indiana* could have implications for the applicability of the TCPA itself.

The TCPA prohibits companies from placing nonemergency autodialed calls to residential telephone lines without the prior express consent of the recipient, unless exempted by the Federal Trade Commission. The Federal Communications Commission has elected to exempt noncommercial calls, including those delivering political messages, from the TCPA. The statute also prohibits all nonemergency autodialed calls to mobile phones without prior express consent, but does not provide the same exemption for political messages or other First Amendment protected speech. Consequently, all nonemergency calls and SMS texts to mobile phones, regardless of their content, require some form of consent.

Patriotic Veterans is a bit of an anomaly in TCPA jurisprudence because most TCPA cases come in the form of a consumer class or regulatory action against a company asserting violations of the act arising out of calls made for a commercial purpose. In *Patriotic Veterans*, plaintiff, a nonprofit Illinois organization that seeks to inform voters about the positions of political candidates on veterans issues and uses autodialed phone calls to deliver these political messages, was attempting to use the TCPA as a bit of a sword, to gut Indiana's more restrictive Indiana Automated Dialing Machine Statute. The state's autodialer law bans all autodialed calls to residential lines unless the receiver has "knowingly or voluntarily requested, consented to, permitted, or authorized receipt of the message[.]" The Indiana statute included some exceptions but, unlike the TCPA, did not exempt noncommercial calls such as political messages to residential landlines.

Patriotic Veterans asserted that, but for the statute, it would place calls in Indiana, and that it cannot afford to hire operators to make the phone calls without the use of an automatic dialer and a recorded message — which would remove the calls from the prohibition of the statute — because the cost would not only be eight times higher than using an automatic dialing service, but also that live operators

cannot make calls fast enough when time is of the essence, such as the night before an election. In its offensive suit against Indiana and its attorney general, the plaintiff argued that, under the statute's preemption or saving clause, the TCPA preempted the more restrictive Indiana law. Plaintiff also alleged that the statute violated the First Amendment to the extent that it prevented the group from disseminating its political messaging.

Because the lower court agreed with Patriotic Veterans that the TCPA preempted the Indiana statute and granted Patriotic Veteran's request for an injunction against enforcement of Indiana's law with respect to political messages, which injunction the Seventh Circuit stayed pending the appeal, it declined to consider plaintiff's First Amendment argument. The Seventh Circuit Court of Appeals reversed, concluding that because the statute contained no express language preempting state laws that regulate the interstate use of automatic dialing systems, they are not preempted, and the presumption against preemption prevented the court from looking beyond the plain language of the text to hold otherwise. The court also found no implied preemption based on either field preemption or conflict preemption grounds. In light of the fact that district court had not reached the constitutional issue, the circuit court remanded the case with instructions that the lower court evaluate whether Indiana's statute violated the free speech rights protected by the First Amendment.

The Seventh Circuit's decision may foreclose defendants (or the rare plaintiff similarly situated to Patriotic Veterans) from asserting that more restrictive state law prohibitions on autodialed or prerecorded messages are preempted by the TCPA — which, in turn, may result in more state law-based cases being filed, more restrictive state laws being passed and more complex compliance considerations for companies.

While these impacts are not insignificant, the outcome of Patriotic Veteran's First Amendment challenge to the Indiana law based on its restriction of political speech — which the Seventh Circuit instructed the district court to undertake — could have far more substantial implications, not only for Indiana, but for other states that prohibit autodialed or prerecorded noncommercial speech. In fact, a successful outcome for Patriotic Veterans would very likely impact the TCPA as well. Because the TCPA did not expressly grant the FCC authority to exempt noncommercial speech from the portion of the statute applicable to calls and text messages to mobile phones, as it did with residential telephones, a successful First Amendment challenge to the Indiana law (or any other similarly restrictive state law) would invite a First Amendment challenge to those more restrictive TCPA prohibitions.

If successful, this kind of challenge could, in turn, result in changes that would permit organizations making non-commercial calls and messages — at least those that implicate the First Amendment — to use autodialers to transmit calls and messages to mobile phones.

The success of the Patriotic Veterans challenge to the Indiana statute remains to be seen. Given the importance of the constitutional challenge, the Seventh Circuit likely will see the case on appeal again, regardless of the district court's First Amendment determination. In light of the breadth of the potential impact to both state and federal law, Patriotic Veteran v. Indiana case should and will be closely watched.

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