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BLOG

Fourth Circuit Finds South Carolina "Anti-Robocall" Statute Unconstitutional

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The United States Court of Appeals for the Fourth Circuit recently overturned South Carolina's "anti-robocall" statute for restricting speech based on content in violation of the First Amendment. Plaintiff Robert Cahaly was arrested after allegedly placing robocalls to South Carolina residents with a prerecorded message about a survey regarding the 2010 election campaign.

Law enforcement alleged that this practice violated South Carolina's prohibition on use of an "automatically dialed announcing device" to deliver "a recorded message without assistance by a live operator for the purpose of making an unsolicited consumer telephone call," including calls "of a political nature including, but not limited to, calls relating to political campaigns." (The statute excluded from the prohibition certain calls, including those made in response to an express request, an existing debt or contract, or an existing or previous business relationship.) Mr. Cahaly sued to challenge the state law under the First Amendment and sought damages.

The Fourth Circuit affirmed that the statute distinguishes between different types of content on its face and thus must withstand strict scrutiny. Even assuming the government had a compelling interest in restricting robocalls, however, the court found the law insufficiently narrowly tailored. The court suggested less restrictive alternatives to a flat prohibition are available, including time-of-day limitations, mandatory disclosures, and do-not-call lists. The South Carolina statute provided for a few of these requirements, but only for calls that did not use an automatically dialed announcing device or that otherwise fell within an exception. The court also found the statute was both over-inclusive and under-inclusive. The law restricted all political calls when the problems are primarily with unwanted commercial calls. At the same time, the court noted, the statute focused on political and consumer calls, while permitting an "unlimited proliferation" of all other types of robocalls. The Fourth Circuit's ruling affirmed the lower court holding that the law was unconstitutional while dismissing Mr. Cahaly's other claims. *Cahaly v. Larosa*, No. 14-1651 (4th Cir. Aug. 6, 2015).

TIP: In addition to the TCPA and TCFAPA, state statutes governing autodialed calls may place additional obligations on companies conducting telemarketing campaigns that target consumers, and this landscape is changing regularly. Moreover, while this particular statute has been struck down, other telemarketing requirements remain under related South Carolina laws.

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