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TCPA Litigation Newsletter

This newsletter provides updates on litigation and regulatory developments regarding the Telephone Consumer Protection Act ("TCPA"):

- TCPA Litigation and Regulatory Interpretation
- Class Certification
- Settlements
- Insurance Coverage

ABOUT
Perkins Coie's Privacy & Security and Class Action Defense Groups defend TCPA cases throughout the country.

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Privacy & Security

Class Action Defense

TCPA LITIGATION AND REGULATORY INTERPRETATION

Vicarious Liability after DISH Network: Ninth Circuit Holds Third-Party Consultant May Be Vicariously Liable for Outsourced Telemarketing, Finds No Vicarious Liability for Taco Bell; Illinois Court Finds Complaint Sufficiently Alleges Vicarious Liability Against One Defendant, But Not Others

Gomez v. Campbell-Ewald Co., No. 13-55486, 2014 WL 4654478 (9th Cir. Sept. 19, 2014).

The Ninth Circuit found that a marketing consultant for the Navy could be held vicariously liable for telemarketing that the consultant had further outsourced. The plaintiff alleged that the defendant marketing consultant hired by the Navy instructed or allowed another third party to send unsolicited texts for a Navy recruiting campaign. The plaintiff alleged that the Navy and the marketing consultant agreed to send messages only to cellular users who had consented and that he did not consent. The court rejected the marketing consultant's argument that "vicarious liability only extends to the merchant whose goods or services are being promoted by the telemarketing campaign." The court acknowledged the FCC's analysis in DISH Network, which found that vicarious liability may be found "under a broad range of agency principles, including not only formal agency, but also principles of apparent authority and ratification." The court found that, although the ruling "may emphasize vicarious liability on the part of merchants, the FCC has never stated that vicarious liability is only applicable to these entities" and that "such a construction would contradict 'ordinary' rules of vicarious liability." The court thus concluded that, in addition to merchants themselves, the consultants they hire may be vicariously liable "where the plaintiff establishes an agency relationship, as defined by federal common law, between the defendant and a third-party caller." The court also vacated the lower court's ruling granting the marketing company summary judgment based on its finding that the company had derivative sovereign immunity and rejected the defendant's argument that the TCPA restrictions on automated calling violated the First Amendment. *Order.*

Thomas v. Taco Bell Corp., No. 12–56458, 2014 WL 2959160 (9th Cir. July 2, 2014).

In an unpublished decision, the Ninth Circuit found that Taco Bell was not vicariously liable for a text message advertising campaign implemented by an advertising agency's vendor. An association of Taco Bell and certain franchisees sponsored a promotion in which the association's advertising agency hired another third party to administer and send the text messages at issue. Even under the broad DISH Network standard, the court concluded that Taco Bell was not vicariously liable for the actions of the association, advertising agency, and text message vendor. *Order.*

Smith v. State Farm Mutual Automobile Insurance Company, No. 13–cv–2018 Consolidated with Nos. 13–cv–7389, 13–cv–7149, and 13–cv–6694, 2014 WL 3906923 (N.D. Ill. August 11, 2014).

Applying the *DISH Network* standard for vicarious liability, in ruling on a 12(b)(6) motion to dismiss, an Illinois federal court found the plaintiff's allegations insufficient to hold two defendants liable for telemarketing calls made by a third party, Variable Marketing, LLC, based on any theory of vicarious liability, including agency, apparent authority or ratification. However, the court found that the plaintiff sufficiently alleged that the third defendant, State Farm, may be vicariously liable under a subagency theory based on allegations that State Farm insurance agents entered into contracts with Variable and "directed the quality, timing and volume of Variable's telemarketing calls and … State Farm's insurance agents provided information to Variable regarding the nature and pricing of State Farm's products to allow Variable to route customers to the proper insurance agents." The court found that plaintiff had alleged sufficient facts to show that the State Farm insurance agents "exercised a level of control over Variable's telemarketing activities" such that the existence of an agency relationship was plausible enough to satisfy the notice-pleading requirements. *Order.*

Courts Continue to Struggle with ATDS Definition; U.S. Argues for Narrow Definition

Courts facing the question of what constitutes an "automatic telephone dialing system" (ATDS) under the TCPA have continued to render different answers. In *Dominguez v. Yahoo!, Inc.,* No. 13–1887, 2014 WL 1096051 (E.D. Pa. March 20, 2014) a Pennsylvania federal court concluded that Yahoo's service that automatically converted emails to text did not constitute an ATDS. The court found that the statute requires "more than simply that the system store telephone numbers and send messages to those numbers without human intervention" and relied on testimony that Yahoo's system could not randomly or sequentially generate phone numbers in granting summary judgment to Yahoo. *Order.*

In contrast, in *Sterk v. Path, Inc.*, No. 13 C 2330, 2014 WL 2443785 (N.D. Ill. May 30, 2014), an Illinois federal court took a broad view of what constitutes an ATDS in rejecting Path's argument that the equipment it used to send text messages was not

an ATDS because it dialed numbers only from contact lists furnished by users. The court determined that the "FCC's main requirement for an ATDS is not the capacity to generate random or sequential numbers, but rather to be able to dial numbers without human intervention" and that the Path equipment "which makes calls from a stored list without human intervention is comparable to the predictive dialers that have been found by the FCC to constitute an ATDS." *Order.*

Also applying a broad interpretation, in *Davis v. Diversified Consultants, Inc.*, No. 13–10875–FDS, 2014 WL 2944864 (D. Mass. June 27, 2014), a Massachusetts federal court determined that to qualify as an ATDS, the equipment in question does not have to actually store or produce telephone numbers or use a random or sequential number generator, "it merely must have the capacity to do so." The court thus found that a predictive dialer used by a debt collection agency to call a mobile phone that relied on lists of numbers and stored numbers for at least one day constituted an ATDS. *Order.*

In *De Los Santos v. Millward Brown, Inc.*, No. 13–80670–CV, 2014 WL 2938605 (S.D. Fla. June 30, 2014), the defendant market research firm argued that the ATDS definition is unconstitutionally overbroad in that it includes any smartphone or computer connected to the Internet. The U.S. intervened to support the constitutionality of the definition by supporting a narrow interpretation of ATDS. In rejecting the constitutional attack, the court agreed with the more narrow interpretation that autodialers under the TCPA are limited to devices that have the "present, not potential, capacity" to produce and dial numbers and do not include smartphones and computers. *Order.*

Who is the "Called Party"? -- Eleventh Circuit Holds That Defendants May Be Liable for Calls to Current Subscribers, Even if They Are Unintended Recipients; New Jersey Court Holds Unintended Recipient Lacks Standing

Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242 (11th Cir. March 28, 2014).

The Eleventh Circuit held that the "called party" under the TCPA is the current subscriber, not the intended recipient. In Osorio, the plaintiff received calls regarding debt collection intended for his housemate with whom he shared a cell phone plan. The court found that plaintiff was the "called party" from whom consent must be obtained, not his housemate (the intended recipient and debtor). Because the court found there were factual issues as to whether there was an agency relationship between the housemates permitting the housemate debtor to consent on behalf of the plaintiff, it remanded the issue to the jury. *Order.*

In contrast, in *Leyse v. Bank of America NA*, No. 2:11-cv-07128, 2014 WL 4426325 (D. N.J. Sept. 8, 2014), in an unpublished opinion, a New Jersey federal court rejected the plaintiff's argument that any person or entity who receives a call has standing under the TCPA, not just the "intended recipient." Relying on a Southern District of New York opinion regarding the same issue asserted by the same plaintiff,

the judge concluded that the plaintiff lacked standing to bring the suit because he was the unintended and incidental recipient of the call. *Opinion.*

Eleventh Circuit and California Federal Court Find That Provision of Cell Phone Number on Hospital Admissions Forms Constitutes "Prior Express Consent" for Calls Regarding Payment

Mais v. Gulf Coast Collection Bureau, Inc., No. 13-14008, 2014 WL 4802457 (11th Cir. Sept. 29, 2014).

The Eleventh Circuit held that the plaintiff's provision of cell phone information to a hospital and agreement to its privacy policy allowing the hospital to provide such information to a third party for billing purposes constituted prior express consent to receive calls by a third-party debt collector regarding medical bills. A 2008 FCC ruling had concluded that the "provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt." Reversing the lower court decision granting summary judgment to the plaintiff, the appeals court held that the lower court did not have jurisdiction to review the validity of the FCC ruling and that medical debtors fell within the scope of the ruling.

Hudson v. Sharp Healthcare, Civ. No. 13–1807–MMA (NLS), 2014 WL 2892290 (S.D. Cal. June 25, 2014).

A California federal court similarly concluded that by providing a cell phone number as point of contact on hospital admissions forms, plaintiff provided prior express consent to receive calls. The court determined that the consent extended to calls regarding payment because the TCPA does not require calls be made "for the exact purpose for which the number was provided," but rather that the call "bear some relation to the product or service for which the number was provided." *Order.*

CLASS CERTIFICATION

Court Denies Class Certification for Failure to Meet Numerosity Requirement

Cabrera v. Government Employees Insurance Co, No. 12-61390-CIV-Williams (S.D. Fla. Sep. 29, 2014).

A federal district court denied class certification of individuals who allegedly received robocalls without consent from GEICO's third-party collection agency due to failure to meet the numerosity requirement. The plaintiff only had standing to pursue claims for calls placed to cell phone numbers and the court determined that there was no evidence identifying what percentage of calls were placed to cell phones as opposed to land lines or how many calls were made using an autodialer, among other things. Thus, the court concluded that it did not have enough evidence to make a finding regarding numerosity.

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Minnesota Federal Court Denies Class Certification

Sandusky Wellness Center LLC v. Medtox Scientific Inc., No. 12-cv-02066, 2014 WL 3846037 (D. Minn. Aug. 5, 2014).

A Minnesota federal court refused to certify a proposed class of persons who were sent unsolicited fax advertisements from a medical laboratory. The court determined that the class was not ascertainable and the class definition was imprecise in that determining who was "sent" each fax would require inquiry into the unique circumstances of each transmission. While the defendant sent the alleged fax in question to a particular doctor who used the plaintiff's offices once a week, it was actually received by the plaintiff, who owned and operated the fax machine in question. The court found that the parties would need to "explore who owned, operated and used the fax machine associated with the fax number" in thousands of faxes at issue in denying the motion for class certification. *Order.*

TCPA Class of Nearly One Million Members Certified

Birchmeier, et al. v. Caribbean Cruise Line, Inc., No.1:12-cv-04069, 2014 WL 3907048 (N.D. Ill. Aug. 11, 2014).

An Illinois federal court certified plaintiffs' classes, finding that a list of almost one million telephone numbers was sufficient to meet the "ascertainability" standard for class certification. Defendants allegedly engaged in an unsolicited robocall campaign in which consumers were told they could win a free cruise by participating in a survey. The judge rejected the defendants' arguments that the class was not ascertainable and that people with the listed numbers did not have standing because they could not prove they were the subscribers for the numbers at the time the calls were made: "[P]laintiffs need not establish that the people who received the calls at the numbers on the list of 930,000 were the actual subscribers; the fact they received calls is enough to permit them to sue." *Order.*

Massachusetts Appeals Court Certifies TCPA Class

Hazel's Cup & Saucer, LLC v. Around The Globe Travel, Inc., 15 N.E.3d 220 (Mass. Appeals Court Aug. 22, 2014).

A Massachusetts appeals court reversed the lower court's denial of class certification and remanded the matter for an entry of an order certifying a class. Plaintiffs claimed that a travel agency's use of marketing services to send unsolicited fax advertisements to 1,640 businesses violated the TCPA. The appeals court criticized the lower court's determination that class certification would be "patently unfair" because the damages under a class action would be disproportionate to the harm suffered, finding that "Congress has made the judgment that statutory damages in this amount are necessary to compensate those injured by the receipt of unwanted fax advertisements, and to deter this unlawful conduct." *Order.*

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SETTLEMENTS

Several TCPA Cases Have Settled in Recent Months

In Re Capital One Telephone Consumer Protection Act Litigation, No. 1:12-cv-10064 (N.D. Ill. July 29, 2014).

The court preliminarily approved a settlement in which defendants would pay $75.5 million into a settlement fund and stop cold-calling customers' cell phones. Defendants allegedly used an autodialer to call about 21.2 million unique cell phone numbers without consent to collect on credit card debts. *Order.*

Gehrich v. Chase Bank, USA, N.A., No. 1:12-CV-5510 (N.D. Ill. Aug. 12, 2014).

The court preliminarily approved a **$34 million** settlement of claims involving alleged calls, texts, and/or voice alerts sent to consumers' cell phones without consent. The final approval hearing is set for March 2015. *Order.*

Ritchie v. Van Ru Credit Corp., No. 2:12-cv-01714, 2014 WL 3955268 (D. Ariz. Aug. 13, 2014).

The court approved a **$2.3 million** settlement amounting to **$1,600 per class member**, one of the largest per-person TCPA settlements to date. The defendant allegedly made prerecorded calls to consumers on behalf of debt collectors without prior express consent. *Order.*

Rose v. Bank of America Corp., No. 5:11-CV-02390; 5:12-CV-04009, 2014 WL 4273358 (N.D. Cal. Aug. 29, 2014).

The court granted final approval for a **$32 million** settlement of claims alleging that Bank of America called or texted cell phones without consent. *Order.*

Courts Recently Denied Settlement Approval in Two Matters

Cullan and Cullan LLC v. M-Qube, No. 8:13-cv-00172 (D. Neb. July 31, 2014).

The court rejected the settlement on the basis that $3 million was insufficient to compensate 30 million people. *Order.*

Physicians Healthsource, Inc. v. Doctor Diabetic Supply, LLC , No. 12-223330-CIV-SEITZ (S.D. Fla. Aug. 20, 2014).

The court denied approval of an $8.7 million settlement in which the class would be able to seek recovery only from the defendant's insurers and

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indemnifiers. The court refused to approve a settlement "with such an uncertain recovery." *Order.*

INSURANCE COVERAGE

Kentucky Federal Court Finds That TCPA Claim Constitutes Personal and Advertising Injury, But Exclusion for Injuries Arising out of Violation of Statute Relating to Transmission of Information Bars Coverage

National Union Fire Insurance Company of Pittsburgh, Pennsylvania et al. v. Papa John's International, Inc. et al., No. 3:12-cv-00677, 2014 WL 2993825 (W.D. Ky. July 3, 2014).

Analyzing Kentucky law, a federal court concluded that although a TCPA claim constituted "personal and advertising injury" coverage within the meaning of a commercial general liability policy, an exclusion for statutory violations related to the communication of information barred coverage. *Order.*

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