

TCPA Litigation Newsletter



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

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ABOUT

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

Please visit these links to our website for more information:

- [Privacy & Security](#)
- [Class Action Defense](#)

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TCPA LITIGATION AND REGULATORY INTERPRETATION

In Two Cases, the Northern District of California Holds That Group Text Messaging Services Did Not Use an ATDS

The Northern District of California addressed the definition of “automatic telephone dialing system” (ATDS), which triggers the requirement for prior express consent to place non-advertising and telemarketing calls to a cell phone number under the TCPA, and decided the issue in favor of the defendants in two separate cases involving group text messaging services.

McKenna v. WhisperText, No. 5:14-cv-00424 2015 WL 428728 (N.D. Cal. Jan. 30, 2015)

In *McKenna*, the court dismissed a complaint against WhisperText, holding that it did not use an ATDS to send group text invitations to users' contacts. The plaintiff relied on the FCC's 2003 order, which has been interpreted to expand the meaning of ATDS to encompass any equipment that stores numbers in a database and dials them without human intervention. Without ruling on the disputed issue of whether the FCC's view was binding, the court found that even under the broader FCC definition, the complaint failed to allege the use of an ATDS because the allegations made clear that text invitations were sent at the user's affirmative direction and therefore were sent with “human intervention.” The plaintiff also argued that a text back to the telephone number from which the invitation was sent resulted in an auto-reply message that “makes it plausible that the invitation was sent using an ATDS.” The court found that the complaint did not sufficiently allege facts to support the plaintiff's auto-reply argument, but granted leave to amend. [Order](#).

Glauser v. GroupMe, Inc., No. 11-2584, 2015 WL 475111 (N.D. Cal. Feb. 4, 2015)

Analyzing similar facts, in *Glauser*, the court granted summary judgment to GroupMe, holding that the GroupMe group messaging app did not use an ATDS to send welcome texts to individuals added to a group by a GroupMe user. In deciding the issue, the court addressed whether the analysis should focus on an equipment's “present capacity” to autodial numbers without human intervention or “potential capacity” to do so. The court concluded that the relevant inquiry is whether the equipment has “the present capacity to perform autodialing functions, even if those functions were not actually used.” In so holding, it disagreed with the conclusion in *Sherman v. Yahoo! Inc.*, 997 F. Supp. 2d 1129 (S.D. Cal. 2014), that the Ninth Circuit

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had rejected a “present capacity” argument. Instead, the court found that the Ninth Circuit had rejected only a focus on “actual use” but did not address the present versus potential capacity issue, freeing the court to decide that “present capacity” is the applicable test. The court then determined that it was bound by the FCC’s expansive view that the defining characteristic of an autodialer is the capacity to dial numbers without human intervention, regardless of the ability to dial randomly/sequentially. Despite rejecting GroupMe’s argument that a more restrictive definition should apply, the court concluded that even under the broad FCC view, the system lacked the present capacity to dial numbers without human intervention and therefore was not an ATDS. [Order](#).

Courts Address Liability for Third-Party Activity

United States v. Dish Network, LLC, No. 09-3073, 2014 WL 7013223 (C.D. Ill. Dec. 12, 2014), vacated in part by 2015 WL 682875 (Feb. 17, 2015); amended by 2015 WL 684178 (minor factual issue not affecting outcome)

In a 238-page opinion, an Illinois federal court ruled on the parties’ summary judgment motions, including Dish Network’s liability for over 50 million telemarketing sales calls made by third parties to persons on the Do-Not-Call Registry or who made a do-not-call request and for calls made with prerecorded messages. Among other things, the court concluded that Dish Network was liable for millions of calls made by third parties in addition to calls made by Dish Network itself. In holding Dish Network liable for certain third-party calls, the court applied the FTC’s interpretation of the Telemarketing Sales Rule, noting that a seller is liable if it “causes” the illegal activity by retaining the telemarketer and authorizing it to market the seller’s products and services. The court concluded that Dish Network authorized certain retailers to make calls to market its products and that prerecorded calls were made at its direction. However, the court rejected attempts to hold Dish Network liable for other calls made by third parties based on express agency, apparent authority, and ratification theories of vicarious liability, finding significant problems of proof. On a motion for reconsideration of the decision by Dish Network, the court reversed its ruling granting partial summary judgment to the government for a small portion (2.38 million) of the third-party calls in question, finding that Dish Network’s obligation to honor do-not-call requests made to retailers was subject to proof of agency for which there were issues of fact. [Original Order](#); [Order Vacating in Part on Reconsideration](#).

Jackson v. Caribbean Cruise Line, Inc., No. 14-cv-2485, 2015 WL 667862 (E.D.N.Y. Feb. 17, 2015)

In *Jackson*, a New York federal court granted Caribbean’s motion to dismiss, finding that the complaint did not adequately plead an agency relationship between it and AdSource, the third-party agency that allegedly sent a text message to the plaintiff using an ATDS on Caribbean’s behalf. Applying federal common law of agency, the court determined that “the existence of a contract between CCL and AdSource—even one that imposes certain constraints on AdSource—does not necessarily mean that CCL had the power to give ‘interim instructions’ to AdSource, the hallmark of an agency relationship.” Because the complaint did not allege that Caribbean Cruise Line had the power to give interim instructions, the court granted the motion to dismiss, but allowed the plaintiff leave to amend the complaint. [Order](#).

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Court Finds Plaintiff Had Standing, Despite Not Being Charged for Allegedly Unsolicited Texts; Text Requesting Confirmation of Opt-In Potentially Constituted “Advertisement”

Meyer v. Bebe Stores Inc., No. 14-cv-00267, 2015 WL 431148 (N.D. Cal. Feb. 2, 2015)

A California federal court denied retailer Bebe's motion to dismiss a putative class action alleging that Bebe sent a text message to the plaintiff's cell phone using an ATDS after she provided the cell phone number to the store in order to exchange a product. The court rejected the retailer's argument that the plaintiff did not allege injury-in-fact and therefore lacked standing, noting that courts have found injury even where the plaintiff was not charged for additional messages received. The court further held that the text message plausibly constituted an advertisement requiring prior express written consent. The retailer argued that the text message was merely informational in asking the plaintiff to “reply YES to confirm opt-in.” However, the court cited additional language in the text, including an offer of 10% off purchases, and concluded that the message was plausibly sent for telemarketing. The court noted that even if the text message served a dual, administrative function, the FCC already determined that such dual purpose calls are prohibited. [Order](#).

CLASS CERTIFICATION

Pennsylvania and Illinois Federal Courts at Odds Over Whether “Fail Safe” Class Can Survive Pleading Stage

Two federal courts came to opposite conclusions in considering motions to strike class allegations involving potentially “fail-safe” classes (i.e., classes “defined so that whether a person qualifies as a member depends on whether the person has a valid claim”).

Zarichny v. Complete Payment Recovery Servs., Inc., No. 14-3197, 2015 WL 249853 (E.D. Pa. Jan. 21, 2015)

In *Zarichny*, a Pennsylvania federal court struck class allegations from the complaint due to the proposed “fail-safe” class definition. The plaintiff sought to bring a class action on behalf of those who received cell phone calls from the defendants using an ATDS but who did not provide prior consent, which the court determined to be a “fail-safe” class. Noting a split in circuits regarding the permissibility of such class definitions, the court determined that the Third Circuit had not yet considered the issue. However, analyzing Third Circuit ascertainability requirements, the court concluded that the class was not adequately ascertainable in that there was no way to provide notice to the putative class without extensive fact finding and, should the defendants win, any other putative class member would be free to litigate the same claim because no class would exist. [Order](#).

Smith v. State Farm Mut. Auto. Ins. Co., No. 13-CV-2018 (N.D. Ill. Jan. 13, 2015)

In contrast to the finding in *Zarichny*, in *Smith*, an Illinois federal court found it premature at the pleading stage to strike class allegations based on an alleged fail-safe class and suggested that “fail-safe” class definitions should not be fatal to class certification without giving the plaintiff an opportunity to conduct discovery and refine

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the class. The complaint proposed a class definition of persons who received calls on their cell phones from a third party “on behalf of” State Farm. The court determined that the plaintiffs should be able to conduct discovery to determine the extent to which they could link calls made by the third party to State Farm. The court further noted that even if the class definition were “fail-safe,” the issue “can and often should be solved by refining the class definition rather than by flatly denying class certification on that basis.” *Order*.

SETTLEMENTS

Court Grants Final Approval of One of the Largest TCPA Settlements in History, but Slashes Attorneys’ Fees

In re Capital One Tel. Consumer Prot. Act Litig., No. 1:12-cv-10064, 2015 WL 605203 (N.D. Ill. Feb. 12, 2015)

An Illinois federal court granted final approval of the parties’ \$75.5 million non-reversionary settlement of claims involving automated debt collection calls to cell phones, noting a “robust and effective” notice plan that reached 91.22% of the estimated total settlement class despite that only 7.87% actually filed claims. The court concluded that a proposed \$34.60 recovery per claimant was fair given Capital One’s “meritorious defenses” and the legal uncertainty of TCPA law. However, after conducting an extensive review of fee award data in other cases, the court rejected class counsel’s fee request of \$22.6 million (32% of available funds after administration and notice costs) as excessive and reduced the award to \$15.67 million, which it found would increase minimum recovery per claimant to \$39.66.

Court Grants Final Approval of \$45 Million Settlement for Alleged Automated Calls to Cell Phones

Hageman v. AT&T Mobility LLC, No. CV-13-50-DLC-RWA (D. Mont. Feb. 11, 2015)

A Montana federal court granted final approval of a \$45 million nonreversionary settlement of a case alleging automated calls to 16,000 cell phone numbers, including a \$15 million attorneys’ fee award to class counsel. Under the agreement, each class member who submits a valid claim form is to receive a pro rata share of the settlement after fees and costs up to \$500 per call.

Settlement Agreement Approved Three Years After Executed; Delay From Deficient Notice to Class

Connor v. JPMorgan Chase Bank, No. 3:10-cv-01284 (S.D. Cal. Feb. 5, 2015)

In January 2012, the parties had executed a \$9 million settlement of claims involving automated calls to borrowers’ cell phones without consent, and in February 2015, a California federal court granted final approval of the settlement. The settlement amount, however, was increased by the parties from the \$9 million preliminarily approved amount in 2012 to \$12 million due to the discovery of additional class members. After an objector to the original settlement complained that he had not

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received notice despite being a class member, the parties investigated and found that a substantial portion of the settlement class had not been provided notice. They engaged in a lengthy process to identify additional class members and consequently increased the settlement amount.

Parties Agree to Settlement Requiring Defendant to Use Third-Party Service to Identify Cell Phone Numbers and Match Debtor Names to Cell Phone Accounts

Jonsson v. USCB, Inc., No. 2:13-cv-08166 (C.D. Cal. Jan. 26, 2015)

A California federal court preliminarily approved a \$2.75 million settlement of claims that a debt collection company made automated calls to cell phone numbers to collect debts from consumers to whom the debt did not belong. The agreement included provisions for prospective relief, including requiring the defendant to partner with a scrubbing service for five years to identify cell phone numbers and match names of debtors to cell phone account holders.

INSURANCE COVERAGE

Conversion Claim Barred by TCPA Exclusion

Am. Cas. Co. of Reading Pa. v. Superior Pharmacy, LLC, No. 8:13-cv-00622 (M.D. Fla. Jan. 8, 2015)

A Florida federal court granted summary judgment to an insurer and held that it did not have a duty to defend or indemnify a conversion claim related to unsolicited fax advertisements. The policy excluded coverage for claims arising out of TCPA violations as well as claims arising out of other statutes that prohibit or limit the sending of material or information. Based on its determination that "arising out of" is broader than "caused by," the court concluded that the conversion claim arose out of alleged violations of the TCPA as well as a Florida statute prohibiting fax ads within the meaning of the exclusion and thus found there was no duty to defend or indemnify. [Order.](#)

Solicitation Calls Not Covered Under Professional Liability Policy

Margulis v. BCS Ins. Co., No. 1-14-0286, 2014 WL 6679356 (Ill. App. 1st Dist. Nov. 26, 2014)

An Illinois appeals court affirmed the lower court's ruling that a professional liability insurer had no duty to defend or indemnify a TCPA claim. The court found that the alleged automated advertising calls by an insurance broker were not made to existing clients and therefore did not arise out of the "conduct of the business of the insured in rendering services for others" as required by the policy. [Order.](#)

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